

PRESIDENTIAL COMMISSION ON
THE SUPREME COURT OF THE UNITED STATES

+ + + + +

MEETING

+ + + + +

FRIDAY
OCTOBER 15, 2021

+ + + + +

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

SHERRILYNN IFILL, NAACP Legal Defense and

Educational Fund, Inc.

OLATUNDE JOHNSON, Columbia Law School
MICHAEL S. KANG, Northwestern Pritzker School of
Law
ALISON L. LaCROIX, University of Chicago Law
School
MARGARET H. LEMOS, Duke Law School
DAVID F. LEVI, Duke Law School
TREVOR W. MORRISON, NYU School of Law
CALEB NELSON, University of Virginia School of
Law
RICHARD H. PILDES, New York University School of
Law
MICHAEL D. RAMSEY, University of San Diego
School of Law
KERMIT ROOSEVELT, University of Pennsylvania
Carey Law School
BERTRALL ROSS, University of California,

Berkeley School of Law

DAVID A. STRAUSS, University of Chicago

LAURENCE H. TRIBE, Harvard University

MICHAEL WALDMAN, NYU School of Law

ADAM WHITE, George Mason University's Antonin

Scalia Law School

KEITH E. WHITTINGTON, Princeton University

DANA FOWLER, Designated Federal Official

C-O-N-T-E-N-T-S

Introduction	4
Roll Call.	5
Opening Remarks	
Co-Chair Rodriguez	9
Co-Chair Bauer12
Session Overview15
Discussion of Materials.18
Membership and Size of the Court57
Length of Service and Turnover of Justices on the Court.	153
The Court's Role in the Constitutional System	216
Case Selection and Review: Docket, Rules, and Practices	254
Closing Remarks.	313

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

2 (10:00 a.m.)

3 MS. FOWLER: Good morning. Welcome to
4 the fourth meeting of the Presidential Commission
5 on the Supreme Court of the United States. My
6 name is Dana Fowler and I am the Designated
7 Federal Officer for this Advisory Committee.

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

14 Before we begin, a few reminders.
15 This meeting is being recorded via video
16 conference and is also being streamed live on our
17 website at whitehouse.gov/pcscotus. This
18 Commission is considered a Federal Advisory
19 Committee and is governed by the requirements
20 under the Federal Advisory Committee Act or FACA.

21 My role as the Designated Federal
22 Officer is to manage the day-to-day

1 administrative operations of the Committee,
2 attend all Committee meetings and ensure the
3 Committee operates in compliance with FACA. All
4 of our commissioners have received training
5 regarding FACA requirements and their ethics
6 obligations as Special Government Employees. In
7 addition, each Commissioner has completed a
8 financial disclosure report that has been
9 reviewed by ethics attorneys to identify any
10 potential conflicts of interest.

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

17 COMMISSIONER ADAMS: Here.

18 MS. FOWLER: Kate Andrias.

19 COMMISSIONER ANDRIAS: Here.

20 MS. FOWLER: Jack Balkin.

21 COMMISSIONER BALKIN: Here.

22 MS. FOWLER: Bob Bauer.

1 CO-CHAIR BAUER: Here.

2 MS. FOWLER: Thank you. William

3 Baude.

4 COMMISSIONER BAUDE: Here.

5 MS. FOWLER: Elise Boddie.

6 COMMISSIONER BODDIE: Here.

7 MS. FOWLER: Guy-Uriel Charles.

8 COMMISSIONER CHARLES: Here.

9 MS. FOWLER: Andrew Manuel Crespo.

10 COMMISSIONER CRESPO: Here.

11 MS. FOWLER: Walter Dellinger.

12 COMMISSIONER DELLINGER: I'm here.

13 MS. FOWLER: Justin Driver.

14 COMMISSIONER DRIVER: Here.

15 MS. FOWLER: Richard Fallon.

16 COMMISSIONER FALLON: Here.

17 MS. FOWLER: Caroline Frederickson.

18 COMMISSIONER FREDERICKSON: Here.

19 MS. FOWLER: Heather Gerken.

20 COMMISSIONER GERKEN: Here.

21 MS. FOWLER: Nancy Gertner.

22 COMMISSIONER GERTNER: Here.

1 MS. FOWLER: Thomas Griffith.

2 COMMISSIONER GRIFFITH: Here.

3 MS. FOWLER: Tara Lee Grove.

4 COMMISSIONER GROVE: Here.

5 MS. FOWLER: Bert Huang.

6 COMMISSIONER HUANG: Here.

7 MS. FOWLER: Sherrilyn Ifill.

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

11 COMMISSIONER JOHNSON: Here.

12 MS. FOWLER: Michael Kang.

13 COMMISSIONER KANG: Here.

14 MS. FOWLER: Alison LaCroix.

15 COMMISSIONER LaCROIX: Here.

16 MS. FOWLER: Margaret Lemos.

17 COMMISSIONER LEMOS: Here.

18 MS. FOWLER: David Levi.

19 COMMISSIONER LEVI: Here.

20 MS. FOWLER: Trevor Morrison.

21 COMMISSIONER MORRISON: Here.

22 MS. FOWLER: Richard Pildes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

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,

1 Commissioner Bauer and Commissioner Rodriguez for
2 opening remarks.

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

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

17 Before we begin those deliberations,
18 I first want to thank Dana Fowler and Patrick
19 McConnell and their team at the General Services
20 Administration. They again were outstanding in
21 facilitating our work in our meetings and we are
22 deeply grateful for their partnership.

1 I also want to say something about
2 charge and our process. So this Commission was
3 formed on April 9, 2021, by President Biden
4 through an executive order and that order tasks
5 us with providing him an account of the
6 contemporary public debate over the role of the
7 Supreme Court and our Constitutional system. We
8 are charged with providing an analysis and an
9 appraisal over the principle arguments for and
10 against reforming the Court. We are considering
11 the legality, efficacy and potential consequences
12 for our system of government of the reading
13 before proposals that are under a public
14 discussion.

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

21 Over the summer, we held two days of
22 hearings and during those hearings we heard from

1 44 witnesses. Their testimony and that of an
2 additional 23 experts is posted on the Commission
3 website that Ms. Fowler mentioned earlier and I
4 highly recommend reading them.

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

18 Public comments may be submitted to
19 the Commission via regulations.gov and all of the
20 comments received to date are available for the
21 public to view on regulations.gov and to find
22 them, you can Google PSCOTUS or you can put that

1 title into regulations.gov or go to the
2 Commission's website where you will find a link
3 to the public comment page.

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

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

20 Today, for the first time, the
21 Commission as a whole is meeting to exchange
22 views and discuss these prominent reform issues

1 and proposals as framed and discussed in these
2 materials. The Commission has not edited the
3 material and the material should not be
4 understood to represent the Commission's views or
5 those of any particular commissioner.

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

20 The deliberations of the full
21 Commission on these materials, toward the
22 development of a report to the President, begins

1 today. One further statement about the
2 difficulty and sensitivity of the task ahead of
3 the Commission. As we open these deliberations,
4 we note that we will of course be discussing
5 issues of great importance to the country and to
6 our system of government at a challenging time
7 for the conduct of public discourse.

8 The views that we have heard expressed
9 on the subject of the Supreme Court and witness
10 testimony and public comments are wide ranging,
11 sometimes in conflict and deeply held.

12 Commissioners themselves hold various and
13 sometimes on some issues very different views.

14 As a Commission, we are committed to deliberating
15 over these matters with respect for disagreement
16 and for complexity. We hope that these
17 deliberations will help us produce a report for
18 the President that fairly represents the full
19 scope of the reform debate and advances public
20 discussion. Thank you, with those preliminary
21 marks done, I'd like to turn it back to
22 Commissioner Rodriguez.

1 CO-CHAIR RODRIGUEZ: Thank you,
2 Commissioner Bauer. I want to underscore what
3 you said about the difficulty and complexity of
4 the issues that we're debating, but also express
5 high confidence based on the work we have already
6 done together within our groups and in this
7 group's ability to have very rigorous and
8 interesting and respectful discussion of these
9 critical matters that are of interest to the
10 country and also to the President, who charged us
11 to have this discussion.

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

20 The subjects for discussion include
21 first the materials that set the stage and
22 provide an account of the origins of today's

1 debates over the Court and outline the criteria
2 for evaluating reform proposals and situate those
3 proposals and today's debates in American
4 history.

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

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

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

19 Finally, we'll take up a set of
20 materials that raises issues and questions
21 involving the Court's internal operations
22 including its emergency orders docket, its

1 management of recusal, conflicts of interest and
2 other ethical standards and questions of
3 transparency.

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

18 I will first invite a commissioner to
19 provide us with a summary of the materials after
20 which the commissioners, who have indicated their
21 interest in addressing the topics in the
22 materials, will be invited to begin the

1 discussion.

2 With that, I will call on Commissioner
3 David Strauss, who will summarize what is in
4 these materials and what will be up for debate in
5 this first session. Commissioner Strauss, please
6 turn on your camera.

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

17 This first chapter is designed to
18 provide background to the work of the Commission.
19 It has three parts. The first part gives an
20 account of the events that lead to the
21 Commission's being established. This part
22 discusses, of course, the controversy surrounding

1 recent nominations to the Supreme Court and the
2 Senate's treatment of those nominations. It
3 describes the extent to which Supreme Court
4 nominations have increasingly become subject to
5 partisan disagreement and then the further
6 disagreement about which side is responsible for
7 that.

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

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

22 Third, proposals concerning the power

1 of the Court in our system including proposals
2 that the Court's power to declare laws
3 unconstitutional be limited or qualified in
4 various ways.

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

11 This part of the chapter then outlines
12 the various criteria that might be used to
13 evaluate these reform proposals and it identifies
14 four such criteria---legitimacy judicial
15 independence, democracy as it pertains to the
16 work of the Court and concerns about efficacy and
17 transparency. The chapter notes that these
18 motions are difficult to define and raise complex
19 questions. Several of them have given rise to an
20 extensive an illuminating academic literature
21 that the report does not claim to summarize or
22 come to grips with.

1 Just, for example, legitimacy might
2 refer to the Court's ability to have people
3 follow its decisions, even people who disagree
4 with the decisions or it might mean something
5 more evaluative, such as whether there are
6 circumstances in which people should not accept
7 that the Court has the final word on what the law
8 is. And questions about the Court's relationship
9 to democracy raised in those fundamental issues
10 about the role the Court should play in enforcing
11 our Constitution in ways that secure individual
12 rights, protect minorities or ensure that our
13 democracy works as it should, sometimes in
14 opposition to role of elected representatives.

15 The final section of this first
16 chapter gives a more comprehensive account of the
17 history of controversies about the Court and of
18 reform proposals. Debates about the Court have
19 been a feature of our constitutional history from
20 the beginning. They became particularly
21 prominent in times of political conflict. Right
22 at the founding in the early 1800s after the

1 transfer of power from the Federalist Party to
2 the Jeffersonians. During the Jackson
3 Administration, in the run up to the Civil War,
4 of course, and in the aftermath of the Civil War
5 in the Progressive era, in the New Deal era and
6 closer to our own time.

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

20 President Biden's charge to this
21 Commission is to provide an analysis of the
22 issues in today's debate about these subjects.

1 CO-CHAIR RODRIGUEZ: Thank you very
2 much, Commissioner Strauss, for that excellent
3 account of some really interesting foundational
4 materials.

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

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

16 I wanted to say just a few things
17 about the criteria for evaluation, that David
18 Strauss just very ably laid out, with a central
19 focus on the criteria for evaluating proposals of
20 legitimacy, judicial independence and democracy.
21 Because it seems to me that thinking about how
22 these concepts figure both into debates and into

1 the thinking and evaluation that the Commission
2 is going to do, are crucial both to our thinking
3 clearly about these matters and to presenting a
4 clear report to the public. Along that line, it
5 is my sense that there is a kind of ambiguity
6 about the role that these organizing values of
7 legitimacy, judicial independence and democracy
8 play in our thinking and in the report.

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

16 When the report does that, when the
17 draft does that, I think as David Strauss just
18 pointed out, the draft is wonderfully effective
19 in noting that different people use these terms
20 in different ways. So that, for example, some
21 people want to measure legitimacy in terms of
22 what they take to be the justifiability of

1 results by reference to deep constitutional
2 values, whereas other people want to use term
3 legitimacy as a gauge of the faith that people
4 have in the Supreme Court and how good a job the
5 Supreme Court is doing at any particular time.
6 These are just fundamentally different gauges.

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

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

22 There may be reforms that would

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

8 But now I want to switch to the issue
9 of our evaluative criteria. I started talking
10 about the vocabulary that we're going to use
11 largely tracking public discourse to summarize
12 and describe people's proposals. Do we mean
13 these analytical criteria of legitimacy, judicial
14 independence and democracy to be embraced in the
15 first chapter as the evaluative criteria that we
16 are going to use? One of the difficulties of
17 embracing it as the evaluative criteria that we
18 are going to use, is it might seem to involve us,
19 from the very outset, in needing to make a choice
20 that is partly substantive, but partly verbal
21 about the best, most appropriate way to use the
22 terms legitimacy, judicial independence and

1 democracy.

2 So as we're thinking about these
3 problems, as we tell the public what to expect in
4 terms of the thinking we're going to be
5 presenting when they start reading with chapter
6 one, do we mean to be buying into these as the
7 most useful analytical rubrics. My sense in
8 response to that question would be in many cases
9 no and if so, then starting the chapter when we
10 have to try to explain how we're going to try to
11 transcend them in one way or the other.

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

18 With respect to judicial independence,
19 I think everybody agrees judicial independence
20 minimally means that no judge or justice should
21 ever be punished for a particular position that
22 he or she took in a particular case on the

1 merits, but there are huge debates, partly
2 substantive and partly terminological about
3 whether, for example, an expansion of the size of
4 the Supreme Court or a reduction in the scope of
5 its jurisdiction would reflect an intrusion on
6 judicial independence.

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

1 originally understood meanings, they are
2 undermining democracy.

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

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

17 COMMISSIONER LEMOS: Thanks, Co-Chair
18 Rodriguez. I'd also like to thank the
19 commissioners who prepared these discussion
20 materials. They're really excellent and clearly
21 the result of a great deal of hard and careful
22 work.

1 I think this introductory chapter is
2 poised to add a lot of value to the report as a
3 whole, both by situating the current reform
4 proposals and recent events as well as broader
5 historical context, but also and importantly
6 laying out this conceptual frame work for our own
7 evaluation of the proposals.

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

18 Let me start by saying just a quick
19 word about one of the criteria we discussed, but
20 not as much as the first three and that's the
21 last one on efficacy. The draft currently
22 focuses on questions of the Court's efficacy by

1 focusing on the topics that are covered in the
2 draft of chapter five right now. But as I read
3 the discussion materials, I see recurring
4 attention in several of the chapters to the
5 question of how different kinds of reform
6 proposals might affect the efficacy of the Court,
7 for good or for ill, including, for example, the
8 Court's ability to oversee and provide guidance
9 for lower federal courts and state courts and its
10 ability to provide and promote uniformity in
11 federal law. We might think about expanding the
12 frame somewhat on the discussion of efficacy in
13 the introduction.

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

22 As it is, the discussion of

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

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

1 unbecoming a judge, and some of accountability or
2 constraint or check on the other.

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

15 So those are the kinds of concerns I
16 see us discussing currently in later chapters of
17 the draft and I think it would help to preview
18 them more in this introductory chapter as well as
19 to note the concerns on the other side of the
20 ledger about the dangers of a completely
21 unchecked judiciary. If we did that, I think we
22 could make good use of the distinction some

1 commentators have drawn between decisional
2 independence, that is the ability of the
3 individual judge to decide cases without fear or
4 favor and institutional independence that has
5 more to do with the place of the judiciary as a
6 whole in our constitutional system.

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

16 CO-CHAIR RODRIGUEZ: Thank you very
17 much, Commissioner Lemos. We will now hear from
18 Commissioner Michael Ramsey.

19 COMMISSIONER RAMSEY: Well thank you
20 very much and I want to start off by echoing the
21 appreciation for the draft that we have in front
22 of us. I think it is an outstanding chapter here

1 in the draft form and in particular I think it
2 does an admirably balanced job of describing both
3 the current debates over the Court and setting
4 the scene for that and also for describing the
5 historical events that have sort of lead us to
6 this position. I think it's really well done.

7 I have two comments on the third part,
8 which is the historical part, which I think it's
9 a very challenging part because it tries to cover
10 a lot of history in a short space of time
11 necessarily and I think, on the whole, it does an
12 excellent job. But I worry that in doing so, we
13 may be oversimplifying in some respects and we
14 may be inadvertently perhaps taking positions on
15 matters of historical controversy that perhaps
16 are not necessary for us to take in order to set
17 the stage. My suggestion is that we think
18 carefully about this historical account
19 generally. Perhaps it should be just a very thin
20 descriptive account and I would be nervous about
21 some of the more detailed analysis, which I think
22 is perhaps not necessary.

1 Let me give one example, it's not the
2 only example I have though, though it was maybe
3 the one that jumped out at me because in my area
4 of specialty, and that's the discussion of
5 Hamilton's Federalist 78, which is on pages 13-14
6 of the draft. The draft has a quote from the
7 famous Federalist 78 and then there's an
8 extensive discussion afterwards in which it
9 attempts to explain what Hamilton intended in
10 Federalist 78. I'm not sure I agree with all of
11 that discussion, but more importantly, I'm not
12 sure that Hamilton scholars would all agree with
13 that discussion. I also don't think it's really
14 necessary for our project. I think all we really
15 need to do, and this is my idea of a sort of a
16 thin account, is just to say that Hamilton made
17 these comments about the role of the judiciary in
18 the founding era and that's sort of a useful
19 starting point.

20 I also think in that regard that it
21 would be helpful to then pair those statements by
22 Hamilton with a sort of counterpoint perhaps from

1 the anti-Federalist Brutus essays, in which
2 Brutus expresses a much more statute-able view of
3 the role and the capacity of the federal courts
4 than Hamilton does and then just sort of leave it
5 at that, without trying to draw any deep
6 conclusions because I don't know that they are
7 necessary for our purposes and may just get us
8 into controversy that we don't need or want to be
9 involved in.

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

16 Then just real quickly, my second
17 comment is about the end of the chapter, which I
18 thought sort of ended sort of oddly and abruptly
19 after the FDR court packing episode and then with
20 a very brief reference to Brown v. Board. I
21 think there's a lot more to be said about that
22 time, in particular, for example, I think that

1 the Court Justices appointed by Roosevelt adopted
2 a much more deferential approach to particularly
3 acts of Congress, for better or for worse, you
4 know, for better in some cases, for worse perhaps
5 in cases of Korematsu.

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

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

22 In any event, I thought the decision

1 to sort of trail off the discussion in the post
2 New Deal period, was unusual and left out some
3 things. I would encourage another couple of
4 pages at the end to bring us up to the modern
5 era.

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

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

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

19 I'd like to begin where Commissioner
20 Ramsey left off and that's to echo his idea that
21 the history section that arrives toward the end
22 would benefit from greater elaboration. Like

1 Commissioner Ramsey, I felt that it ended quite
2 abruptly and I believe that disputes over the
3 Warren Court's legacy cast a long shadow over our
4 modern constitutional order. One of the great
5 virtues of these materials is that it gives
6 readers an opportunity to understand a thumbnail
7 history of the Supreme Court of the United
8 States, but to more or less omit the last, you
9 know, seven or so decades seems unwise to me. I
10 agree that another couple of pages would be
11 advantageous.

12 At the beginning of the chapter, there
13 is a discussion of conflict over the Court and
14 some particularly controversial nominations. I'd
15 like to propose adding the failed nomination of
16 Judge John J. Parker to the Supreme Court in
17 1930. Civil Rights groups opposed Judge Parker's
18 nomination in large part because of his position
19 on black equality.

20 When he was running for Governor of
21 North Carolina, he suggested that black
22 participation in politics was a source of evil

1 and his nomination to the Supreme Court of the
2 United States went down in no small part because
3 of those views. This episode has been largely
4 forgotten to history and I think it shouldn't be
5 in part because it's important to note this
6 nomination in that it helps to, in my view, make
7 Judge Robert Bork's defeat in the 1980s look less
8 anomalous. Indeed, it seems to be that his views
9 on racial equality played some role in preventing
10 him from making his way to the Supreme Court of
11 the United States.

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

19 At the same time, Bork also, as a
20 professor, wrote an article in a national
21 magazine opposing what would become Title 2 of
22 the 1964 Civil Rights Act. This is, of course, a

1 public accommodations measure that ensured that
2 black people would be able to gain access to
3 restaurants and hotels, things of that nature,
4 movie theaters. Professor Bork called this
5 measure, which was again designed to ensure that
6 black people could be full citizens in the United
7 States, he called it a measure that was
8 predicated on a principle of unsurpassed
9 ugliness. Many of us can imagine other
10 principles that are uglier than a measure that
11 was designed to ensure that black people could
12 buy hamburgers.

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

1 extraordinary impact on the lives of Americans
2 generally.

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

19 The next thing that I would say is
20 about the history that, again I think, is
21 generally quite helpful for offering readers an
22 overview. I would suggest refraining a bit the

1 treatment of Dred Scott and the Reconstruction
2 Amendments. Our sort of quotation and treatment
3 of Dred Scott in these discussion materials seems
4 to me to sanitize some of the odious language of
5 Dred Scott, which makes that opinion so deeply
6 reviled by many of us today. Obviously, Chief
7 Justice Taney's opinion speaks about black
8 inferiority and black people being reduced to
9 slavery for their benefit and I would propose
10 adding that language to this material.

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

19 Finally, I would think that it would
20 make sense to mention Frederick Douglass as an
21 important constitutional voice of the 19th
22 century. He made claims on the Constitution and

1 rejected the Dred Scott decision and said that he
2 had no fear that our national conscience will
3 accept such an open, glaring and scandalous
4 decision.

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

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

18 COMMISSIONER WHITE: Thanks and thanks
19 everybody. Like all of us, I've been thinking
20 about our role in the Commission and President
21 Biden's executive order going back to what
22 exactly he has tasked us to do. He directed us

1 to study "the commentary and debate about the
2 role and operation of the Court" among other
3 things. There's an important nuance there, it's
4 the difference between studying the Court itself
5 versus being a commentary debate about the Court
6 and, of course, we need to do both: study the
7 Court and the debate surrounding it.

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

17 I think this attempt to frame the
18 debate inadvertently reinforces a narrative about
19 the Court as a primarily political body with
20 political stakes. Our discussion lacks, I think,
21 a sufficient anchor in the fundamental duties and
22 powers of the Court as entrusted with the

1 Constitution's judicial power and like Richard
2 Fallon, I worry about the document's unclear
3 notions of legitimacy.

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

16 I'm an originalist and a textualist
17 and that's how I tend to begin to approach these
18 issues, or at least as the foundation for judging
19 the Court's work. I know that we're not all
20 textualists here and our report can't possibly
21 exhaust the timeless debates about how to
22 interpret laws and decide cases. But I do think

1 we should not declare bankruptcy on these issues
2 at the very outset. I think we needn't exhaust
3 them here, but we should at least acknowledge
4 them before moving on to the perceptions and
5 debates around the Court's work.

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

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

20 COMMISSIONER LACROIX: Thank you, Co-
21 Chair Rodriguez. I have a few thoughts to add to
22 the discussion as well and I think there are many

1 things obviously to say. There's so much rich
2 material here, but I'll make three main points.

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

17 Second, I've thought a lot about this
18 point about where should a sort of historical
19 treatment of the Court maybe stop, and the
20 current day, how did we get here discussion begin
21 and this goes to some of the comments about where
22 the third part of this chapter leaves off.

1 You know, in my view, there is a
2 certain point at which one is talking much more
3 about the origins of the current moments debates
4 and I think this is something that people have
5 many different views on. Is it the 1980s? Is it
6 1937? Is it 1787? But I think somewhere around
7 the period of the sort of post Brown v. Board,
8 which of course is indeed a Warren Court
9 decision, but somewhere around that point, maybe
10 after, the 1960s perhaps, seems like the point at
11 which we're getting very close to what people
12 think of as the now of the report.

13 We see in other parts of the report
14 discussion of the 1960s, for instance, or the
15 sort of later Warren and Burger Courts and so
16 that's, I think, a real question of when does the
17 history and the now begin. Another thing that I
18 think the historical section really can add is
19 fleshing out this sort of history before, say
20 1937. So in 1937 Franklin Roosevelt and the
21 attempt to expand or pack the Court and the
22 response is something that's been discussed in

1 the public discourse, the media. People may have
2 some general sense of that at least.

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

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

1 you.

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

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

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

1 far that we will be able to do that.

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

16 One could be simply an agreement on
17 the meaning of legitimacy, but a disagreement
18 about whether any particular reform proposed or
19 decision not to pursue a reform proposal, how
20 that would bear on legitimacy. Another is
21 disagreement on the content of legitimacy and I
22 thought Commissioner Fallon was very instructive

1 this morning and his comments along those lines.

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

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

1 defined.

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

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

20 The more we can try and have
21 terminological and conceptual clarity at the
22 outset, I think, the more helpful the first

1 chapter will be to the balance of the report.

2 I'll leave it there. Thank you.

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

10 Seeing no takers at the moment, I will
11 thank profusely those who assisted in preparing
12 these materials and those who offered their
13 observations on what we have before us. I think
14 what you've highlighted is two things. First, is
15 the challenge we face in how we describe an
16 institution and its value. How we describe a
17 problem and how we describe a history that might
18 be contributing both to our understanding of that
19 institution and to the nature of the problem.
20 But secondly, as a Commission, we have the
21 challenge of figuring out how, in fact, to
22 appraise what will inevitably be different

1 accounts of those things and how to fit them
2 together in a way that informs the debate on the
3 role of the Supreme Court in the American system
4 and in American life.

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

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

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

18 Let me begin by saying because
19 different members of our audience may in fact
20 call in or tune in at different times, you'll
21 hear reference to discussion materials. These
22 were prepared by a group within the Commission

1 for deliberation and they don't reflect the views
2 of the Commission as a whole or those of any
3 particular commissioner. They were designed to
4 be inclusive in the discussion of arguments for
5 and against reform and to assist the Commission
6 in robust, wide-ranging deliberations.

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

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

19 COMMISSIONER GROVE: Thank you, Co-
20 Chair Bauer. So there have been calls to expand
21 the Supreme Court beyond its current size of nine
22 members by, for example, adding four seats. The

1 draft materials explore how to the calls for
2 court expansion have increased dramatically in
3 recent years as well as the scope of Congress'
4 power to modify the size of the Court and
5 prudential arguments for and against court
6 expansion. The draft materials also discuss
7 several other proposals for restructuring the
8 Supreme Court which I will describe at the end of
9 my remarks.

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

18 In 1789, the Court had six members.
19 In subsequent decades, Congress changed the size
20 of the Supreme Court seven times, setting the
21 Court's size at between five and 10 members.
22 These changes were made for a mix of what we

1 might call institutional and political, maybe
2 even partisan, reasons. That is, Congress
3 adjusted the Court size in part to provide more
4 judicial personnel to serve a growing nation, but
5 Congress also tended to do so when it trusted the
6 sitting President to select the nominees, that
7 is, when Congress and the President were from the
8 same political party. For example, in 1807, a
9 Democratic-Republican Congress expanded the Court
10 from six to seven members, when its party leader,
11 Thomas Jefferson, would fill the vacancy.

12 In 1837, a Congress controlled by
13 Jacksonian Democrats, expanded the Court from
14 seven to nine members, when its party leader,
15 President Andrew Jackson, was in charge. In the
16 1860s, a Republican Congress changed the size of
17 the Supreme Court on three different occasions,
18 moving the Court up to 10 to allow President
19 Abraham Lincoln to shape the Supreme Court in
20 1863. In 1866, Congress reduced the size of the
21 Supreme Court from 10 to seven members to prevent
22 a political opponent, President Andrew Johnson,

1 from selecting Justices. Then in 1869, Congress
2 moved the number back up to nine in order to
3 allow its fellow Republican, Ulysses S. Grant,
4 who was then in office, to select nominees.

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

20 Two decades later in the 1950s,
21 Congress also rejected a Constitutional amendment
22 that would have fixed the size of the Supreme

1 Court at nine members.

2 Now, starting in the mid-20th century,
3 there was a pretty strong norm that said Congress
4 should not modify the size of the Supreme Court,
5 but Congress continues to have very broad power
6 to structure the Supreme Court.

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

13 Advocates of court expansion argue in
14 part that the Supreme Court faces a legitimacy
15 crisis because of the controversy surrounding
16 recent nominations to the Court. For example, in
17 2016, the Senate failed to hold hearings on
18 President Obama's nominee, Judge Merrick Garland,
19 thereby leaving a vacancy for the next President.

20 Another concern is the direction of
21 the Supreme Court's jurisprudence on the issues,
22 such as voting rights, affirmative action,

1 reproductive justice and other areas. Advocates
2 argue that court expansion could help restore
3 balance to the Court and help prevent a potential
4 jurisprudential crisis.

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

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

17 One reform aims to ensure more
18 partisan balance in the Court. A second proposal
19 calls for a rotation system, that is, a system by
20 which judges would rotate between service on the
21 Supreme Court and the lower federal courts and a
22 third would create a panel system, that is, the

1 Justices would decide some cases in panels of,
2 for example, three members. One legal question
3 is whether these rotation or panel systems
4 comport with the Constitutional requirement that
5 there be, to quote Article III, one Supreme
6 Court.

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

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

22 COMMISSIONER DRIVER: Thank you, Co-

1 Chair Bauer and thanks also to Commissioner Grove
2 for that incredibly lucid overview of these
3 discussion materials. I'm grateful to you for
4 teeing us up for, I'm sure, a lively discussion.

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

21 I want to be clear here that I'm
22 speaking about the constitutionality of panel

1 systems rather than the desirability of panel
2 systems. A bad idea is not necessarily an
3 unconstitutional one and I fear that, as it's
4 phrased here, it leaves little room for doubt
5 that a panel system would be unconstitutional.
6 The constitutional text is, of course, quite
7 spare here when we're thinking about one Supreme
8 Court and I fear that the approach is excessively
9 formalist and wooden.

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

22 I would also note that we have several

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

14 I would also say that I want to be
15 careful about what people have referred to as the
16 normative power of the actual. This is a term
17 that Professor Paul Mishkin has used and he
18 defines it as that which is law tends by its very
19 existence to generate a sense of being also that
20 which ought to be the law. It's true that we
21 haven't had panel systems at the Supreme Court of
22 the United States for our history, but that

1 doesn't necessarily mean the decision would be
2 unconstitutional and I would prefer it if the
3 analysis of this section were more even handed
4 than it currently is. Thank you again, Co-Chair
5 Bauer.

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

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

21 I do have one place in the draft where
22 I think a bit more could be said. Although

1 parenthetically I'd like to endorse the comments
2 that you just heard from Commissioner Driver,
3 that I think more could be said on this panel
4 system as well, although that's not where I'm
5 going to focus, but I am inclined to agree that
6 perhaps the discussion of the panel system could
7 be enhanced a little bit along the lines that he
8 says.

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

16 I think to begin it's useful to
17 identify precisely what the source of Congress'
18 power here is, which is the power to regulate as
19 necessary and proper. In this case to enhance
20 and to carry into effect the powers of other
21 branches of Government; in this case, the Supreme
22 Court, that's the source of the power that

1 Congress has. Therefore, I think it is quite
2 true, as the draft says, that everyone agrees
3 that this gives Congress the power to, for
4 example, set the size of the Court and in other
5 respects regulate the design of the Court so that
6 the Court is its most effective and efficient.

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

17 In the draft, there is a reference to
18 Professor Barnett's testimony in a footnote,
19 quite a long footnote, that isn't mostly about
20 him, in footnote 113. I would suggest that this
21 be brought up into the text in a paragraph or so,
22 in which we distinguish between the argument that

1 Congress can set the size of the Court to make it
2 the most efficient and effective it can be, which
3 Congress clearly has that power and distinguish
4 that from Congress using that power to attempt to
5 compel particular political outcomes. I think
6 these are two different arguments as Professor
7 Barnett has testified to us.

8 I think that it's worthy of our time
9 briefly to highlight the difference and to
10 highlight this argument. I do think,
11 notwithstanding my own views of the merits of
12 this argument, that if there was a serious
13 proposal acted on in Congress to enhance the size
14 of the Court, that this constitutional argument,
15 identified by Professor Barnett, would be raised
16 against it. And to the extent that Congress made
17 arguments relating to particular political
18 outcomes for its plan to enhance the size of the
19 Court, that would make it more subject to
20 constitutional challenge than if Congress were
21 changing the size of the Court in order to effect
22 an institutional design that it thought was more

1 appropriate. I think it's appropriate for us to
2 foreground these potential arguments against the
3 Court expansion plan rather than putting them in
4 a footnote, whether or not we, ourselves, agree
5 with them.

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

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

15 COMMISSIONER BAUDE: Thank you, thank
16 you very much. I have two comments about the
17 draft materials here. One of them amplifies
18 something that Mike Ramsey just said about the
19 legality. It seems to me that one of the most
20 important things we as a Commission have to
21 contribute are our views about the law given that
22 this is Commission mostly of legal scholars and

1 that's one of our areas of core expertise and
2 it's a place where we have, I think, a special
3 obligation to try to be as careful and consistent
4 and avoid special pleading as possible, given the
5 political nature of the topic. I worry that the
6 current section regarding court packing would not
7 do that and we should rethink a lot.

8 Again, like Mike actually, I don't
9 think there is a limit on Congress' ability to
10 change the size of the Court, but I have my
11 reasons for thinking and I'm not sure whether the
12 report reflects currently any reasons for
13 thinking that. There does seem like there are
14 plausible arguments either that Congress' power
15 under the necessary and proper cause can be
16 limited when Congress acts for bad reasons and/or
17 relatedly, that a norm has solidified in the past
18 50 to 100 to 150 years imposing some limits on
19 Congress' ability to use its power. Now I think,
20 as an originalist, I have a sense of why I don't
21 necessarily think either of these things are
22 true, but this is not an originalist Commission

1 and it's not adopting sort of an originalist
2 perspective on the Constitution.

3 So I think we need to know, for those
4 who don't, why there aren't such arguments.

5 Clearly, we would really not want to have the
6 appearance that members of the Commission endorse
7 non-originalist arguments based on constitutional
8 norms or endorse implicit limits on what the
9 legislature done for bad motives sometimes, but
10 then mysteriously don't do so here.

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

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

22 The third would be there actually are

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

11 Now I do also worry about the draft's
12 discussion about the prudent efficacy and
13 consequences of changing the size of the Court.
14 I do appreciate that the draft acknowledges a lot
15 of the arguments against changing the size of the
16 Court and I'm very glad it doesn't do less of
17 that and that it doesn't do more in suggesting
18 that there is any reason to change the size of
19 the Court, but I do really worry that even given
20 as much oxygen as we do, as seriously as we do,
21 the argument for substantive court packing is
22 dangerous and wrong.

1 So at the risk of an analogy that
2 people won't like, I think if there were an
3 election commission that was considering the
4 question, should Republican state legislatures
5 cancel elections and appoint the electors
6 themselves rather than having people vote for the
7 President. I think one could write a report
8 saying well it's probably lawful under Article
9 II, there's an argument they can't but it's
10 probably lawful, but is it prudent? Well
11 probably it would be bad for democracy, but if on
12 the other hand, some people think it would be a
13 really good idea. We could write a report like
14 that, I think it would not be a good idea to
15 write a report like that. I think that would
16 itself sort of contribute to destroying a norm
17 that I think many of us believe in and support.

18 Now I could be wrong about where we
19 have standard admission on that, I mean there are
20 places where the Commission notes that we're
21 divided and this is one of our first chances to
22 really talk as a Commission about that or think

1 about that. So if I'm wrong about that, I
2 probably owe it to the country to tell them, but
3 if I'm right about that and the number of
4 commissioners who think that it is currently
5 prudent to pack the Court is very small, we
6 probably ought to clarify that so as to avoid
7 misleadingly contributing to destruction of one
8 of the most important norms in American politics.
9 So I guess I think we need to talk more about
10 that or figure out what we think or be very
11 careful. I think this draft really goes much
12 farther in a dangerous direction than it should.

13 I've talked for a long time so I'm
14 just going to add one last example of why I think
15 about this. I recently have been reading John
16 Hartly Ely's work including his famous critique of
17 *Roe v. Wade*, and one of the points he makes there
18 is about the dangers of crying wolf. And to the
19 Court, he put it as people kept telling the Court
20 over and over again that it was, in a word,
21 *Lochnering*, which he thought it was not, but not
22 fair. One possible judicial response was to this

1 style of criticism was to conclude that you might
2 as well be hanged for a sheep as a goat. That as
3 long as you're going to be told no matter what
4 you do, that all you do is Lochner, you might as
5 well Lochner. And while the Court may not think
6 quite that explicitly about it, the chance that
7 it sort of slides in that direction is really too
8 high.

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

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

22 COMMISSIONER IFILL: I'm here.

1 CO-CHAIR BAUER: Oh, good.

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

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

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

1 to an answer.

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

14 My second concern is a bigger one and
15 that is that this entire discussion is framed in
16 the context of partisan politics and I actually
17 think that is a disservice to the exploration of
18 this issue and to the argument. I do think that
19 there are people who have genuine concerns about
20 the Court, about the discussions that are
21 happening in the public and in the profession
22 about the Court, who care about the reputation of

1 the Court, who care about the legitimacy of the
2 Court and who care about the rule of law. I
3 count all of us on the Commission as those
4 people.

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

16 I think that's the project that we are
17 about and so to read a chapter in which all of
18 the calculations are about one political party or
19 another to give the Democrats this to give the
20 Republicans this, as though there are no
21 arguments that go to court balanced, that go to
22 the fact that lifetime tenure means that Justices

1 are locked in for decades in ways that they are
2 not in any other workplace. Often for good
3 reason in terms of impartiality and so forth, but
4 nevertheless ensuring that the personnel of the
5 Court is always kinds of decades out of step with
6 the general population of the country. There are
7 reasons that relate to diversity of background
8 and of profession, of race and of gender, of
9 geography, of law school. There are many reasons
10 why one might support the idea of expanding the
11 Court that don't have to do with your being
12 beholden to a particular partisan agenda or
13 another.

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

20 For those of us who represent
21 communities that came to see the Court's role in
22 the context of kind of footnote four in Caroline

1 Products, who saw the Court being a place where
2 one could be heard when the political processes
3 were closed or were malfunctioning, the Court
4 carries a certain kind of imprimatur in our
5 committees. Therefore, we have a stake and an
6 interest in respect for the Court. For all of
7 those reasons, my greatest concern beyond the
8 lack of balance in terms of the presentation of
9 the arguments is that the framing of this as a
10 purely partisan exercise, I think does a
11 disservice to the Commission and does a
12 disservice to this issue.

13 Once you put it in that category that
14 this is purely an issue about whether the
15 Democrats should get a greater advantage or
16 whether the Republicans should get a greater
17 advantage, you've basically allowed people to
18 check out from the arguments that actually relate
19 to the legitimacy of the Supreme Court, not its
20 own legitimacy in its eyes, but its legitimacy in
21 the eyes of the public and the public sense that
22 the Supreme Court is a forum and a place where

1 they feel they can be heard and where they see
2 themselves. So I'll stop there.

3 CO-CHAIR BAUER: Thank you very much,
4 Commissioner Ifill.

5 COMMISSIONER GRIFFITH: Commissioner
6 Bauer, I can't hear you, but I think you said
7 it's my turn.

8 CO-CHAIR BAUER: I did indeed.

9 COMMISSIONER GRIFFITH: Okay, great.
10 Great. Let me echo the voice of Nettie in
11 thanking you and Chair Rodriguez, and all those
12 who participate. This is a remarkable
13 undertaking.

14 My experience with my working group
15 has just been remarkable, as we carried on
16 passionate disagreement with civility and
17 respect. And I, it's been a, really been a
18 wonderful experience for me.

19 I did not see the product of the other
20 working groups until they were circulated
21 recently. So, my comments are largely addressed
22 to some of the assumptions that make up their

1 work.

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

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

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

17 In my view too much of this discussion
18 draft reinforces the assumptions of many that the
19 Justices are partisans, just looking for ways to
20 advance policy agendas of the President who
21 appointed them, and the political parties that
22 supported them.

1 There are at least two problems with
2 this view. First, it's inaccurate. It's just
3 not the way it happens. And second, those who
4 maintain this view I believe do great damage to
5 the Supreme Court, which I believe is an
6 institution that has been largely successful in
7 performing its role under the Constitution.

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

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

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

21 And yet, I totally reject the idea
22 advanced by some that those who took the view

1 that the pre-clearance requirements of the Voting
2 Act needed updating by Congress were somehow part
3 of a nefarious Republican strategy to limit
4 Democratic electoral success.

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

9 Our opinions were the product of
10 months of discussion among the three of us. We
11 went back and forth on both the outcome and the
12 reasoning.

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

18 And I'm confident the Supreme Court
19 approached the matter in the same way, even
20 though I disagree with their outcome. Let me
21 tell you one reason why I'm confident the Supreme
22 Court approached it in the same way.

1 At her confirmation hearing Justice
2 Kagan flatly rejected the idea that there might
3 be some room for personal preferences in judicial
4 decisions.

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

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

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

22 Too much of the language in this draft

1 not only disregards this facts, but assumes the
2 contrary. The Republic is in choppy waters. And
3 ominous storm clouds are on the horizon with the
4 revelations that each day we are reminded just
5 how fragile our Republic is.

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

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

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

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

22 Now is the time to build confidence in

1 the Court. Too frequently elements of this draft
2 report does just the opposite. Thank you.

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

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

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

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

21 I was struck by the partisan framing
22 of this chapter. I won't say much more about

1 that, because I think it's been very nicely and
2 eloquently articulated. So, I will amend those
3 parts of my comments.

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

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

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

17 And then to think about Commissioner
18 Ifill's comments, which is that, look, there are
19 substantive -- we are in a moment in our polity
20 in which very thoughtful people are considering
21 the role of the Court in this democratic system,
22 and the sense that those arguments have to be

1 taken seriously and they have to be given voice.
2 And so the question, then, for this chapter, and
3 the challenges, is how do we think through and
4 tie together both of those points?

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

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

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

22 And I don't think we can perform that

1 function in this chapter and as a Commission if
2 the policy considerations are speculative. And
3 if they're not sufficiently even handed and
4 balanced.

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

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

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

21 And I think it's, you know, that
22 doesn't seem to me to be warranted. The

1 conclusion is drawn by simply changing the burden
2 of proof, and placing it on the reformers.

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

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

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

21 But nevertheless, I think achieving
22 what we would like to achieve will be made

1 easier, and much more effective if we reframe and
2 take out the partisan balance, partisanship of
3 the framework. And then, think much more broadly
4 and carefully in getting more even handedness in
5 the policy considerations. Thank you for
6 listening to me.

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

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

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

19 The arguments in favor of expansion
20 are presented tentatively and at a distance, in
21 the voice of unnamed others. And in every
22 instance they're teed up really just to be

1 knocked down by arguments against expansion,
2 which received more comprehensive treatment, and
3 are stated in the Commission's own voice as its
4 clearly favored position.

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

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

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

17 Chapter 2s rejection of court
18 expansion thus shapes, and in my view distorts
19 not just the chapter, but the entire report. The
20 overarching message sent to those who see deep
21 problems with the current Court, and with how its
22 most recent seats have been filled seems to be,

1 don't do the one thing you can do to address the
2 problem, court expansion, but consider trying
3 some things that probably won't work, like
4 amending the Constitution, or passing statutes of
5 questionable efficacy or constitutionality.

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

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

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

21 We were not asked to resolve this
22 debate, which in addition to being salient and

1 serious, implicates a complicated and complex set
2 of interbranch dynamics in which Congress's
3 ability to consider using its powers, its ability
4 to keep all of its lawful options on the table is
5 itself an element of the analysis.

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

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

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

20 First, I think the chapter should be
21 restructured to avoid treating the pro-expansion
22 arguments as set ups for anti-expansion

1 knockdowns. And that the Commission, to avoid
2 using its own voice to stick the arguments on
3 only one side of the debate.

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

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

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

20 To proponents of expansion this is
21 just not true. The norm has been broken
22 recently. If one defines court packing as

1 Congress using its legislative power to change
2 the size of the Supreme Court of political or
3 partisan reasons there is a fair argument that
4 the Senate violated that norm when it shrunk the
5 size of the Supreme Court to eight seats for the
6 last year of President Obama's term, when it
7 threatened to keep it at eight seats if Hillary
8 Clinton were elected President in 2016, when it
9 returned the Court to nine seats when President
10 Trump was elected, and when it then violated its
11 own newly crafted precedent against election year
12 confirmations by confirming Justice Barrett just
13 weeks before the 2020 election, while voting was
14 already underway.

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

19 Expansion proponents take the
20 reasonable, and to my mind correct view that
21 norms are only norms if their violation means
22 something if the violations are acknowledged and

1 corrected through action that aims to prevent the
2 norm from being violated again.

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

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

14 This is one prominent argument in
15 favor of court expansion that the draft I believe
16 treats dismissively. There are others. The
17 overarching effect though is a report that will
18 fairly be read as rejecting court expansion.
19 That at least is how I read it.

20 I think this is a mistake. It is not
21 what we were asked to do. It is not what I
22 expected us to do. And I don't think that a

1 final report submitted in this form would be
2 presenting a fair or constructive account of the
3 debate on this important issue.

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

6 Thank you again, Commissioner Bauer.

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

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

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

21 And I don't think that the draft, I
22 join in this with Commissioners Ifill, and

1 Charles, and Crespo. I don't think the current
2 draft reflects, adequately reflects that debate.

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

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

19 I don't believe that the draft
20 adequately reflects the latter position. I take
21 Commissioner Griffith's concern. But I don't
22 think that this discussion is about partisanship.

1 We really are looking back from a distance of the
2 Court to look at structural changes, and why
3 those structural changes are necessary.

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

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

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

21 It doesn't mention that those
22 jurisdictions didn't meet our example. They were

1 already doing that. It doesn't matter, it didn't
2 matter what we do to their efforts to undermine
3 their democracies.

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

8 It talks about how the Republicans
9 breached norms guiding the confirmation process
10 when they blocked a hearing for Merrick Garland,
11 because President Obama had proposed him during
12 an election year, namely ten months before the
13 2016 election.

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

19 If cites to a Wall Street Journal
20 editorial. This is the introduction, which
21 asserts that after all the Republicans were only
22 doing what Democrats have done in the past. And

1 somehow this was ordinary politics.

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

7 My second point is about democracy.
8 It's not about democracy in the sense of the
9 legitimacy of the institution, the extent to
10 which courts overturn legislation.

11 The draft doesn't talk about how
12 unique this moment is for our democracy, when one
13 party apparently is seeking to embed its power
14 for years and years to come through voting
15 changes.

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

1 and years, and years to come.

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

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

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

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

20 I would suggest that the draft reflect
21 what he said, as opposed to characterizing it as
22 they're both wrong.

1 And while the Republicans fault the
2 Democrats for their criticisms of Republican
3 nominee Bork, the fact is he had a hearing. He
4 had a hearing. That it seems to me is a major
5 difference.

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

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

15 This is not about the Court
16 overturning legislative enactments. It is not
17 only about legitimacy. It really is that the net
18 effect, whatever the motive, whatever the basis,
19 the net effect of rulings of this Court,
20 ratifying efforts to restrict the voting of
21 racial minorities, to regulate money in politics,
22 restrict partisan gerrymandering, the net effect

1 of those rulings is to enable one party, the
2 party supported by a minority of citizens to
3 secure a tactical advantage for a long time,
4 regardless of demographic trends.

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

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

20 The purpose of this Commission was to
21 encourage discussion, as opposed to stop it. I
22 think that the current chapter as currently

1 drafted stops that discussion, at least with
2 respect to expansion. And I don't think that
3 that adequately, accurately reflects where the
4 Commissioners are. Thank you.

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

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

19 Those who did work on the draft
20 certainly understood they were not speaking for
21 the Commission, or in the voice of the
22 Commission. They were framing the issues. And

1 criticism of the kind that we're hearing on both
2 sides are precisely what we would expect to hear
3 in a vigorous debate.

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

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

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

1 motivating a very, very active conversation.

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

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

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

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

22 We're talking about balance. We're

1 talking about theme, and tone, and style, and
2 sequence, and how some arguments are set up only
3 to be knocked down.

4 I appreciate all of those discussions.
5 But I think the time has come to talk about the
6 merits. That is, what really are the pros and
7 cons of various important changes?

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

22 And these aren't always along partisan

1 lines. One of the first decisions in that
2 series, a 2008 decision in the Crawford case,
3 which essentially gave the Court's blessing to
4 photographic identification in voting, regardless
5 of disparate racial impact.

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

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

19 And for those who believe that that is
20 the course on which the current Court has put us,
21 whether because of the games that one political
22 party or another played, for those who believe

1 that it is not just a question of the style of a
2 report, it's a question of the survival of what
3 we care the most about.

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

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

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

22 And my objection to it is not that the

1 ultimate result in Shelby County was somehow
2 designed to help the Republican party. It's the
3 combined effect of those decisions to dismantle
4 the Voting Rights Act.

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

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

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

17 But for those who believe that the
18 course is profoundly misguided, to say that the
19 only clearly constitutional path is blocked is
20 essentially saying, stop worrying about the
21 Court. The situation isn't all that drastic.
22 And for this report to send that message when one

1 believes the opposite I think would be a profound
2 mistake.

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

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

22 But it seems to me there's a big

1 difference between doing something to a Judge
2 because you disagree with her ruling, and
3 responding in a democratic way to an anti-
4 democratic course of jurisprudence. The first
5 compromises traditional independence. The second
6 does not.

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

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

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

21 I say, set aside those questions of
22 motive, and ask, does it make structural sense in

1 terms of the survival of democracy to keep on the
2 table the one obviously clear exercise of
3 constitutional power available to Congress, to
4 send a signal of profound disapproval with a
5 jurisprudential trend that threatens an important
6 core value of our democratic system.

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

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

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

1 Commissioner Whittington.

2 COMMISSIONER WHITTINGTON: Thank you.

3 I appreciate the work that my colleagues have put
4 in to getting us to this point. We are tasked
5 with difficult and divisive issues in the report,
6 issues that divide not only the country at large,
7 but the Commission itself. And I appreciate the
8 efforts of the Commissioners in wrestling with
9 the challenges of navigating those disagreements
10 as best we can.

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

18 I've been a sizable force to my
19 scholarly career damning the informal workings of
20 our constitutional order. By design and by
21 necessity legal powers and duties of Government
22 officials laid out by the text of the

1 Constitution have been supplemented over time
2 with a flexible and sometimes less durable, but
3 critically important set of understandings,
4 practices, norms, and conventions, what I would
5 call constructions that form and guide the
6 operation of the constitutional system.

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

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

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

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

1 constitutional democracy itself.

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

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

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

18 I hope the final report will explain
19 more the scope of the Congressional power in
20 regard to court expansion. And also set out
21 clearly the potential dangers of using the
22 legislative power to reshape the membership of

1 the Supreme Court and alter the substance, in
2 order to alter the substance of the Court's
3 jurisprudence. Thank you.

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

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

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

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

22 So, of course for those who are

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

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

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

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

20 And one thing that we don't say is
21 actually a point that matters a lot to some of
22 this constitutional interpretation. That is the

1 fact of, that it, it just has been historical
2 practice.

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

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

17 And I think that's a very interesting
18 argument that seems to have percolated in very
19 recent years. It's a very hard argument to make
20 about court-packing legislation writ large, which
21 usually is based on the necessary and proper
22 clause of Article 1.

1 Virtually every time in American
2 history, from 1789 to the present, when members
3 of Congress or the Executive Branch have proposed
4 reform to the Supreme Court, those reforms have
5 been supported more by one political party than
6 another political party.

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

14 For example, proposals in 2004 and
15 2006 to take away the Supreme Court's
16 jurisdiction over certain constitutional issues
17 were overwhelmingly supported by House
18 Republicans, and overwhelmingly opposed by House
19 Democrats.

20 One can explain this in part on
21 partisanship grounds. But it's also different
22 perspectives on constitutional issues. So, I

1 want to associate myself with Commissioner
2 Tribe's arguments. But it would be extremely
3 hard in this context, and probably many others,
4 to say that any particular legislation is
5 unconstitutional because it is partisan.

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

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

16 CO-CHAIR BAUER: Thank you very much,
17 Commissioner Grove. I would like to now invite,
18 we do have time, and we wanted to make sure we
19 had time. So, Commissioners who would like to
20 use raise the hand function and join the
21 conversation, please do so. And we can begin
22 with Commissioner Baude.

1 COMMISSIONER BAUDE: Thanks. First,
2 I have two examples about the constitutional
3 point, and two thoughts on common ground.

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

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

22 You know, if one thinks it would be

1 unconstitutional for the Court to, for Congress
2 to strip jurisdiction of our free speech cases
3 with the intent to disfavor our free speech
4 rights, would it be similarly unconstitutional
5 for Congress to do the same through court
6 packing, to try to overturn a free speech
7 decision or do something else?

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

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

21 If one things that's true, then if
22 there's some norm about partisan gerrymandering

1 via the Supreme Court maybe those puzzles
2 wouldn't count as part of the gerrymandering
3 because they're, you know, changing the numbers
4 in a good way, rather than a bad way, or
5 something.

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

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

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

19 And I think maybe it's, if we just
20 acknowledge them in those terms that the only
21 reason to do so is, this is that set of extreme
22 circumstances, then of course we're too

1 deadlocked to, you know, to disagree whether
2 we're there. That might actually be more helpful
3 than a lot of what was said. Thank you.

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

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

12 There's a lot of discussion about the
13 inevitability of a tit-for-tat following a sort
14 of court expansion that would lead to a slippery
15 slope regarding the number of Justices in the
16 future, with one report citing, one study citing
17 60 to 65 Justices in the future.

18 And one thing I would love the report
19 to expand upon is the context of the 1860s, where
20 we did see an expansion, and a contraction, and
21 then the expansion of the Court that didn't
22 ultimately lead to a tit-for-tat and a slippery

1 slope of number of Justices to 60 or 65.

2 I think it would helpful to kind of
3 get a sense of what might have been different
4 about that context that might lead us to think in
5 this context we might head down that slippery
6 slope.

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

13 So, some reflections to the extent
14 that there are any available about that
15 particular era, and what stopped that particular
16 kind of contraction and expansion. And whether
17 proposals that just a gradual expansion of the
18 Court that are also mentioned in this chapter of
19 the report, that talk about expanding the Court
20 one Justice at a time per administration might be
21 used as tools that could resist any sort of tit-
22 for-tat game.

1 CO-CHAIR BAUER: Thank you very much,
2 Commissioner Ross. Commissioner Fallon.

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

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

22 As I said, I don't think that there's

1 any possible way that this Commission could
2 reconcile those, or come to a consensus
3 conclusion. But I think it would be so helpful
4 to other people trying to understand what's going
5 on here if the positions could be formulated with
6 the nuance, and in some instances the passion
7 that we've heard over the past hour or so.

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

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

20 CO-CHAIR BAUER: Thank you very much,
21 Commissioner Fallon. I'd like to turn now to
22 Commissioner Boddie.

1 COMMISSIONER BODDIE: Yes, hi. So
2 first of all I, this has been a very powerful
3 exchange, and a really important debate. And I
4 just want to make a few quick points.

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

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

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

21 The other question that I had, and
22 then I'll be quiet, is the, I'm not sure that

1 I've heard a response to the points that
2 Commissioner Crespo made about the decision by
3 the Senate to disregard essentially, or to refuse
4 to act on Judge Garland's nomination, and the
5 consequences of that decision, which was to leave
6 the Court at the number of eight.

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

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

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

20 And I guess I want to say something
21 about this doctrinal and legal analysis of court
22 expansion, and of Congressional control more

1 broadly, which again we'll talk about in Chapter
2 4. And that is, so first I think this is
3 something that the chapter, both chapters could
4 profitably talk about more.

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

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

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

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

22 And so, if political means something

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

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

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

19 And then I'll just say as another note
20 about doctrine, one of the big cases about
21 Congressional control of the Supreme Court, again
22 on the subject of jurisdiction stripping, which

1 we'll talk more about, ex parte McCardle, the
2 Court clearly says motive is irrelevant.

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

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

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

18 COMMISSIONER ADAMS: Can you hear me?

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

21 COMMISSIONER ADAMS: Now of course I
22 can't hear you. Hold on one second. Why don't

1 you go to another Commissioner, and let me see if
2 I can fix this problem.

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

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

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

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

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

22 And this particular doc chapter tells

1 one version of that story, in an effort to
2 explain why the calls for court packing began in
3 2017, 2018, the kinds of calls that have not been
4 heard until relatively recently, by telling the
5 story of these nominations.

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

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

17 I also wanted to raise a point that
18 has been raised to us in public commentary quite
19 forcefully. And that is that there is support
20 not only for keeping the Supreme Court at nine,
21 but for enacting a Constitutional Amendment to
22 fix the number of Justices at nine.

1 And there are members of Congress,
2 hundreds of members of Congress who support this
3 amendment

4 And I think the amendment reflects
5 what Commissioner Driver said in the last session
6 about the normative power of the actual. But the
7 reason given by those who support this amendment
8 is so that Congress can never interfere with the
9 size of the Court for partisan reasons, or
10 reasons that favor one point of view, or one
11 political party.

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

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

1 animating this discussion.

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

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

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

22 And then the last thing I want to say,

1 that some of this conversation brings to mind,
2 and it relates back to this question of
3 conventions or norms.

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

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

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

19 Or is the burden of persuasion instead
20 on those who would raise the risks of expansion
21 as a way of trying to prevent that conversation
22 from proceeding, to prove that those risks would

1 in fact materialize?

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

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

14 COMMISSIONER ADAMS: Hi. Can you hear
15 me?

16 CO-CHAIR BAUER: We can hear you.

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

22 I simply want to go back to a point

1 that Commissioner Fallon raised, which was about
2 trying to capture some of the texture of this
3 conversation in this chapter.

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

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

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

22 CO-CHAIR BAUER: Thank you very much,

1 Commissioner Adams. Commissioner Tribe,
2 Commissioner Charles, and then Commissioner Levi.
3 But I'll come back and recognize each of you.
4 Begin please, Commissioner Tribe.

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

8 CO-CHAIR BAUER: Okay.

9 COMMISSIONER TRIBE: Silence is
10 sometimes golden, I suppose.

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

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

19 Resolution is, may not be possible.
20 But just articulating and surfacing the various
21 questions that we are surfacing today and now I
22 think is important and beneficial, both for us,

1 but for the country as a whole.

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

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

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

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

22 And I don't say that it's a justified

1 tradition. In fact, I feel quite the reverse
2 about it. But they do not feel that they have
3 changed, for example, the size of the D.C.
4 Circuit when they refuse to confirm or act on a
5 nomination to the Circuit.

6 And I suspect that at least one way to
7 view the nomination of such a qualified person as
8 Merrick Garland is that they did not consider
9 that they were changing the size of the Court,
10 but they were simply waiting for the election, as
11 they do in so many other judicial nominations.
12 Not that I think it's a good practice, because I
13 don't. Thank you.

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

21 COMMISSIONER GERTNER: This is a bit
22 along the lines of what Commissioner Levi just

1 said. I think it's important that what we do,
2 even if we can't come to a resolution, that what
3 we do enables the conversation to go forward.

4 That's what I thought the task of this
5 Commission was going to be. Not necessarily
6 coming up with a slate of recommendations, but to
7 enable the conversation going forward.

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

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

20 I think that those are really
21 conversational stopping. And I think that's not
22 where we ought to be. Everything should be on

1 the table. All criticisms should be on the
2 table. Not this or that decision. I appreciate
3 that. But criticisms about structural issues,
4 the impact of a series of decisions on the
5 political process, that's a fair criticism. And
6 it seems to me that could enter into our
7 discussion.

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

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

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

21 I want to associate myself
22 particularly with what Commissioner Adams said

1 about just precisely this kind of engagement
2 being so important to this country at this
3 particular time, and with Commissioner Fallon's
4 suggestion that if we capture this conversation
5 in our draft, then we would be doing what our
6 charge called upon us to do, to inform the public
7 debate.

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

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

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

22 COMMISSIONER TRIBE: He means 2:00

1 p.m.

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

3 Sorry about that.

4 (Whereupon, the above-entitled matter
5 went off the record at 12:50 p.m. and resumed at
6 2:00 p.m.)

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

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

20 They were designed to be inclusive in
21 their discussion of the arguments for and against
22 reform to assist the Commission in robust, wide

1 ranging deliberations.

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

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

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

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

22 I'll refer to this as a system of term

1 limits for Supreme Court Justices, and it's one
2 of the proposals that has been central in
3 discussion of possible Supreme Court reform going
4 back at least the last 20 years or so. So it's a
5 proposal that pre-dates the more recent
6 controversies around the Court.

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

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

22 Most proposals suggest that the

1 President's first nomination should arise in year
2 one of a new presidential term, and the second in
3 year three, to avoid nominations arising during
4 election years. So in short (audio interference)
5 would serve for 18 years. Each President, in a
6 presidential term, would have a similar number to
7 nominations.

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

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

20 The materials that discuss the
21 following main justifications for term limits,
22 and I'll highlight a few in the short time here,

1 first, term limits would regularize the
2 appointments process and make appointments more
3 predictable.

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

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

17 Given that the Constitution has
18 created a political mechanism for filling seats
19 on the Court, that is presidential nomination and
20 Senate confirmation, term limit proponents argue
21 there's no obvious justification for why
22 different Presidents should have such different

1 opportunities to nominate members for the Court.

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

12 By regularizing Supreme Court
13 appointments, a system of term limits would make
14 the appointments process, in the view of
15 supporters of this proposal, appear to be more
16 fair, less arbitrary, more predictable and, in
17 addition, since all Justices would serve 18 years
18 and only 18 years, term limits would also remove
19 the incentive that currently exists for
20 Presidents to consider only relatively young
21 nominees who have the potential to serve for many
22 decades.

1 The materials provide additional
2 justifications for term limits, but to keep these
3 comments brief, I also want to highlight some of
4 the concerns about term limits the materials
5 discuss. One is a concern about whether a system
6 of term limits would compromise at all the
7 extremely important value of judicial
8 independence.

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

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

19 Finally, the materials discuss the
20 important issue of whether the adoption of term
21 limits would require a constitutional amendment
22 or whether it would be constitutional as well as

1 prudent for Congress, through ordinary
2 legislation, to change the system of life tenure
3 to one of (audio interference) appointments to
4 the Court.

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

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

17 Commissioner Michael Kang?

18 COMMISSIONER KANG: Hi, thank you,
19 Commissioner Andrias. So I had a question about
20 whether changing the Supreme Court term from a
21 lifetime tenure determines the type of justice we
22 end up with on the Court.

1 So changing the term obviously changes
2 the job to a degree. And you might expect
3 Presidents to nominate a slightly different set
4 of candidates. The job might become more
5 attractive to some candidates, less attractive to
6 others, with an 18-year term. And it might not
7 be safe to assume that Congress can impose a term
8 limit, and we end up with the same people on the
9 Court as Justices.

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

21 Now, there is some reason to think
22 that this is what happens with some elected

1 offices that are term limited at the state and
2 local level. And having raised that concern, I
3 wanted to take a shot at helping to address it.

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

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

20 In other words, state justices would
21 still be retiring after a similar number of years
22 in office, similar age as they do without a term

1 limit. And if that's right, a term limit
2 wouldn't dramatically change career incentives
3 for state justices.

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

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

22 And what's more, as Commissioner

1 Pildes said, with a term limit, as opposed to
2 life tenure, Presidents would no longer be
3 incentivized to nominate younger nominees.
4 They'd probably nominate, on average, people who
5 are a little bit older than maybe now.

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

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

17 COMMISSIONER ANDRIAS: Thank you.
18 Commissioner David Strauss.

19 COMMISSIONER STRAUSS: Thank,
20 Commissioner Andrias. And thanks to the members
21 of the Commission who put together this chapter
22 which I thought did really a marvelous job of

1 marshaling evidence from other places, and the
2 term limits there, and also the part of the
3 chapter that works through all the complexities
4 in imposing term limits.

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

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

21 There are reasons for term limits that
22 really don't have anything to do with courts or

1 with political appointments. So my impression is
2 that, if you look at the boards of corporations
3 or of not for profit entities, that term limits
4 are common and, I think, are considered best
5 practice. And the reasons for that should apply
6 to courts to some extent as well.

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

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

21 And the fact that this is accepted in
22 these other realms where people have

1 responsibilities that obviously are not -- but
2 they aren't completely different either, maybe
3 furnishes some additional arguments for that
4 side, not necessarily to say that they are
5 conclusive arguments.

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

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

19 And I get the point. It's an
20 important point, but my concern is that it will
21 normalize the idea that appointments are kind of
22 an extension of a party's agenda into the courts,

1 that judicial appointments are the judicial wing
2 of that party, or that administration, or that
3 movement. And I think we should not normalize
4 that.

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

22 But it's hard to specify exactly where

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

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

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

21 You know, my own view at least would
22 be we need to reject both of those. The first

1 one is both not realistic and not really what our
2 system seems to envision. And I also think the
3 latter one, which is that the President should be
4 intently focused on the specific positions that a
5 nominee would take, that we have to make sure
6 this person is, quote, unquote, "sound."

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

17 You also see it in the cries of
18 betrayal when an appointee votes in a way that
19 people of the party that appointed him or her
20 don't like, the idea they betrayed us and they
21 were disloyal to the team. And the cry of let's
22 not have anymore of Justice X, referring to a

1 previous appointee who was a disappointment.

2 Let's make sure that we don't get a Justice X
3 again.

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

16 COMMISSIONER ANDRIAS: Thank you,
17 Commissioner Strauss.

18 Commissioner White, Adam White.

19 COMMISSIONER WHITE: Thank you.
20 Thanks again, everyone. My comments actually
21 pick up a bit where Commissioner Strauss left
22 off. The proposals in this document for term

1 limits, they do present profound risks, I think.
2 Some of them are foreseeable, and they're
3 foreseen in the document. But other risks are
4 subtler, and I think they should be highlighted
5 in the final report.

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

13 COMMISSIONER WHITE: But more
14 fundamentally, the new process for judicial
15 appointments would further expand and entrench
16 presidential power at the cost of the Court, and
17 the Court's reputation, and at the cost of the
18 Senate and, I think, at the cost of our
19 Constitutional politics which are already very,
20 very presidentially centric. And I think that
21 we, the Commission, should recognize and consider
22 these problems.

1 As was just noted, the term limits
2 framework would cement a notion that Presidents
3 are entitled, eventually, to Justices of their
4 choosing. Our Constitutional system's never
5 guaranteed this, and for good reason. And in an
6 era when Presidents wield ever more power and
7 political weight, relative to the rest of
8 government, we shouldn't vest them with even more
9 power and political weight.

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

21 Finally, there's real danger in
22 treating seats on the (audio interference)

1 expecting two of them to be delivered
2 automatically after every inauguration. Our
3 Constitution doesn't map judicial vacancies onto
4 the cycles of presidential elections. Professor
5 Feldman noted this in his testimony when he
6 observed that the vacancies, quote, "are
7 distributed roughly randomly across time." They
8 are therefore, in an important way, accents.

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

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

20 To the extent that this Commission
21 sees that as a problem, I do think it is a
22 problem. I think we ought to confront it

1 directly, and I don't think that can be solved
2 through the changing of the laws so much as
3 changing of norms and pushing back against that
4 kind of mindset among judges.

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

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

1 change.

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

9 Thank you.

10 COMMISSIONER ANDRIAS: Thank you.

11 Commissioner Griffith?

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

18 I want to start with one that the
19 Commission has been repeatedly told that we're
20 not to make recommendations. This chapter comes
21 awfully close to me to seeming like we're making
22 a recommendation. I think it crosses that line.

1 I think the points that you had
2 opposed term limits are not given as much
3 discussion as they should be. So that would be
4 my first comment.

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

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

19 Just two quick points in closing.
20 Will shorter term limits, terms lead to less
21 contentious set of confirmation hearings? I'm
22 not certain of that. That's not clear to me. In

1 fact, it might make the appointment of Justices
2 even more deeply embedded in the politics of the
3 moment. And I agree with Professor Feldman here,
4 I don't think that's a good thing. I think it's
5 likely to lead to less judicial independence.

6 And, finally, just to note, I think
7 there's much that would be lost by limiting a
8 Justice's service to 18 years. Here's just a
9 partial list of the Justices who served more than
10 18 years: Chief Justice Marshall, Chief Justice
11 Story, Justice Holmes, Brandeis, Brennan, Scalia,
12 and Ginsburg.

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

19 COMMISSIONER ANDRIAS: Thank you.
20 Commissioner Whittington?

21 COMMISSIONER WHITTINGTON: This
22 section grapples with an important and

1 fundamental feature of constitutional design.

2 And I think the draft materials do a reasonable
3 job of exposing many of the complexities.

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

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

19 In this particular context we have to
20 deal with two particular problems. First the
21 Court has become a much more powerful and
22 important institution within our constitutional

1 system than it once was. That has developed over
2 a long period of time.

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

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

18 And given the setup of the argument on
19 behalf of term limits in particular, the bill is
20 also going to regularize the timing of changes in
21 the membership of the Court. The term limits
22 only really, and really only partially, addresses

1 half of that equation, the timing of vacancies.
2 But the whole plan is thrown into disarray if the
3 other half of the equation is not (audio
4 interference) appointments. And obviously the
5 real problem here is the prospect the vacancies
6 occurred during a period of divided government.
7 And I think we have to grab that bull by the
8 horns and actually deal with it much more
9 directly than the current materials do.

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

17 If we want to take into account Senate
18 elections as well as presidential elections, then
19 that would push us in one direction. If we
20 really want to avoid giving any (audio
21 interference) effect of divided government, then
22 that would push in a very different direction.

1 It is not obvious to me, at the end of
2 the day, that there's a better alternative than
3 what we have now. But I think we'll need to do
4 more to expose the difficulties of the
5 alternative proposals. Thank you.

6 COMMISSIONER ANDRIAS: Thank you.
7 Commissioner Roosevelt?

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

18 Now, that said, I think we do have to
19 acknowledge that it matters who the judges are.
20 People wouldn't care so much about the Court,
21 they wouldn't fight so much over the appointment
22 process if it didn't matter.

1 Now that doesn't mean that judges are
2 partisan. As Commission Griffith mentioned
3 earlier, Justice Breyer recently wrote a book
4 warning against a partisan understanding of
5 judging. But part of what he said there was
6 that, of course, judges differ. Different people
7 have different backgrounds and experiences that
8 shape their world views. And that can affect
9 judging.

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

21 There are different ways of doing
22 that. And within some bounds, they're all

1 plausible, they're all legitimate, they're all
2 based in a reasonable attempt to find the right
3 answer under the Constitution. So they're not
4 partisan, but they are different.

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

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

18 And I think it would make more sense
19 to connect it, in a consistent and predictable
20 way, to the outcome of presidential elections.
21 And I don't think that's just my view. I think
22 it's the Constitution's view too. Because as

1 Commissioner LaCroix mentioned earlier, the
2 framers quite deliberately gave the appoint power
3 to the President and the Senate.

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

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

19 But they were thinking that elections
20 should have consequences. And I think that there
21 are strong arguments, and in fact I think the
22 emergence of the party system has made them

1 stronger, that a term limits approach would help
2 that system work better. Thank you.

3 COMMISSIONER ANDRIAS: Thank you.
4 Commissioner Johnson?

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

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

17 So, I mean, one concern that I really
18 hear about term limits is that it may sacrifice
19 judicial independence or make the Court appear,
20 to either the political process or to voters, as
21 more partisan. We don't want to normalize those
22 kinds of perceptions of the Court. And I really

1 hear that.

2 I do want to point out one practical
3 thing about the discussion draft that I think is
4 important which is that (audio interference) 18-
5 year term limit. And that's still quite long. I
6 mean, it's longer than most Americans stay in
7 their jobs, of course. It's maybe seven years
8 short of a generation. It's longer than most
9 elected bodies, the presidency, two terms of a
10 presidency, two terms of Senate. It's long in
11 comparative terms. I mean, look at the state
12 constitutional approaches, most of them anyway.
13 And when you look at other countries,
14 functionally and formally, 18 years is long.

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

21 And so I think that that question of
22 length should maybe give some solace or really

1 not minimize or take away, but maybe soften some
2 of the concerns about it seeming just like a
3 partisan process.

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

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

20 And I don't actually see how 18-year
21 term limits themselves affect that. Separation
22 of power is a calculus. But I hear very much

1 Commissioner Strauss' recommendation that perhaps
2 softening the language around political
3 responsiveness to also put it in the negative
4 might be helpful.

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

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

19 And then this is the very last thing
20 I'd say is that, I think, that with regard to
21 term limits, even if we didn't have the problems
22 around confirmation that we've had in recent

1 years, and some of the conflicts that we had
2 discussed earlier, I think there would be strong
3 arguments, nevertheless, for considering term
4 limits in terms of any time you were, like,
5 taking a fresh look at optimal constitutional
6 design. And I think some of the lessons from
7 other jurisdictions tell us that, that they're
8 worth taking seriously on that measure. So thank
9 you.

10 COMMISSIONER ANDRIAS: Thank you.

11 Commissioner Balkin?

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

17 I myself have supported the idea of
18 term limits for the Supreme Court for a very long
19 time. But like Mr. Whittington, I agree that we
20 can't just think about court reform without
21 paying attention to the confirmation process.
22 And today, that process is broken.

1 And this is not just a problem for
2 term limits proposals. It's also a problem for
3 other forums that might change the Court's
4 jurisdiction, its size, its structure, or its
5 vetting rules.

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

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

20 Even so, there are real limits to what
21 this Commission can suggest. We live in a period
22 of high polarization and intense party

1 competition that we haven't seen since the middle
2 of the 19th century. And our Constitution was
3 not designed for such politics. And indeed, as
4 has been pointed out before, the framers did not
5 even expect that there would be political parties
6 of the kind that we have today.

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

16 People often think of the courts as a
17 counter majoritarian institution in American
18 democracy. And that's why they think its powers
19 need special justification. But in today's
20 America, the most powerful counter majoritarian
21 institution is not the Supreme Court. It is the
22 United States Senate.

1 The Senate no longer functions
2 according to the famous metaphor, as the saucer
3 that cools the passions of the public. Today, it
4 functions more like a black hole. It is where
5 the democratic wheel of the American public goes
6 to die.

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

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

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

1 Thank you.

2 COMMISSIONER ANDRIAS: Thank you.

3 Commissioner Gerken?

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

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

16 I also just wanted to say that I
17 really appreciate all of the Commissioners who
18 commented on this set of the deliberative
19 materials in their efforts to not just offer a
20 critique but to help offer a solution, as we all
21 try to find our way to something that we can
22 agree upon.

1 And finally, I'll just note that,
2 about this conversation in particular, that it
3 largely is not exclusively centered around
4 questions of the prudential rather than
5 traditionally legal. And that is, of course, I
6 think, where all of the law professors, at least
7 in this room, are most tentative, because we
8 understand that this is where expertise is
9 probably weakest.

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

18 And this is an opportunity for us
19 really to think through to get this together and
20 to recognize the potential weaknesses of our
21 arguments and to recognize the potential
22 unanticipated consequences that we are trying to

1 think through. So I just wanted to thank all the
2 Commissioners for the really excellent
3 discussion.

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

7 Commissioner Fredrickson?

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

16 And so, you know, I think although it
17 definitely raises a whole host of differences
18 among different people, nonetheless, the
19 differences don't necessarily center on a right
20 or left, Democrat or Republican, conservative or
21 liberal. They're really about sort of the merits
22 of the proposal.

1 I think it makes it very interesting
2 for the discussion that we can have here. You
3 know, does it make sense, how would you go about
4 doing it if so. And just as someone who is
5 currently a law professor, but hasn't been one
6 for very long, I know this is something that
7 resonates very broadly among the American public
8 as well.

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

15 COMMISSIONER ANDRIAS: Thank you.
16 Commissioner Ramsey?

17 COMMISSIONER RAMSEY: Thanks. I just
18 wanted to quickly echo what Judge Griffith said,
19 I think, about the tone of this draft. I found
20 it, like Judge Griffith, that it seemed almost an
21 implicit endorsement of term limits, and
22 particularly because the section that discusses

1 the pros of term limits is cast in the voice of
2 the Commission rather than in the voice of
3 proponents of term limits. And there was an
4 implication of a consensus of the Commissioners
5 behind the idea of term limits.

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

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

15 Like Professor White, I have found
16 that, in thinking about this more closely, that
17 term limits seem less a good idea than I once
18 supposed. And indeed, I find them to be
19 something in the nature of a solution in search
20 of a problem with, as Professor Whittington has
21 pointed out, on the back end some very serious
22 implication problems were we to go down that

1 path. So I think that we should not present this
2 in any way as sort of an idea that we were all
3 rallying around.

4 COMMISSIONER ANDRIAS: Thank you.
5 Commissioner Levy.

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

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

22 Now, this probably goes back to

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

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

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

21 Finally, I think some attention should
22 be given to, I think, what Commissioner Balkin

1 was talking about. In a system that is as rough
2 as our current system, having regular
3 confirmation hearings, and more of them, is a
4 bold move. More of what we have now is not going
5 to be beneficial, I don't think, to the country.

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

17 And that is not something, I think,
18 any of us really wants to see. But it's very
19 hard to, for me anyway, to see that something
20 very close to that would happen. Because we've
21 already experienced it to some degree when
22 President Trump knew that he would have an

1 appointment when he was a candidate. He put
2 together a list of people. And it's just a very
3 short step to identifying a list of a person or
4 two people. Thank you.

5 COMMISSIONER ANDRIAS: Thank you.

6 Commissioner Waldman.

7 COMMISSIONER WALDMAN: Thank you.

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

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

20 I think it is right that the fact that
21 each winner gets to make two nominations would be
22 front and center in presidential elections. I

1 think though that that is a norm that has largely
2 been shattered already, whether overtly or by sly
3 innuendo. We know that President Trump, in
4 effect, announced his potential list of nominees.
5 We know that candidates of both parties talk
6 about, in effect, litmus tests on issues like
7 abortion rights and other matters.

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

15 The other point relating to that, as
16 well as to the notion of partisan balance, simply
17 without accepting the properness, the propriety
18 of parties viewing seats as theirs or needing a
19 partisan balance, it is nevertheless an empirical
20 fact that regularized appointments simply will
21 bring greater partisan balance in terms of who
22 appoints and nominates the Justices.

1 In all likelihood, simply by dint of
2 how voters vote, or even how the Electoral
3 College chooses people, certainly over the last
4 half century, voters and the Electoral College
5 have divided the presidency far more evenly among
6 parties than the nominations for Supreme Court
7 Justices.

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

16 COMMISSIONER ANDRIAS: Thank you.
17 Commission Baude.

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

1 issue.

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

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

16 But I worry that the draft doesn't
17 have quite enough imagination. I mean, there was
18 a time when Supreme Court Justices were
19 interested in running for the presidency. And
20 it's, you know, easy to imagine people being on
21 the Supreme Court and becoming tempted for that
22 kind of limelight. And that could change

1 incentives. I suppose a constitutional
2 amendment, not a statute, could say that a former
3 Supreme Court Justice could never run for
4 President, that would be something.

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

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

19 But I do think another good thing
20 about this proposal is that it, you know, it's
21 better than a lot of the other proposals. And so
22 focusing on it might be much more healthy.

1 Another thing I'm just struck by
2 listening to this discussion, especially
3 Commissioner Balkin and Commissioner
4 Whittington's comments, is term limits seem to be
5 an area where there is a broad by-partisan
6 consensus among a lot elites that it would be a
7 good idea.

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

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

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

1 the whole thing.

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

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

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

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

20 But as we've talked about throughout
21 the day, there is a difference between a court
22 that is motivated to advance the agenda of a

1 particular party and court that is responsive to
2 the people in some sense. And how you specify
3 that sense, I think, is the challenge.

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

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

20 Now, the debate in part revolves
21 around whether a constitutional amendment would
22 be required. And the fact that this would

1 dramatically restructure the Supreme Court might
2 be a reason, regardless of the merits of that
3 issue to pursue it through an amendment.

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

16 COMMISSIONER ANDRIAS: Thank you.
17 Commissioner Tribe?

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

22 My view on that hasn't really changed.

1 I began as someone who did, including
2 Commissioner White, with an assumption that, of
3 all the possible changes, this would be the most
4 obvious one that would be relatively
5 uncontroversial, widely supported across the
6 spectrum, and probably beneficial.

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

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

1 thinking is probably a bad one.

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

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

14 COMMISSIONER ANDRIAS: Thank you.
15 Commissioner Ross? You'll have the final word.

16 COMMISSIONER ROSS: Thank you. So I
17 think that in terms of thinking about this
18 particular chapter and this working group's
19 responsibility, I think what it's run into is the
20 problem that the accidents that Professor Feldman
21 described with respect to Supreme Court vacancies
22 are becoming fewer and fewer.

1 And even those that are associated
2 with a passing in office have become
3 opportunities for strategic behavior. And one of
4 the things that this group has to wrestle with,
5 and I don't know, maybe term limits are or are
6 not the answers, I don't know what a better
7 answer is, is to respond to the fact that
8 strategic behavior has become a predominant mode
9 of turnover on the Supreme Court which can
10 contribute to the entrenchment of power of one
11 particular political perspective over the other.

12 I think that we're still struggling,
13 as Professor, or Commissioner LaCroix identified,
14 with the differentiation between what's partisan
15 and what's political. But I do want to associate
16 myself with Commission Roosevelt's point that the
17 Court is a political institution comprised of
18 political actors who have a different set of
19 political beliefs that tend to, tend to, but not
20 necessarily always, associate with, at least in
21 these days, the partisan preferences of our two
22 dominant political parties.

1 And so if we have a turnover process
2 that's dominated by strategic behavior, and that
3 can lead to the entrenchment of particular
4 political perspectives on the Court, then the
5 question has to be, well, what do we do?

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

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

1 particular chapter.

2 COMMISSIONER ANDRIAS: Thank you.
3 Thank you to everyone for those really helpful
4 comments.

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

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

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

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

1 3:10 p.m.)

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

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

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

20 And for an initially summary of what's
21 presented in these materials I turn to
22 Commissioner Carolina Fredrickson. Commissioner

1 Fredrickson, you have the floor.

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

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

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

20 It does not look at all possible
21 mechanisms to do so, but looks most closely at
22 jurisdiction stripping, super majority voting

1 requirements, as well as other rules that would
2 require greater deference to political branches,
3 and legislative overrides by Congress of Court
4 decisions.

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

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

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

19 And second, that in a democracy, the
20 judiciary as well, needs to be subject to checks
21 and balances. Some even argue that the
22 principals of democracy require that a final

1 determination on the constitutionality of
2 legislation should be left to the political
3 branches.

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

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

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

22 Especially because the Constitution in

1 itself is so difficult to amend. And as the
2 Justices serve for life, that they become
3 increasingly unrepresentative over time.

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

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

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

20 Those who criticize these proposals
21 worry that such reforms might undermine
22 protections for individual rights, in particular,

1 minority rights.

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

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

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

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

20 But instead, we analyze the extent to
21 which the various proposals to disempower the
22 Courts would reach the goals proponents hope to

1 achieve and identify some of the potential costs,
2 including from the perspective of those who
3 emphasize the importance of the Courts in
4 protecting individual rights, federalism or other
5 constitutional values and structures.

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

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

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

19 Without taking a position on the
20 ultimate merits of these proposals, the chapter
21 aims to help inform public debate about whether
22 such reforms would be worth pursuing and how such

1 a system might be designed consistent with
2 broader constitutional principles.

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

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

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

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

19 So my two smaller observations on the
20 chapter, in jurisdiction stricken section, it
21 says on Page 6, in this section, we consider
22 proposals to strip courts of their jurisdiction

1 to renew the constitutionality of executive and
2 legislative enactments.

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

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

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

18 The second that might warrant more
19 discussion in the chapter is in the supermajority
20 section, the chapter invokes fair quite a bit and
21 then goes on to talk about whether we have
22 supermajority requirements for review of federal

1 legislation only federal and state legislation
2 potentially.

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

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

15 So those are the two comments. The
16 broader comment as I've been listening to our
17 discussions over the last several sessions,
18 picking up on things that Commissioner Rodriguez
19 and Commissioner LaCroix and Commissioner Ross
20 have said, I think this, one of the challenges
21 that we face as a commission is we're dealing
22 with some of these challenging issues.

1 We talk about terms like judicial
2 ideology and principle and we talk about terms
3 like partisanship and politics. And what I have
4 found in looking at Court-curbing legislation,
5 including jurisdiction stripping legislation is
6 that to, what is to one person principle, is to
7 another person partisanship.

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

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

21 I also want to suggest that it's a
22 challenge for us as we continue in the writing

1 going forward to try to be sensitive to the fact
2 that what is to one person principle is to
3 another person a partisan attack on the
4 judiciary.

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

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

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

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

20 And I think that there needs to be a
21 lot of clarification that's brought to the
22 discussion that's currently in the materials

1 about that complicated issue.

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

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

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

19 And very importantly, that they don't
20 have to agree with the Supreme Court's
21 interpretation of the Constitution. So the
22 classic example for the 19th Century is the

1 Supreme Court says Congress has the power to
2 create a National Bank of the United States.

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

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

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

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

21 It means that if Congress enacts a
22 statute making it a crime to burn the flag of the

1 United States, for example, the Supreme Court
2 holds that the First Amendment is violated when
3 the Government tries to prosecute someone for
4 burning the flag, that the Supreme Court decision
5 doesn't mean that Congress has to just lie down
6 and play dead and that's the end of the matter.

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

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

17 And so I think all scholars agree on
18 that. Including the departmentalists that these
19 materials cite. And so this means Congress
20 cannot override a Supreme Court decision by
21 statute at least in the way the report presents
22 this.

1 At least as I understand the arguments
2 in the scholarship here. If Congress cannot by
3 statute do what is permitted by the Constitutions
4 of some other countries that are cited here like
5 the Canadian system where there can be a
6 legislative override and the override has the
7 final legal effect.

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

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

19 And in fact, I think it's quite
20 dangerous to suggest otherwise. So I think that
21 concluding paragraph for example on Page 31 is
22 not clear as the earlier discussions also are not

1 clear about what people who argue against
2 judicial supremacy actually are arguing and what
3 the consequences are of the diction.

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

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

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

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

22 Legislative overrides I think have

1 some difficulties in general, but they have
2 particular difficulty in the specific American
3 context in which the Supreme Court exercises the
4 power of interpreting both constitutions and
5 statutes and construes an appliance of the
6 Constitution in the context specific and concrete
7 cases and controversies.

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

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

19 Article V of the Constitution creates
20 a high hurdle to amending the Constitution that
21 has benefits and drawbacks, but it seems to me
22 that Article V is the real source of the problem

1 that legislative overrides are trying to solve.

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

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

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

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

20 What do we think the constitutional
21 rules should be going forward let's say if
22 overrides are much messier? They are too closely

1 tied to the specific details of particular
2 controversies.

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

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

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

20 CO-CHAIR RODRIGUEZ: Thank you very
21 much, Commissioner Whittington. We'll next hear
22 from Commissioner Boddie.

1 COMMISSIONER BODDIE: Thank you. So
2 first of all, I'd just like to add my thanks for
3 all the terrific, hard, extraordinary work that
4 has been done on this chapter.

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

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

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

22 Not just that the Court is

1 theoretically better suited, but that it is and
2 it has in fact been better at protecting
3 individual rights.

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

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

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

20 And the term minorities doesn't really
21 capture that distinction. We might consider
22 using the term minoritized which captures a

1 context in which racial and ethnic groups who
2 might have strength in numbers don't have
3 strength that alliance with their actual power in
4 the political process. Thank you so much.

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

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

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

20 So it is one big problem here that the
21 Justices have to oversimplify in order to present
22 it useful to anybody, including the public. But

1 I think Commissioner Grove is right. That the
2 oversimplification of the legislative review of
3 an executive question is probably one
4 oversimplification too far.

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

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

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

20 One thing in thinking about the role
21 of reducing the role of the Court and the role of
22 the Courts because I think this is more a

1 question of the judiciary versus what we think of
2 as the elected or the political branches.

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

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

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

19 And that is the view that's associated
20 with Thayer and if the draft implies that Thayer
21 went beyond that, it shouldn't. But that is what
22 I think what one might call Thayerism although

1 Thayer didn't suggest that Congress should impose
2 this rule.

3 He suggested that the Courts
4 themselves should adopt a rule of deference as to
5 Congress. But that raises the question of why
6 Congress.

7 It's not clear to me why there should
8 be special deference to Congress as opposed to
9 special deference to the political branches. I
10 understand the argument for juridical, not to say
11 that I endorse it, but I understand it, is the
12 special deference to political branches rising
13 out of the idea of that there should be more
14 democracy, more political decisions as to
15 important matters of social and cultural policy.

16 And those social decisions shouldn't
17 go to the Courts, but if that's your view, of why
18 the power of the Court should be reduced, there
19 isn't any reason to limit this to acts of
20 Congress.

21 And instead, it seems like it should
22 go more broadly both to the deference to the

1 executive branch or the supermajority rules, the
2 executive branch or however you want to put the
3 limit.

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

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

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

20 So I think that's a dilemma or a
21 attention I suppose I would say that the draft
22 needs to make clear that it recognizes and it is

1 dealing with and that the language needs to be
2 precise.

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

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

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

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

21 Reasons relating to the nation's
22 history and the reconstruction amendments and the

1 floor, among other developments, and I think that
2 it's worth the draft.

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

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

19 And the topics that were discussed now
20 have garnered much less attention. They have
21 garnered some. Certainly there's a lot of law
22 review articles written about jurisdiction

1 stripping and so on.

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

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

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

19 I think the current draft in its
20 effort to achieve brevity also ends up being
21 maybe perhaps a bit misleading, but I would note
22 that Commissioner Pildes' clarification goes, in

1 particular, to help legislative overrides can be
2 accomplished without constitutional amendment.

3 Right?

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

9 And so kind of offering at least the
10 arguments for how Congress could achieve some of
11 these strategies now the amendment is important.

12 But in order to do that, that nuance
13 that Commissioner Pildes pointed out must be
14 clarified in the draft. And that relates to
15 Commissioner Whittington's point about
16 constitutional amendment.

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

21 Although I think it certainly bears
22 mention in the draft and I think more attention

1 must be given to why legislative overrides may
2 have advantages over a broader change to the
3 constitutional amendment process or may have
4 disadvantages as Commissioner Whittington was
5 suggesting.

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

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

16 That we should try to identify the
17 arguments that would enable reform both with
18 amendments or without amendment and really think
19 the kind of elaborate the arguments for and
20 against both legally and preventably to help
21 inform public debate going forward. Thank you.

22 CO-CHAIR RODRIGUEZ: If there are

1 other Commissioners who would like to make an
2 observation or comment about this chapter, I
3 invite you to raise your hands and do so.

4 Commissioner Tribe?

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

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

17 Take Marbury itself as a thought
18 experiment. The Supreme Court did not in a sense
19 invalidate the judiciary act of 1789. It held
20 that Act could not constitutionally be applied to
21 find original jurisdiction in circumstances like
22 those posed by Mr. Marbury.

1 Now what would a provision, whether
2 statutory or constitutional purporting to deprive
3 the Supreme Court of the authority to invalidate
4 an act of Congress or purporting to require a
5 supermajority which wouldn't have been an issue
6 in the days of John Marshall, but would be an
7 issue now, or purporting to authorize an override
8 mean on facts like that.

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

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

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

22 And when constitutional avoidance is

1 used to reach result X rather than result Y, is
2 the Court exercising the power to invalidate an
3 act of Congress or is it not?

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

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

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

18 It is not always regarded as
19 inconsistent with the rule of law for an
20 executive branch, either of the state or of the
21 federal government to keep returning to the
22 judicial system with the constitutional argument

1 that it has been rejected and saying that you
2 should reconsider as it's not clear even under a
3 view that makes the judiciary supreme in the
4 exposition of the meaning of the law exactly how
5 one deals with repeated encounters between
6 litigants and either the legislative or the
7 executive branch.

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

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

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

20 But then think instead in terms of
21 might we amend the Constitution to enable
22 legislatures, Congress in particular, to overcome

1 a constitutional decision of the Court is worth
2 considering to the extent we think the underlying
3 questions of democratic theory are ones that
4 should motivate reform.

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

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

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

19 And that's facilitated by the fact
20 that they have a parliamentary system and there's
21 an independent judgment necessarily being made
22 about whether to enforce a law.

1 In the design of that, there are also
2 certain rights that cannot be overridden. Rights
3 that protect democratic process and in their
4 case, language rights which is central to the
5 constitutional compromise in that jurisdiction.

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

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

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

21 So with that, I will bring this
22 session to an end and say that we will reconvene

1 for our final session at 4:10. We'll see you
2 then.

3 (Whereupon, the above-entitled matter
4 went off the Record at 3:46 p.m. and resumed at
5 4:10 p.m.)

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

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

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

21 They were designed, however, to be
22 inclusive in their arguments for and against

1 reform to assist the Commission in wide-ranging
2 and robust deliberation.

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

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

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

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

19 Public discussion as well as proposals
20 for reform have also addressed the Court's
21 procedures and practices. This includes issues
22 which have drawn lots of public attention lately

1 such as the Court's views of emergency orders in
2 cases of great public importance.

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

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

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

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

1 Senate this past year.

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

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

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

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

22 For example, the debates have focused

1 on how emergency rulings have less briefing.
2 They usually don't involve oral arguments by the
3 lawyers. And often do not provide much public
4 explanation of the Court's reasoning.

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

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

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

20 In the second category, case
21 selection, these materials focus on concerns
22 about the informational inputs of the Court at

1 the point when it's deciding which cases to hear.
2 Known as the certiorari stage.

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

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

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

21 These discussion materials also
22 considered a public debate and proposals about

1 recusals of the Justices from individual cases to
2 the potential conflicts of interest.

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

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

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

18 I thought that the discussion
19 materials were somewhat diffident on this
20 particular issue and I would promote a more
21 straight-forward maybe a more straight-forward
22 approach.

1 We say in the discussion materials on
2 about Page 28 or so, the Commission notes the
3 consensus among observers that no Justice or
4 their spouses and dependent children should own
5 or continue to own individual publicly traded
6 securities.

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

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

16 And that seems like, as I say, a
17 reasonably large number. I understand that this
18 could be, you know, a delicate matter given that
19 we are dealing with individual Justices,
20 finances, but I do think that there are
21 mechanisms that are in place that when a conflict
22 arises, it offers Justices the opportunity to

1 divest themselves of the individual stock without
2 incurring capital gains.

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

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

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

19 Having said that, I also note that
20 there are several of my fellow Commissioners who
21 were judges and may be more attune to these
22 issues and I would really invite comment on these

1 sorts of matters so as to, you know, air them
2 here in our deliberations so. Thanks for hearing
3 me.

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

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

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

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

20 And I think that's all to the good
21 given how much attention has been paid to the
22 Court's use of emergency orders more recently.

1 But this is the intervention that I'd like to
2 suggest.

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

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

17 There is some discussion a couple of
18 sort of right into the chapter about the Court's
19 practice in the '50s and '60s, but there's not a
20 really thick substantive account of that and it
21 would, I think that the chapter would do well to
22 compare and contrast.

1 There's a significant different, why
2 is that so, the chapter says the number of
3 emergency orders have multiplied in recent years
4 and has increased dramatically.

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

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

18 Again, I think that the draft
19 chapter's covering a lot of ground and I think,
20 like the other chapters in the report, it's a
21 significant triumph in terms of the level of
22 analysis and sort of real sort of erudition that

1 is there, but I think that the chapter would be
2 improved if we added a little bit more history
3 and context in the first portion. Thank you.

4 CO-CHAIR BAUER: Thank you very much,
5 Commissioner Adams. Commissioner Griffith?

6 COMMISSINER GRIFFITH: Yes, thank you,
7 Commissioner Bauer. I do agree with everything
8 Commissioner Adams said. I think this is an
9 important issue that's not well understood.

10 The only thing I would add is I really
11 think we should, with all due respect to
12 Professor Baude, I think we ought to drop the
13 terminology shattered document.

14 It just makes it sound so sinister and
15 yet Commissioner Huang didn't use the term in
16 describing the then set up. I think they, I
17 think the report would be improved by getting
18 away from that.

19 But having said that, I think we
20 should add that this is exactly right, that this
21 an area that public doesn't know a great deal
22 about.

1 And because of the increased use of it
2 by the Court, I think it's, I think it would be
3 worthwhile to have more context than this. Thank
4 you.

5 CO-CHAIR BAUER: Thank you very much,
6 Commissioner Griffith. Commissioner White?

7 COMMISSIONER WHITE: Thanks again and
8 thanks everyone. On this document I would like
9 to raise two concerns. First, about the
10 emergency docket and second, about case
11 selection.

12 First off the emergency docket, I
13 think our, the document downplays the connection
14 between the Supreme Court's emergency docket and
15 the lower court injunctions.

16 Our document alludes to the one
17 specific issue of district court's nationwide
18 injunctions and that's an important aspect of the
19 issue I think, but it's only one aspect.

20 And what I'm getting at is it seems
21 that the Supreme Court's exercise of equitable
22 powers with abbreviated procedures on issues of

1 national importance is just an echo of a broader
2 issue of federal courts exercising equitable
3 powers with abbreviated procedures on issues of
4 national importance.

5 In that sense, the Court's emergency
6 docket or shadow docket, apologies Commissioner
7 Griffith, is just a special example of the bigger
8 question of how Court's ought to carry out the
9 responsibilities as courts in our constitutional
10 system.

11 At the Supreme Court and in lower
12 courts, judges face constant requests for swift
13 and energetic judicial intervention on a
14 discretionary basis under equitable standards
15 that leave the judges with immense power and with
16 decisions that leave confusing precedential
17 effects.

18 And so whether the Supreme Court or
19 the lower courts are the ones exercising this
20 discretionary power, it strikes me as somewhat
21 antithetical to the constitutional design of a
22 judiciary created to exercise neither force nor

1 will but merely a judgment.

2 And I also think it would be a mistake
3 to attempt as this document attempts, to afford
4 profoundly different treatment to one part of the
5 emergency docket, namely capital cases, than to
6 the rest of the emergency docket.

7 I understand that death is different.
8 But there are many differences among the various
9 kinds of cases on the emergency docket and so
10 even for someone like me who would like to see
11 the death penalty abolished and the federal
12 government and in all the states, this part of
13 the report strikes me as special pleading.

14 Now, my second point on the Court's
15 case selection process, I have similar concerns
16 here about the Court's discretion in deciding
17 which cases it's going to hear.

18 The discussion document highlights
19 many problems inherent in the Court's
20 discretionary power to hear or not hear cases. I
21 worry that this aspect of the Court's work shapes
22 the public's perception of the Justices and also

1 the Justice's own perception of their
2 constitutional roles.

3 Reading that part of the document, I
4 thought as I went, well, maybe the best solution
5 here is not to encourage the Justices to wield
6 this power and discretion differently, but to
7 just reduce their power and discretion by
8 reforming statutes and increasing their mandatory
9 docket.

10 But as I page through the document,
11 through a number of possible solutions, I never
12 reached that one. Instead, we seized our more
13 targeted discussions of how to reallocate
14 discretion.

15 Again, I think as I said in my first
16 comment today which feels like a very long time
17 ago, admittedly, I think the basic challenge for
18 the Commission in all five of the topics we're
19 discussing, is how we should think about the
20 Court as a Court as a deliberative body entrusted
21 with judicial powers.

22 Courts should receive cases not claim

1 them, Courts should decide cases deliberately,
2 not swiftly and we should always look for
3 opportunities to reduce the judiciary's
4 discretion, not enlarge it.

5 And I hope that this aspect of our
6 report in particular which I think is especially
7 relevant to those considerations is re-oriented
8 accordingly. Thank you.

9 CO-CHAIR BAUER: Thank you very much,
10 Commissioner White. Commissioner Baude.

11 COMMISSIONER BAUDE: Thank you. I'm
12 sort of reluctant to speak up about this chapter
13 because I worry that my comments are going to be
14 destructive rather than helpful, but I do feel
15 sort of compelled to do so.

16 So I think there are a lot of things
17 about the approach these materials take that are
18 not a good way to approach it at a sort of a high
19 and systematic level.

20 So in discussing the emergency docket,
21 and I'm not at all led into calling it the shadow
22 docket, I'd be happy not to call it the shadow

1 docket.

2 We're discussing the emergency docket,
3 I worry that we started acknowledging the point
4 in a few places, that the draft materials still
5 don't do a very good job of disentangling what
6 critiques really reduce to just the figuring out
7 what the merits of particular objections, you
8 know, that the Court showed a different view
9 about SBA than it does or a different view about
10 free exercise than it does and which ones
11 actually have some sort of, you know, trans
12 substantive non-partisan, non-political content.

13 You know, even and then, seems like
14 it's probably exacerbated to the fact that here's
15 the one part of our materials where we sort of
16 trying to talk through a specific about recent
17 cases.

18 Something that managed this data to
19 help us find common ground in other areas, but I
20 think it makes it harder to do here when we start
21 actually having to adjudicate a bunch of cases in
22 a recent memory that we have views about.

1 Then, another problem is that when it
2 comes to the hammer reform, much of the reforms
3 to Justices here are focused really on telling
4 the Court what to do, telling the Court to behave
5 differently which is again, not an approach we've
6 otherwise taken and I think we've not taken it
7 for good reason.

8 We were commissioned by the President
9 to provide advice to President and then to the
10 public about some reform possibilities, most of
11 what we're talking about here is not addressed to
12 the President really or the public so much as the
13 Justices.

14 And I worry that's made worse by the
15 fact that we haven't really heard any form of
16 capacity from the Justices and haven't had them
17 to sit in this process.

18 And that makes it even harder for us
19 to sort of come in and tell them that they should
20 be doing their jobs differently when we don't
21 really know what they think that they're doing or
22 what they're confronting or why they're doing

1 what they're doing.

2 So I think it sort of ends up being
3 both misdirected and potentially uninformed.
4 Beyond that, I do, I share Commissioner White's
5 concern that singling out how capital cases for
6 sort of separate structural treatment just make
7 us appear guilty of the same kind of picking and
8 choosing particular causes that we worry about
9 when the Court does it.

10 And that's not great. And then as to
11 other parts, I won't spend some time on them, but
12 I don't think we've done enough to show there's
13 any problem in the Supreme Court bar or case
14 selection process that really merits discussion
15 at all.

16 The same thing is true for judicial
17 ethics where we haven't really shown there's some
18 sort of judicial ethics problem or even really
19 appearance of judicial ethics problem with the
20 Court that requires us to address it or requires
21 to the Court to do anything differently.

22 So I'd like to propose a different

1 approach that, by looking at a different approach
2 which would be to not issue or to neither pursue
3 any report on this topic, to just take, you know
4 I think it was a right thing to do to have a
5 working group to study it and to try to amass a
6 bunch of materials I think.

7 You know, that will, of course, be
8 part of the whole record of discussion that's on
9 the record, but I think in the interest of trying
10 to find a way to move forward some things that
11 we've already talked about which there's a lot, I
12 wonder if it would be best if we just not have
13 this chapter be a part of our final report and
14 leave that for some, you know, different body,
15 different people to consider on their own was my
16 suggestion.

17 CO-CHAIR BAUER: Thank you very much,
18 Commissioner Baude. Commissioner Boddie?

19 COMMISSIONER BODDIE: Yes, hi. So
20 thank you. I thought this was another terrific
21 chapter and want to commend everyone who
22 contributed to it.

1 I just want to say a quick word about
2 the section on capital cases. I thought that
3 this section could benefit from acknowledging
4 more explicitly the high complexity of capital
5 cases which is important context for
6 understanding the consequences of emergency
7 rulings in this area.

8 And although I know this is a report
9 to the President, it does have a public audience
10 and it may not be clear to lay audiences that
11 this is a highly specialized and thorny area of
12 law that really does limit the pull of lawyers in
13 the lower courts who can expertly represent
14 people on death row which is another reason why
15 death is different.

16 And also, why, you know, based on my
17 view, the Court should err on the side of pausing
18 executions. It would be interesting to note if
19 there were empirical studies that talk about the
20 availability of lawyers who have expertise in
21 this area.

22 I have to imagine that they exist.

1 I'm not personally aware of them. I knew that in
2 the draft, there is sort of somewhat oblique
3 preference to the special context of capital
4 cases.

5 But I think that could be drawn out
6 more specifically and I just note that the
7 testimony from the federal habeas, sorry, Federal
8 Capital Habeas Project does provide some language
9 to that effect if you wanted to insert that in
10 the draft.

11 CO-CHAIR BAUER: Thank you, very much,
12 Commissioner Boddie. And I would like to now
13 recognize Commissioner Ifill. Or do I, have I
14 missed --

15 COMMISSIONER IFILL: I'm here.

16 CO-CHAIR BAUER: Oh, did you have
17 your, are you in the queue or --?

18 COMMISSIONER IFILL: I'm in the queue.

19 CO-CHAIR BAUER: Okay. The floor is
20 yours.

21 COMMISSIONER IFILL: Okay. I think
22 first of all, I'm grateful to all of you for

1 those comments. They actually spark my thinking.

2 I wanted to respond to two
3 observations made by William Baude. The first
4 one is one, you know, that's not surprising
5 because, you know, we see it all through the
6 literature.

7 And we see it all in the commentary.
8 You know, is the concern about the Supreme Court
9 shadow docket procedures really just a concern
10 about the merits of the cases that are being
11 taken.

12 And I guess I would presume to begin
13 kind of from the area that the way in which Adam
14 White talked about what judges do. And I would
15 begin by talking about what we think are the
16 benefits of adjudication and what those elements
17 of adjudication are.

18 I think we are in agreement as lawyers
19 that we mostly think that adjudication consists
20 of certain elements that we think actually
21 surface the critical issues in cases and allow
22 judges to be in the best position to make good

1 decisions.

2 And that could include trial,
3 briefing, argument, appeals and so on and so
4 forth. Most of us would be unemployed if we
5 didn't think that those things were important.

6 Obviously, when you're dealing with
7 emergency orders, you are truncating a process in
8 which those elements are not happening and I left
9 out one element.

10 One element, another element is the
11 written decision of a judge which I think in our
12 profession we tend to think actually is a form of
13 discipline because the judge is essentially
14 showing her work, is showing the reasoning, is
15 allowing us to walk through a process and
16 understand the meaning of the decision.

17 Emergency orders are different and I
18 think it said throughout the text obviously you
19 need the answers quickly and so there's a
20 truncated process.

21 So when the question is raised about
22 isn't this just about the merits, my reaction to

1 that is always, yes, partially it is about the
2 merits. It's not just about the merits, but
3 partially it is.

4 All of the commentators, those who
5 criticize the Court's shadow docket procedures
6 and those who condemn them or those who defend
7 them, excuse me, all recognize that this issue
8 has become uncomfortable as these emergency
9 orders emerge in recent years in matters of
10 national significance, involved in areas that
11 involve the rights of millions of people.

12 If we think about the COVID prison
13 cases, the election cases, the religious liberty
14 cases, the abortion case, that these are high-
15 profile substantive matters.

16 And that is drawing our attention to
17 the Court's procedures in the emergency orders
18 realm. So it seems to me it asks that question
19 as to say yes, that is part of it.

20 It's not just it, but it is part of it
21 and it's what it's revealing is what is bumping
22 together is the reality that emergency orders

1 don't allow us to get all of the elements that we
2 tend to feel comfortably belong in the
3 adjudication of important substantive matters.

4 And yet we are getting decisions from
5 the Court that are having the effect of, in many
6 cases, conclusively deciding the issue because in
7 the election cases, the election is going to
8 happen because in the COVID cases, you're either
9 going to get it or you're not in that short
10 period and so on and so forth.

11 So I don't think that's really a
12 criticism. I think that's a concession. We
13 recognize that the fact that the merits cases are
14 so, the substance of the cases are so important
15 that it actually raises the stakes on these
16 issues.

17 And then the question is, well, what
18 do you expect the Court to do about it and I
19 think that what this section tries to suggest is
20 that it is not inappropriate for us to expect the
21 Court to notice that these are happening in areas
22 that involve the substantive rights of millions

1 of people.

2 And therefore, to take care to be
3 consistent, consistent in whether the Court
4 reveals the standards it's using, consistent in
5 whether the Court actually offers even a brief
6 explanation of the decision, consistent in
7 whether the Court purports to believe that the
8 emergency order has precedential effect or not.

9 So I think the fact that the merits
10 are involved is of a piece. Not in terms of one
11 side or another, but in terms of the fact that
12 these are important cases.

13 And then the last part about focusing
14 on telling the Court what to do, I don't really
15 see it that way. You know, I think we're charged
16 in each of these chapters with trying to explore
17 the possibility of reforms on important issues
18 related to the Court that have become the subject
19 of tremendous controversy and that are related to
20 the issues of Court expansion in the minds of
21 people who believe that something must be
22 corrected and those who believe that nothing

1 must, needs to be corrected.

2 And it seems important that in the
3 exploration of this set of issues, we identify if
4 there were to be reforms, how would they happen.

5 It so happens, that because of the
6 subject matter of this section, that most of the
7 power to make reforms actually sits in the power
8 of the Court.

9 This is not a circumstance in which it
10 is actually something that should fall into the
11 area of Congress or in which the President has
12 the power.

13 These are actually internal matters
14 that are churning a tremendous amount of
15 discussion that touch on the legitimacy of the
16 Court in the eyes of the public.

17 And so, I don't think, I don't see it
18 as telling the Court what to do. I see it as
19 identifying for the President and for the public,
20 if reforms were to happen, how they would happen
21 and who would be responsible for making them
22 happen.

1 So I feel quite comfortable with that.
2 I understand why it's different than other
3 chapters, but I think it's different than other
4 chapters because of the subject matter.

5 That doesn't make it, in my view,
6 right for disqualification from the report. But
7 I think it's just right for recognition that it
8 is different and therefore in the reforms
9 proposed and how they're set forth, it's going to
10 necessarily be different.

11 CO-CHAIR BAUER: Thank you very much,
12 Commissioner Ifill. Commissioner Lemos?

13 COMMISSIONER LEMOS: Thanks, Co-Chair
14 Bauer. I'm going to end up echoing I think some
15 of what Commissioner Ifill just said. Because I
16 wanted to speak to the same issues that she just
17 addressed.

18 But I'll try not to just repeat. So
19 as others have mentioned at earlier parts of
20 discussion today, we can't possibly talk about
21 everything that might be relevant to an account
22 of contemporary commentary and debate about the

1 role and operation of the Supreme Court.

2 We have to make some line-drawing
3 decisions and in this chapter in particular,
4 seems to pose the line-drawing challenge in
5 particularly stark form.

6 And I think that's been reflected in
7 some of the other comments we've just heard.
8 Commissioner White says, you know, there's more
9 we should address here and Commissioner Baude
10 said, no, there's a whole lot less we should be
11 addressing here.

12 My own view is that it is useful and
13 appropriate for this chapter to consider
14 proposals that the Court could implement itself
15 voluntarily.

16 For sure that's a different approach
17 to reform than proposals for new legislation or
18 for constitutional amendments. But it strikes me
19 as a valuable approach for us to consider
20 especially in a chapter focused on the Court's
21 own internal process use.

22 Since the Court sets its own

1 procedures, it would seem odd to my eye at least
2 to talk about those kinds of issues without
3 considering changes the Court itself might opt to
4 take up.

5 And then putting that together with
6 constraints of space and time and the need to
7 draw some lines, it then makes some sense to me
8 for the chapter to focus primarily if not
9 exclusively on proposals that are addressed to
10 the Court itself.

11 And I take it that may be one reason
12 for the draft not to include a lengthy discussion
13 of mandatory jurisdiction, but it seems the more
14 important reason for not focusing on mandatory
15 jurisdiction in any detail in this chapter is
16 that to my knowledge at least it has not been a
17 significant theme in current debates about the
18 Court.

19 And is also not something that we
20 heard about from the many witnesses who submitted
21 testimony to us. Those witnesses were instead
22 focused on the sort of information environment in

1 which the Court operates at the certiorari stage
2 and on mechanisms that the Court itself could use
3 to expand that environment or process the
4 relevant information more effectively.

5 So that's the first thing I wanted to
6 say. The other topic I wanted to touch on was to
7 pick up on Commissioner Baude's and Commissioner
8 Ifill's comments about the relationship between
9 debates about the shadow docket so called and
10 debates about the merits of the Court's
11 decisions.

12 And I, here I want to associate myself
13 with Commissioner Baude's suggestion that one way
14 our report can and I think should be helpful is
15 by clarifying when and why those debates overlap.

16 So when and why debates about the
17 Court's emergency orders are in a sense really
18 debates about the merits of the Court's
19 decisions.

20 And I think to some extent they are
21 and unsurprisingly so because the standards the
22 Court is applying in this context include an

1 inquiry into the merits by asking whether the
2 applicant has shown a likelihood of success on
3 the merits.

4 And we also heard what to my ear was
5 really useful testimony about the unavoidably
6 normative and contestable judgments that go into
7 other parts of the test including on the
8 assessment of irreparable harm and the weighing
9 of the public interest.

10 And so it follows, I think, that
11 disagreements with how the Court is applying
12 those tests are to some extent and again
13 unavoidably going to be disagreements with the
14 Court's judgments about contested questions of
15 law and about how to weigh competing values and
16 interests.

17 And I think our report can be helpful
18 in clarifying that point. And also being clear
19 about its limits. And so here I really am
20 echoing some of what Commissioner Ifill said, but
21 as I understand the pulse for the Court to offer
22 more explanation for its emergency orders are not

1 intention on the merits.

2 In other words, arguments about
3 transparency are not, as I understand them,
4 grounded in or limited to disagreements on the
5 merits, but are driven by a desire for more
6 explanation largely so that the public can
7 understand what the Justices' views of the merits
8 are.

9 And understand what judgments the
10 Justices are making about how to weigh computing
11 interests and understand how the different prongs
12 of the relevant standards work together including
13 just how much work the merits are doing in the
14 Court's own assessments.

15 I'd say the same thing about arguments
16 about precedential effect of the Court's
17 emergency decisions. I take the general thrust
18 of those arguments to be independent of the
19 merits or outcome of any given case and to have
20 more to do with kind of generalized
21 considerations about the strength and scope of
22 precedent.

1 And so, I hope as we move forward with
2 these drafts that as we get toward a more final
3 draft of this chapter, we can better clarify that
4 interaction.

5 CO-CHAIR BAUER: Thank you very much,
6 Commissioner Lemos. I would like now to
7 recognize Commissioner Crespo.

8 COMMISSIONER CRESPO: Thank you, Chair
9 Bauer. I thought I'd offer just two comments in
10 response to Commissioner's Baude and also the
11 Commissioner White first on the capital portion
12 of the chapter and then on the issue of
13 addressing the Court.

14 On the capital portion, I take
15 Commissioners Baude and White to be responding to
16 the fact that the capital cases are broken out to
17 their own section. And the concern being at this
18 endorsed view of it, to use an often-stated
19 phrase, death is different. Don't you just think
20 it's important on this point to distinguish
21 between a descriptive use of that phrase and a
22 normative use of that phrase and to talk about

1 how I read the report actually using or which I
2 see the report sort of embracing.

3 On the descriptive point, the idea
4 that death is different, I think, is just
5 important to note and to front and center.
6 Something that the Court itself has said numerous
7 times since the 1970s when its own modern capital
8 jurisprudence sort of started. Is that as
9 recently as 2012 in Miller v. Alabama, that was
10 Justice Kagan that said it; in 1991 in Homeland
11 v. Michigan, that was Justice Scalia.

12 I think each time the Court says it,
13 it seems to be at least at a minimum addressing
14 the descriptive observation that death is in fact
15 different. This is a point that Professor Bray
16 made to the Commission when he was talking about
17 the basic fact that an execution is irreversible.

18 Now, of course, in many of the
19 emergency order cases, there are instances where
20 it seems practically irreversible, but in this
21 respect death is actually different and if an
22 execution goes forward it is final.

1 There is no way to undo an execution.
2 And I think that's the point that again,
3 Professor Bray was making. I think he was
4 echoing the Court again itself when it says that
5 it is different because it's unremittable. It
6 cannot be undone.

7 Now, that's different than a motive of
8 claim which was also brought forward to the
9 Commission. Again, Professor Bray said not only
10 that death is different, but that the fact that
11 death is different should matter.

12 His testimony to the Commission was
13 that "the Justices should be much more willing to
14 give shadow docket orders that delay an execution
15 than shadow docket orders that accelerate one."

16 Now this he was saying because death
17 is different, the Court should treat it
18 differently. I think the report from the
19 Commission could have been written to embrace
20 that normative view.

21 I expect that perhaps unlike some
22 other issues there are many people in the

1 Commission who could coalesce around such an idea
2 perhaps in part because the Court itself has
3 treated death differently because it thinks it is
4 different and should be treated differently.

5 But with, I think with due respect to
6 Commissioner White, I don't think the report
7 actually does embrace this normative point. I
8 think it acknowledges a descriptive point, but I
9 don't think the Commission does actually say that
10 it agrees with Professor Bray.

11 Rather it quotes him, it quotes those
12 who disagree with him and it lays out the two
13 sides of the argument without stating a position.

14 The only other thing I'll say on
15 capital point, is that I agree with Commissioner
16 Boddie. There, I think actually that there is
17 quite a bit of empirical evidence on the
18 complexity of capital cases and on why that often
19 times impacts the timing in which these cases are
20 brought.

21 The current report cites empirical
22 evidence on this from Professor Lee Kovarsky

1 which I'll just speak for myself. I find
2 persuasive on this point.

3 This is in the endnotes of the report.
4 I think it's something that I would personally
5 welcome seeing elevated to the text of the
6 chapter, but I imagine that for all sorts of
7 space and other reasons, it wouldn't surprise me
8 if it stays there, but I just wanted to say to
9 Commissioner Boddie that I think it's an
10 important point and that it trains some of this
11 issue surrounding capital litigation.

12 One other point I wanted to make to
13 Commissioner Baude on the question of addressing
14 the Court, you know, it was thinking that this is
15 as you were speaking and it strikes me that
16 there's maybe more analytic similarity across the
17 issues addressing the chapters here than might
18 meet the eye.

19 You know, Commissioner Lemos describes
20 the issues in this chapter as things that the
21 Court itself could implement and I agree that
22 these are things the Court itself could

1 implement. I just think it may be worth
2 observing that a number of the things we spoken
3 about all day are things that the Court itself
4 could implement.

5 For example, if there were Justices
6 listening to this who actually were persuaded by
7 the normative force of term limits, that's
8 something that the Justices could implement.

9 They could embrace a norm of all
10 retiring after 18 years. Indeed, you can imagine
11 Justices taking leadership and announcing that
12 they were retiring at 18 years in order to
13 instantiate for precisely such a norm.

14 Likewise, we've been in jurisdiction
15 stripping or Congress taking certain matters off
16 of the Court's docket, but the Court has an
17 almost entirely discretionary docket.

18 If it was persuaded by any of those
19 arguments, it could also take steps to do the
20 same thing. So I think really all I'm trying to
21 say is that I think it's perhaps a matter of
22 emphasis that in this chapter, there are matters

1 as in other chapters, the Court itself could take
2 up if it wanted to.

3 Likewise, those things could be
4 imposed on the Court externally. And this
5 chapter also talks of ways that many of the
6 interventions with respect to the emergency
7 docket could be imposed externally by Congress.

8 So I just wanted to observe that point
9 that this may be more a matter of framing our
10 language than some sort of deep analytical
11 distinction that separates these chapters from
12 the others.

13 CO-CHAIR BAUER: Thank you,
14 Commissioner Crespo. Commissioner Gertner?

15 COMMISSIONER GERTNER: Let me start
16 where Commissioner Crespo ended. I think that
17 this in one sense, this is another chapter in
18 which we are talking about issues of legitimacy
19 of and as well as judicial independence.

20 And so to some degree, it's broadly
21 framed in exactly the way that the rest of the
22 chapters are. A Court that has no rules that are

1 apparent to anyone else governing what they do,
2 and no mechanisms to enforce ethics is a Court
3 that could well suffer from a legitimacy problem.

4 So I agree with Commissioner Crespo
5 that there is, that this really is sort of a
6 consistent part of the other themes of the other
7 chapters.

8 In addition, this, I think that this
9 chapter has a unique role in the overall report.
10 Because this is a chapter with sort of much more
11 concrete, this is what you can do tomorrow kinds
12 of suggestions.

13 And I think it's really critical that
14 we speak to that. That we do more of the this is
15 what you can do tomorrow kinds of observations
16 and that's where this one is going.

17 I also, as a District Court Judge, I
18 wasn't sure that I completely understood the
19 point that somehow the shadow docket was related
20 to the effect that district court judges and the
21 courts of appeals are issuing nationwide
22 injunctions.

1 The fact of the matter is that a
2 district court that issues an injunction has to
3 write an opinion. It has to write an opinion.
4 And that a court of appeals that affirms it has
5 to write an opinion.

6 Only the Supreme Court doesn't. And
7 it seems to me that that's critical. It's
8 critical to the guidance to the lower courts and
9 I'm not sure that, who said this, maybe it was
10 Commissioner Ifill, but writing opinion changes
11 the decision.

12 I do some arbitrations now and I think
13 it's hysterical that arbitrations the parties
14 that are involved in an arbitration will say to
15 me, you know, I'm supposed to ask whether they
16 want a reasoned opinion or unreasoned opinion.

17 And I've always, the, I never knew
18 what to say about that. I feel like saying,
19 okay, you want an unreasoned opinion? You win,
20 you lose, I'm out of here.

21 Essentially, not writing an opinion
22 enables a different kind of decision making. And

1 so that is, I think, a key is an issue of
2 transparency, there's an issue of legitimacy, but
3 it changes the nature of the decision making if
4 you have to say it out loud on paper on the front
5 pages of the newspapers.

6 So I think that is a broad critique of
7 the so-called shadow docket. As to the concern
8 of some that we are intruding into the territory
9 of the Supreme Court Justices: so be it, is my
10 comment. Judges and Justices are responsive to
11 the public, and they can no more be in a tower
12 than any of us can be.

13 CO-CHAIR BAUER: Thank you,
14 Commissioner Gertner. Commissioner Baude?

15 COMMISSIONER BAUDE: Thanks. So I
16 just, I have three quick comments. I take off
17 the suggestive points about sort of the
18 descriptive and different. I guess, part of that
19 said, I think there's a land in which everything
20 is different from everything.

21 You know, the Court also has things it
22 says about, you know, how it's free exercise

1 right is different from other things, that it's
2 like to enjoy possibly how the abortion right is
3 different, and other parts of the report with
4 regard those are just kind of lumped together.

5 We move past those. But as, I'm
6 sorry, I'm still not sure that we're sort of
7 being consistent in how we think about what's
8 different from what and what's similar to what.

9 Of course, you know, some people would
10 say that abortion cases involve death too. It's
11 not my view, but that's part of the debate.

12 I mean the transparency is actually a
13 good illustration of part of the problem. So I
14 totally agree that asking for just transparency
15 seems like it doesn't allow us to get into the
16 merits.

17 And yet, I think you would get a very
18 misleading impression from those materials about
19 what kind of transparency the Court provides.

20 So in the past few years, the Court
21 has taken to writing opinions and in a lot of the
22 shadow docket decisions. And the report does not

1 try to do this systematic way.

2 So you know here are all of the, you
3 know, contested emergency orders the Court has
4 issued. Here are the ones they issued an
5 opinion, here are the ones they didn't.

6 Of course, once they did issue them in
7 Holman Power vs. Jackson, the second eviction
8 moratorium case, a New York eviction moratorium
9 case.

10 Several of probably the most
11 consequential of the Church COVID cases. I think
12 if we were to line them up, I mean, this is
13 upsetting here, but I think if you were to line
14 them up, it wouldn't be obvious that the Court is
15 making the wrong choices.

16 We don't really have any basis for
17 saying that something's wrong here. Especially
18 since the report itself sort of professes
19 agnosticism about how the Court should draw the
20 line. So it sort of comes across as a calling
21 upon the Court to do better without even really
22 showing that the Court is not doing well.

1 And my impression, and again, it is
2 just an impression because we haven't heard from
3 the Court itself, is that this is a self-
4 conscious attempt to put reform on the Court over
5 the past couple of years.

6 So I think we come across as being
7 sort of out of touch with what the Court is
8 actually doing or, you know, potentially sort of
9 leisurely following the news account that the
10 Court rather than ourselves is something to
11 actually figure out what's going on.

12 And I, I mean, I have many criticisms
13 of the Court. I am happy to intrude on this,
14 this territory, all the time. I probably do it
15 too much.

16 But I do think we're not doing it here
17 in an informed and careful way.

18 CO-CHAIR BAUER: Thank you very much
19 Commissioner Baude. Commissioner White?

20 COMMISSIONER WHITE: Thanks. Since I
21 already spoke once, I don't want to try people's
22 patience, but quickly just to respond to a few

1 things that have been said, I do think the issue
2 of mandatory jurisdiction is on the table for the
3 Commission aspects that have been explored and
4 testimony submitted by Michael Kuhn (phonetic).

5 He alluded to proposals and had very
6 eloquent criticisms of it. The committee of
7 Supreme Court practitioners wrote on it at length
8 and noted that we had specifically invited their
9 testimony on the subject of mandatory
10 jurisdiction and questions of death penalty
11 cases.

12 So I do think it's a live issue. I
13 don't think we necessarily need to explore
14 exhaustively in our report. With respect to
15 Commissioner Crespo's comments, the points are
16 very, very well taken and the difference that I
17 see and the thrust of the first part of the
18 emergency docket discussion and the capital cases
19 part, I might just be putting my own gloss on it
20 as a reader.

21 If that's not the case, to the extent
22 that there is a real difference in the thrust of

1 the first part of this document and the second, I
2 don't think it's really enough to just invoke
3 the, you know, the justifiable line that death is
4 different.

5 First of all, because as Commissioner
6 Baude said, there's a lots of differences between
7 different kinds of cases on the emergency docket.

8 And we can't just say that the rock is
9 heavier than the stick is long. I think we need
10 to grapple with these as part of our unified
11 whole of the emergency docket. And as
12 Commissioner Baude said, death, matters of life
13 and death arise in any number of issues on the
14 Court's emergency docket.

15 Questions of national security,
16 questions of abortion which present matters of
17 life and death and all the different dimensions
18 for different people, matters of the criminal
19 process and the COVID cases and so on.

20 And so again, this might just be my
21 gloss that I'm putting on it as a reader on the
22 Commission, but it did strike me in the reading.

1 And then finally, Commissioner
2 Gertner's comments on my attempt to draw a
3 connection between the shadow docket and the
4 equitable powers of lower courts is well taken
5 and I don't want to overstate the similarity.

6 Yes, it is a good thing that the lower
7 courts offer opinions to accompany their
8 preliminary injunctions and TROs and the lower
9 court should do it as well.

10 But for me, the point I was really
11 getting at, and I want to be clear. It's not so
12 much the fact of a written opinion which is
13 important, but it's just the quality of the
14 process.

15 The abbreviated process in both cases
16 and also I think the nature of the decision in
17 these equitable matters where it's not just an
18 interpretation and application of law and facts,
19 but it's a mix of discretionary equitable
20 considerations that often confuse as much as they
21 clarify in the written opinion. Thank you.

22 CO-CHAIR BAUER: Thank you very much,

1 Commissioner White. Commissioner Ifill.

2 COMMISSIONER IFILL: Thank you. I
3 just wanted to one more time respond to
4 Commissioner Baude because I don't want to leave
5 the impression that there's kind of shoddy work
6 here that is responsive to kind of the fad of
7 talking about the shadow docket.

8 The transparency argument is actually
9 connected with the consistency argument. There
10 are a number of cases and I think it's explained
11 in the materials in which the Court has offered a
12 brief and short explanation and including in the
13 most recent abortion case.

14 I think you will discover that those
15 cases as I think even you indicate, are quite
16 recently and have begun to happen with more
17 consistency because of perhaps not because of,
18 but certainly it correlates with the increasing
19 criticism of the shadow docket.

20 And I think the argument that is being
21 raised is that should happen more consistently.
22 That you shouldn't be, jury, you know you

1 shouldn't be picking between different cases.

2 Some getting an explanation and some
3 not. So I think that's the point of it. Not to
4 suggest that the Court doesn't do it. And as I
5 have said when we've, you know, talked about this
6 issue, you know two or three cases doesn't
7 necessarily mean a trend.

8 You know, we've been tasked with
9 studying something. We see it, we have a pretty
10 heavy body of work to look at and we see it in
11 consistency and so it's great if the Court has
12 gotten the messages and is beginning to do it.

13 But we really have no way of knowing
14 whether they intend to consistently apply that.
15 So I don't think we're out of touch. I think
16 we're quite aware of the cases that went to the
17 Court is writing those short explanations and
18 we're approving of them.

19 We think that should happen and it
20 should happen more consistently. And then I
21 would just say, on the death is different piece,
22 you know, it goes to Commissioner Boddie's

1 comments and Commissioner Crespo's on the issue
2 of process.

3 When I'm hearing death is different
4 for purposes of this particular section, it is
5 not only that it cannot be reversed. It is that
6 the process of capital punishment cases is
7 distinct from almost every other of the
8 procedures by which a capital case gets to the
9 Supreme Court is governed by a very particular
10 body of law.

11 One and a particular process, one
12 which the Court itself has critiqued which
13 encouraged Congress to pass a statute to try to
14 change what that process would be like, and
15 frankly, I think the effort was to try to be
16 respectful of that.

17 To be respectful of the fact that
18 capital cases sit in a very specific and
19 identifiable procedural lane. But otherwise, I
20 take the comments to be actually quite helpful
21 and the need to add more of the empirical data to
22 explain more in part because of what was said at

1 the top by Commission Huang which is that this an
2 area that many lay people don't understand.

3 And therefore showing all the work and
4 giving the back story is important. And if
5 Commissioner Bauer will allow greater space for
6 the report, I think that your suggestions are
7 well taken.

8 CO-CHAIR BAUER: That you,
9 Commissioner Ifill. I just have a couple of
10 quick -- I know I shouldn't prolong what has been
11 a long and extraordinary day. I apologize. I'm
12 also having some audio issues.

13 So if I'm shouting, I'm
14 overcompensating. I apologize, but what I would
15 say just very quickly is the concluding remark on
16 my part about this conversation and then I will
17 turn it over to Co-Chair Rodriguez for some final
18 remarks.

19 I just want to say something about our
20 charge which is implicated in some of the
21 comments that have just been made. First of all,
22 as we note in the draft, or has been noted in the

1 draft, particularly reflected in the comments
2 that we've made about the executive order and how
3 the charge should be understood by the terms of
4 the executive order, we as a Commission, have not
5 been charged with making a recommendations.

6 We've been charged however, with
7 providing the President with an informed and
8 critical account of the current debate about the
9 Supreme Court.

10 And that naturally brings us to issues
11 like the ones that we've been discussing just in
12 this last hour. However, it obviously does
13 involve us both in the case of confirmations in
14 the Senate and in cases involving internal
15 operations of the Court.

16 It involves us in speaking carefully
17 with the President to inform them of the issues
18 that we really do have to address, but attempt to
19 do so in a manner that is institutionally
20 respectful.

21 We're not speaking to the Court, we're
22 speaking to the President and of course, the

1 President intends for the report to inform the
2 public.

3 So I do think these are issues
4 appropriately touched upon, but how we go about
5 it is significant. It was my impression that as
6 Commissioner Driver noted, that the phrase
7 appearing in the draft on judicial stockholding,
8 I hear people are having huge trouble hearing me.

9 Is that correct? Is there a problem
10 with the audio?

11 CO-CHAIR RODRIGUEZ: I can hear you
12 well, Bob.

13 CO-CHAIR BAUER: Okay.

14 COMMISSIONER MORRISON: Before we
15 couldn't hear you so well, but now it seems fine.

16 CO-CHAIR BAUER: Okay, very good.
17 Thank you. That, well and Commissioner Driver
18 was referring to the text. I don't have it in
19 front of me, where there was a note made about
20 consensus that he said he would like to see more
21 affirmatively endorsed.

22 I read the language of that working

1 group to be an attempt to come to terms with
2 precisely this question of how you inform the
3 President, how you show critically the direction
4 of the debate has taken on a particular point.

5 But that you do so in a careful and
6 respectful way that also doesn't cross into the
7 line of recommending a particular course of
8 action directed at the Supreme Court.

9 And similarly, I think we heard very
10 powerful testimony about the confirmation
11 process. I think we ought to bring that to the
12 public's attention in a variety of ways which are
13 noted in the draft materials.

14 Anyway, I will conclude and simply say
15 that I am very impressed with how this last day
16 goes. I'm going to turn this over to Co-Chair
17 Rodriguez, but you have heard today Commissioners
18 talking about how this process has affected their
19 view of the issues as they've read the vast
20 materials, thought about these issues and
21 listened to one another, views that they thought
22 that they were bringing into the process have

1 changed.

2 And that's in fact what a deliberative
3 process is supposed to be. And I've been really
4 impressed on all sides at all comments today,
5 sober, careful and very much to the benefit of
6 the Commission as a whole.

7 So with that, I'm going to pause and
8 turn it over for closing remarks to Co-Chair
9 Rodriguez.

10 CO-CHAIR RODRIGEZ: I will keep this
11 brief and first say that we will reconvene in
12 approximately a month's time to deliberate over
13 what will be a draft report for the Commission
14 that will reflect today's debate and will
15 transform the discussion materials into something
16 that will inform the President as well as the
17 public debate.

18 The date and time will be announced in
19 the coming weeks and we will publish a draft
20 report in advance of that meeting. I'd also like
21 to issue a final invitation for further public
22 comments.

1 We welcome public comments and will be
2 receiving them throughout the life of the
3 Commission and looking to accept them until
4 November 14th.

5 However, I should note that comments
6 most helpful to the Commission if submitted
7 before November 1st and they may be submitted via
8 regulations.gov.

9 And to find them, again, you may go to
10 the Commission's website where the links are
11 posted. Or you may go directly to
12 regulations.gov.

13 And then the last thing that I will
14 say is that I very much enjoyed spending the day
15 with all of you. The last time we were together,
16 the last two times we were together, we were
17 listening passively to others and asking
18 questions of some of them, but this was our first
19 real opportunity to talk as a Commission and I
20 think it was enormously productive.

21 We have points of conflict that are
22 difficult and challenging, but also lots of basis

1 for providing the appraisals that we were asked
2 to provide.

3 I wish we could have been in the same
4 room today and perhaps one day we will be. But I
5 thank you for your attention, your time and your
6 incredible work. I hope everyone has a great
7 weekend. And we will be in touch soon.

8 (Whereupon, the above-entitled matter
9 went off the record at 5:06 p.m.)

10

11

12

13

14

15

16

17

18

19

20

21

22

A			
a.m 1:8 4:2 57:10,11	accountability 33:1,5 209:11 221:9	adding 40:15 44:10 45:5 58:22 117:12	advocacy 11:7
a/k/a 263:13	accounts 17:15 57:1 96:8	addition 5:7 72:7 97:22 117:5 158:2,17 219:9 297:8	advocated 168:19
Aaron 38:10	accurately 110:3	additional 11:2 30:9 61:10 159:1 167:3	Advocates 62:13 63:1
abandoning 214:15	accuses 226:13	address 64:17 97:1,13 144:11 155:16 160:14 162:3 164:15 196:6 233:13,15 274:20 285:9 310:18	affect 31:6 159:17 183:8 188:21 218:6 220:15 222:12 263:18
abbreviated 267:22 268:3 305:15	accustomed 195:14	addressed 84:21 160:7 204:9 212:13 255:20 259:3 273:11 284:17 286:9	affection 89:16
ability 15:7 21:2 31:8 31:10 34:2 73:9,19 74:13 78:17 98:3,3 146:10 151:11	achieve 94:22 98:18 222:1 234:14 245:20 246:8,10	addresses 110:11 180:22	affirmative 62:22 114:10
able 28:13,14 42:2 49:10 53:1 120:15 143:16 145:21 160:12 263:8	achieved 218:9 222:8 246:4	addressing 17:21 94:11 117:9 154:6 203:14 255:5 258:9 285:11 290:13 291:13 294:13 294:17	affirmatively 311:21
ably 23:18 24:10	achieving 52:19 70:12 94:21 253:19	adequately 103:2,20 108:9 110:3	affirms 298:4
abolished 269:11	acknowledge 48:3 122:13 130:20 135:8 182:19 259:11	adheres 231:14	afford 269:3
abortion 203:7 219:8 280:14 300:2,10 304:16 306:13	acknowledged 61:14 78:12 100:22	adjacent 232:19	afforded 23:14
above-entitled 57:9 153:4 215:21 254:3 315:8	acknowledges 75:14 293:8	adjudicate 272:21	afraid 139:16
Abraham 60:19	acknowledging 272:3 276:3	adjudication 180:6 278:16,17,19 281:3	aftermath 22:4
abruptly 37:18 40:2	act 4:20 28:19 32:22 41:22 87:2 113:20,21 116:4 118:13,17 136:4 149:4 173:16 191:6,10 248:19,20 249:4 250:3	adjust 70:11	age 162:15,22 163:21 166:13
absent 142:17 222:18	action 62:22 101:1,3 114:10 173:11 191:11 199:18 219:19 224:7 312:8	adjusted 60:3	agenda 32:9 82:12 167:22 208:22
absolute 169:17 200:11	actions 101:8 120:13 243:20,20	administration 9:20 22:3 132:20 168:2	agendas 85:20
abstract 42:20	active 112:1	administrations 103:7	ages 156:13,18 166:11 166:13
abuse 121:16 149:17	Acton 200:11	administrative 5:1	agitation 33:6
abused 121:11	actors 182:13 183:13 213:18	admirable 68:18	agnosticism 301:19
academic 20:20 244:16	acts 38:3 73:16 240:16 241:19 242:14,17 243:5	admirably 35:2	ago 95:18 102:17 270:17
Academy 206:13	actual 67:16 142:6 207:20 238:3	admission 76:19	agree 28:13,14 36:10 36:12 40:10 69:5 72:4 85:9 95:11 104:10 110:16 124:17 151:8 177:5 178:3,13 184:5 189:12 190:19 194:22 200:18 228:20 230:17 238:9 245:15 247:13 266:7 293:15 294:21 297:4 300:14
accelerate 292:15	Adam 2:14 8:16 45:17 171:18 278:13	admittedly 270:17	agreeing 182:10
accents 174:8	Adams 1:12 5:16,17 139:15,16,18,21 140:3,6 145:13,14,17 147:1,14 151:22 263:5,6 266:5,8	adopt 241:4	agreement 53:16 55:2 124:14 146:17 278:18
accept 11:14 21:6 45:3 217:13 229:16 314:3	add 30:2,9 39:14 48:21 50:18 52:7 62:8 77:14 116:12 190:13 196:11 236:2 266:10,20 308:21	adopted 33:3 38:1	agrees 27:19 70:2 229:8 293:10
accepted 166:21 168:12 231:18	added 266:2	adopting 74:1	ahead 14:2
accepting 203:17		adoption 159:20	aimed 258:17
access 42:2		adopts 248:14	aims 63:17 101:1 222:21
accesses 47:12		advance 81:7 85:20 87:16 208:22 313:20	air 263:1
accidental 174:9		advanced 86:22	Alabama 1:19 291:9
accidents 212:20		advances 14:19	Alison 2:2 7:14 48:19
accommodations 42:1		advancing 32:9	all-time 81:10
accompany 305:7		advantage 83:15,17 109:3	alliance 238:3
accomplish 134:19 235:18		advantageous 40:11	allotted 133:8
accomplished 215:11 246:2		advantages 247:2	allow 60:18 61:3 142:20 257:12,13 278:21 281:1 300:15 309:5
accomplishing 111:22 134:18 233:16		adversarial 67:12	allowed 83:17 185:4
account 10:5 15:22 18:20 21:16 23:3 35:18,20 36:16 43:17 54:3,11 91:12 102:2 140:20 152:10 181:17 264:20 284:21 302:9 310:8		advice 273:9	allowing 223:3 259:5,6 279:15

- allows** 162:14
alluded 303:5
alludes 267:16
alphabetical 5:14
alter 123:1,2
alteration 122:2,9
alternative 91:6 179:13
 182:2,5 228:12,15
 233:16
alternatives 179:17
amass 275:5
ambiguity 24:5
ambiguous 65:18
ambitious 181:13
amend 91:2 220:1
 233:17 234:13 246:18
 251:21
amending 97:4 233:20
 235:11,14
amendment 44:12,14
 61:21 141:21 142:3,4
 142:7,14,15 159:21
 206:2 209:21 210:3,7
 210:21 215:12 218:10
 222:9,18 230:2 234:9
 234:17 235:8,9,18
 246:2,7,11,16 247:3
 247:18
amendments 44:2
 234:4,18 243:22
 247:9,18 285:18
America 192:20
American 16:3 22:18
 57:3,4 77:8 114:17
 115:16 126:1 192:17
 193:5,18 197:7 200:8
 233:2
Americans 43:1 45:6
 187:6
amount 39:16 263:12
 283:14
amounts 19:20
amplifies 72:17
analogies 128:21
analogy 76:1 128:5
analysis 10:8 22:21
 30:12 35:21 37:13
 38:17 51:17 54:9 68:3
 69:13 98:5 136:21
 202:10 216:5 245:10
 265:22
analytic 25:14 294:16
analytical 26:13 27:7
 38:18 55:11 221:15
 248:9 296:10
analyze 221:20
analyzed 218:5
anchor 46:21
- and/or** 73:16
Andrew 1:15 6:9 60:15
 60:22
Andrews 1:19
Andrias 1:12 5:18,19
 153:7,9 160:10,19
 164:17,20 171:16
 176:10,13 178:19
 182:6,9 186:3 190:10
 190:13 194:2 196:4
 197:15 199:4 202:5
 204:16 208:2 210:16
 212:14 215:2 243:13
 243:14
anew 180:16
animating 10:20 143:1
announced 203:4
 313:18
announcing 295:11
anomalous 41:8
answer 42:18 65:17
 80:1 140:15 141:8
 143:17,18 145:4
 184:3 213:7 250:4
answered 209:18 250:6
answers 164:12 213:6
 240:5 279:19
anti- 118:3 221:12
anti-common 130:11
anti-expansion 98:22
anti-Federalist 37:1
anticipation 169:15
antithetical 268:21
Antonin 2:14
anybody 238:22
anymore 170:22
anyway 163:16 187:12
 201:19 312:14
apart 185:6
apologies 268:6
apologize 309:11,14
apparent 297:1
apparently 106:13
appeals 207:16 279:3
 297:21 298:4
appear 158:15 186:19
 274:7
appearance 74:6
 274:19
appearing 311:7
appears 207:22
appliance 233:5
applicant 288:2
application 305:18
applied 236:11,21
 248:20 249:10
applies 259:15
apply 16:10 88:14
 130:9 166:5 200:18
 220:8 258:16 307:14
applying 287:22 288:11
appoint 76:5 185:2
 191:7 201:13
appointed 38:1 85:21
 155:17 170:19
appointee 170:18 171:1
appointment 166:14
 169:17 174:11 178:1
 179:6 182:21 202:1
 209:10
appointments 109:6
 157:2,2 158:13,14
 160:3 165:15,18,20
 166:1 167:21 168:1
 169:12 170:9 172:7
 172:15 177:14 181:4
 182:13 192:10 201:10
 203:20
appoints 203:22
appraisal 10:9,19
 152:10 212:5
appraisals 315:1
appraise 56:22
appreciably 66:18
appreciate 75:14
 108:13 109:12 113:4
 115:19 120:3,7 151:2
 194:17 208:9 238:10
appreciation 34:21
 39:15 208:6
approach 38:2 47:17
 66:8 132:11 186:1
 260:22 271:17,18
 273:5 275:1,1 285:16
 285:19
approached 87:19,22
approaches 187:12
approaching 89:6
appropriate 26:21 72:1
 72:1 138:3,6 141:10
 225:5,12,12 285:13
appropriately 214:20
 311:4
appropriateness
 137:15
approving 307:18
approximately 11:5
 313:12
April 10:3
arbitrary 158:16 165:18
arbitration 298:14
arbitrations 298:12,13
architecture 79:9 80:9
area 36:3 65:6 69:9
 137:7 196:13 207:5
 266:21 276:7,11,21
 278:13 283:11 309:2
areas 63:1 73:1 129:11
 130:8 272:19 280:10
 281:21
arguably 105:15
argue 62:13 63:2,8
 157:20 162:10 218:21
 232:1
argued 33:5 237:4
argues 231:9
arguing 225:6 232:2
argument 20:10 70:14
 70:14,22 71:10,12,14
 75:21 76:9 80:18
 94:20 99:17 100:3,17
 101:14 125:18,19
 127:10 130:17 132:7
 150:16 167:9,16
 171:6 180:18 241:10
 250:22 279:3 293:13
 306:8,9,20
arguments 10:9,19
 13:15,18 17:14 20:7
 24:13,14 25:10,11
 58:4 59:5 71:6,17
 72:2 73:14 74:4,7
 75:15 79:8,12,16,20
 80:3,11 81:21 82:17
 83:9,18 85:5 91:14,22
 92:17 95:19 96:1,8
 98:22 99:2,5 104:14
 113:2 119:11,11
 125:12 127:2 130:7,7
 130:12 133:19 153:21
 163:8 165:12 167:3,5
 171:14 185:21 190:3
 195:21 198:9 199:15
 199:19 200:1 205:5
 215:9 216:14 231:1
 231:10 232:7 244:10
 246:10,18 247:17,19
 254:22 258:2 289:2
 289:15,18 295:19
arises 248:15 261:22
 262:5
arising 156:3
arrived 93:15
arrives 39:21
article 41:20 43:11,13
 51:8 64:5 65:13 67:3
 76:8 107:11 125:22
 233:19,22 235:11,14
articles 244:22 249:12
articulate 17:8 165:10
 166:8 208:15 209:5
articulated 91:2 125:12
articulating 147:20
aside 118:21 215:9

251:18
asked 10:15 18:9 42:15
 51:20 97:21 101:21
 152:8 175:17 191:14
 193:14,16 315:1
asking 226:10 288:1
 300:14 314:17
asks 280:18
aspect 267:18,19
 269:21 271:5
aspects 12:16 48:11
 53:6 165:15 191:17
 303:3
assertions 265:7
asserts 105:21
assess 10:16
assessment 65:19
 288:8
assessments 289:14
assigned 89:8
assist 13:18 58:5
 153:22 255:1
assisted 56:11
associate 85:2 127:1
 147:15 151:18,21
 176:14 202:13 213:15
 213:20 287:12
associated 90:15 94:19
 213:1 240:19 253:7
assume 129:19 161:7
 179:8
assumes 89:1 177:6
assumption 198:12
 210:19 211:2
assumptions 84:22
 85:18 218:12
assure 87:14
assuring 94:12
attack 227:3
attempt 13:14 46:17
 50:21 71:4 99:13
 184:2 186:12 189:14
 243:8 269:3 302:4
 305:2 310:18 312:1
attempts 36:9 269:3
attend 5:2
attendees 4:9
attention 19:10 31:4
 65:6 96:11 135:10
 190:21 200:21 234:19
 242:21 244:16,20
 245:5 246:22 255:22
 259:12 263:21 280:16
 312:12 315:5
attentive 135:13
attorneys 5:9
attractive 161:5,5
attune 262:21

audible 90:7,10 140:4,5
audience 57:19 197:11
 276:9
audiences 276:10
audio 90:4 128:7
 139:16 140:9 145:12
 156:4 160:3 168:14
 173:12,22 175:9,13
 181:3,20 183:16
 187:4 260:6 309:12
 311:10
audio's 112:4
authoritarian 104:19
authority 200:7,9
 248:15 249:3
authorize 249:7
automatically 174:2
autonomy 34:12
availability 276:20
available 4:12 11:20
 119:3 132:14
availing 199:16
average 162:16,17,18
 164:4,7
avert 120:13
avoid 73:4 77:6 98:21
 99:1 156:3 181:20
 199:10 249:20
avoidance 249:16,22
aware 52:12 277:1
 307:16
awfully 176:21

B

B 1:19 87:5
B4 104:18
back 14:21 39:7 45:21
 51:3 57:12 61:2 64:9
 87:11 104:1 139:4
 140:6 144:2 145:22
 147:3 153:7,8 155:4
 175:3 198:21 199:22
 242:17,17 244:12
 252:16 254:7 256:17
 260:8 309:4
backdrop 98:6
background 18:18
 38:20 82:7 133:20
backgrounds 183:7
bad 54:21 66:2 73:16
 74:9 76:11 130:4
 169:2 170:16 202:14
 212:1
balance 28:12 32:20
 33:4 56:1 63:3,18
 65:19 83:8 94:12 95:2
 96:7 109:5 111:14
 112:22 124:4 167:10

183:20 187:18 203:16
 203:19,21
balanced 35:2 68:18
 79:7 81:21 93:4 152:9
 204:12
balances 137:20
 218:21
Balkin 1:13 5:20,21
 190:11,12 200:22
 207:3 211:12
ball 93:17
banc 66:16
bank 229:2,4
bankruptcy 48:1
bar 274:13
Barnett 70:8 71:7,15
Barnett's 70:18
Barrett 100:12
barrier 234:3,5 235:9
 235:11
based 15:5 56:7 74:7
 74:15 94:13 125:21
 143:10,12 158:7
 184:2 195:11 276:16
basic 48:9 270:17
 291:17
basically 83:17 166:9
 233:16
basics 124:9
basis 52:21 92:14 93:14
 108:18 236:19 258:19
 268:14 301:16 314:22
battles 219:6
Baude 1:14 6:3,4 72:14
 72:15 78:20 94:9
 115:5 117:10 122:4
 127:22 128:1 131:5
 204:17,18 238:7,8
 239:13,19 266:12
 271:10,11 275:18
 278:3 285:9 290:10
 290:15 294:13 299:14
 299:15 302:19 304:6
 304:12 306:4
Baude's 85:3 91:13
 287:7,13
Bauer 1:8,10 3:5 5:22
 6:1 9:1,5,9 12:5,8
 15:2 17:9 18:8 23:12
 57:12 58:20 64:9,10
 65:1 68:5,6 72:12
 78:19 79:1 84:3,6,8
 90:3,10 95:7,11 102:6
 102:7 110:5 112:6,6
 119:21 123:4 127:16
 131:4,8 133:1 134:20
 136:11 139:14,19
 140:3,9,10,14 145:8

145:16 146:22 147:8
 147:11 148:2 149:14
 151:13 153:2 217:4
 254:6 255:15 260:8,9
 260:13 263:4,7 266:4
 266:7 267:5 271:9
 275:17 277:11,16,19
 284:11,14 290:5,9
 296:13 299:13 302:18
 305:22 309:5,8
 311:13,16
bear 53:20 254:9
bears 246:21
becoming 205:21
 212:22
began 45:10 51:7 141:2
 210:18 211:1,22
 212:7
beginning 21:20 40:12
 79:16 307:12
begins 13:22
begun 145:6 306:16
behalf 180:19
behave 264:16 273:4
behavior 129:18 184:14
 213:3,8 214:2
beholden 82:12
behoove 43:4
beliefs 213:19
believe 40:2 65:10
 76:17 79:18 86:4,5
 89:18 93:10 101:15
 103:4,9,19 112:4
 113:10 114:19,22
 116:17 124:10,15
 129:15 146:21 231:9
 262:11 282:7,21,22
believes 103:12 117:1
belong 281:2
bench 157:10
beneficial 147:22 201:5
 211:6
benefit 39:22 44:9
 67:11 101:4 134:15
 178:16 203:13 264:6
 276:3 313:5
benefits 93:11 166:11
 218:8 233:21 278:16
Berkeley 2:10
Bert 1:20 7:5
Bertrall 2:9 8:8
best 26:21 28:10 48:11
 120:10 130:11 166:4
 195:10 235:7 270:4
 275:12 278:22
betrayal 170:18
betrayed 170:20
better 28:18 30:14

31:19 38:3,4 94:12
 133:17 155:12 173:16
 176:15 182:2 186:2
 206:21 210:6,15
 213:6 219:6 234:5
 236:20 237:1,2 240:6
 290:3 301:21
beyond 58:21 70:10
 83:7 117:11 165:13
 240:21 246:19 247:9
 255:17 274:4
biased 32:15
bicameralism 246:5
Biden 10:3
Biden's 22:20 45:21
big 117:22 122:13
 138:20 209:16 238:20
bigger 80:14 165:11
 167:6 268:7
bill 180:19
bills 259:19
bit 15:13 31:14 43:22
 59:16 68:22 69:7,14
 72:8 80:10 136:19
 148:6 149:21 161:18
 164:5,7 167:7 169:6
 171:21 188:9 203:14
 224:20 225:10 239:17
 244:6 245:21 266:2
 293:17
black 40:19,21 42:2,6
 42:11 44:7,8 193:4
blessing 114:3
blocked 105:10 116:19
blueprint 209:14
blunt 87:16
blush 67:13
Board 37:20 38:8 50:7
boards 166:2
Bob 5:22 9:5,9 12:5
 23:12 311:12
Boddie 1:14 6:5,6
 134:22 135:1 136:12
 235:22 236:1 238:6
 275:18,19 277:12
 293:16 294:9
Boddie's 140:16 307:22
bodies 187:9
body 46:19 54:8 114:7
 118:9 270:20 275:14
 307:10 308:10
bold 201:4
bolder 181:12
book 88:8 183:3
books 250:12
Bork 41:13,19 42:4,14
 43:6,7 108:3 112:14
 112:19

Bork's 41:7,16 43:11
borked 43:7
borne 121:13
bound 116:13 259:13
bounds 183:22
Bradley 225:4
branch 101:6 126:3
 138:18 217:10 242:1
 242:2 250:20 251:7
branches 16:15 33:7,14
 38:8 69:21 137:17
 138:4,9 185:8 193:16
 216:8 217:19 218:2,7
 219:3 220:17 240:2
 241:9,12 242:10
 245:14
Brandeis 178:11
Bray 291:15 292:3,9
 293:10
breached 105:9,15
break 15:18 57:7,13
 113:10 130:16,17
 254:7
breaks 15:18
Brennan 178:11
brevity 245:20
Breyer 88:7 183:3
brief 37:20 56:6 58:11
 72:7 79:3 154:2 159:3
 215:5 216:16 260:15
 282:5 306:12 313:11
briefing 20:10 67:11
 258:1 279:3
briefly 62:9 63:14 71:9
 155:9 196:11 243:15
bring 39:4 48:11 128:11
 203:21 253:21 312:11
bringing 312:22
brings 144:1 310:10
Brnovich 116:14
broad 10:16,16 13:14
 62:5 196:13 207:5
 220:10 299:6
broaden 259:4
broader 30:4 123:13
 186:13 197:10 223:2
 223:17 225:16 247:2
 268:1
broadly 95:3 137:1
 197:7 241:22 243:8
 296:20
broke 101:4
broken 99:21 101:9
 190:22 192:10,11,12
 193:10 211:11 290:16
brought 19:10 70:21
 123:20 128:19 164:14
 227:21 292:8 293:20

Brown 37:20 38:8 50:7
Brutus 37:1,2
buckets 79:4
build 89:22
Building 30:8
bull 181:7
bulwark 89:19
bumping 280:21
bunch 272:21 275:6
burden 94:1 144:8,19
Burger 38:12 50:15
burn 229:22
burned 230:15
burning 230:4,13
 250:10
busy 81:5
buttons 199:12
buy 42:12
buying 27:6
by- 207:10
by-partisan 207:5

C

C-O-N-T-E-N-T-S 3:1
calculations 81:18
calculus 188:22
CALEB 2:5
California 2:9
call 3:3 5:12,13 18:2
 57:20 58:12 60:1
 121:5 154:4 158:5
 160:16 216:17 240:22
 255:11 271:22
called 42:4,7 152:6
 219:14 228:16 287:9
calling 271:21 301:20
calls 58:20 59:1 63:19
 141:2,3 258:11
camera 18:6
cameras 5:13 8:21 23:6
 160:12 223:8 256:6
 260:4,5
campaign 201:14
Canadian 231:5
cancel 76:5
candidate 107:18
 161:13 162:8 202:1
candidates 161:4,5
 162:11 201:8,12
 203:5
capable 262:15
capacious 209:7
capacity 37:3 217:16
 273:16
capital 258:16 262:2
 269:5 274:5 276:2,4
 277:3,8 290:11,14,16
 291:7 293:15,18
 294:11 303:18 308:6
 308:8,18
capper 161:11
capture 146:2 152:4
 237:21
captures 237:22
Cardozo 1:12
care 80:22 81:1,2,8
 115:3 182:20 206:17
 227:14 282:2
career 120:19 161:11
 163:2,19 164:11
careers 178:17
careful 29:21 67:15
 73:3 77:11 85:4 169:9
 170:10 189:7 302:17
 312:5 313:5
carefully 35:18 95:4
 310:16
cares 136:9
Carey 2:8
Carolina 40:21 216:22
Caroline 1:17 6:17
 82:22
carried 84:15
carries 83:4
carry 69:20 268:8
case 3:19 27:22 69:19
 69:21 86:11 107:10
 109:18 114:2 137:6
 139:4 203:13 219:18
 229:9 244:7 249:18
 253:4 254:10 257:5
 258:20 267:10 269:15
 274:13 280:14 289:19
 301:8,9 303:21
 306:13 308:8 310:13
cases 20:9 27:8,17
 28:17 32:17 34:3 38:4
 38:5 47:22 64:1
 121:22 122:8 129:2
 138:20 192:9 218:18
 233:7 235:4 239:10
 248:15 254:11 256:2
 257:20 258:17,18
 259:1 260:1 263:17
 269:5,9,17,20 270:22
 271:1 272:17,21
 274:5 276:2,5 277:4
 278:10,21 280:13,13
 280:14 281:6,7,8,13
 281:14 282:12 290:16
 291:19 293:18,19
 300:10 301:11 303:11
 303:18 304:7,19
 305:15 306:10,15
 307:1,6,16 308:6,18
 310:14

- cast** 24:13 25:9 40:3
65:15 198:1
- casting** 134:11
- categories** 19:9,13
30:13 220:10 257:4
- category** 83:13 257:7
258:20 259:10
- cause** 73:15
- causes** 33:6 239:6
274:8
- cement** 116:5 173:2,10
- center** 181:11 196:19
202:22 291:5
- centered** 195:3
- central** 23:18 113:8
142:22 155:2 170:9
218:5 253:4
- centric** 172:20
- century** 44:22 59:17
62:2 192:2 204:4
228:22 242:19
- cert** 261:14
- certain** 50:2 83:4 124:4
126:16 162:12 177:22
219:11 252:12 253:2
278:20 295:15
- certainly** 41:15 49:14
103:3 110:20 111:22
201:10 204:3 210:13
232:14 244:21 246:17
246:21 306:18
- certiorari** 259:2 287:1
- cetera** 263:19
- Chair** 1:11,11 18:8
39:14 48:21 52:6
58:20 65:1 84:11
208:3 260:13 263:7
290:8
- Chairman** 227:12
- challenge** 22:16 56:15
56:21 71:20 91:11
124:3 127:14 181:13
209:3 219:21 226:22
227:5,8 230:10
270:17 285:4
- challenges** 52:17 92:3
120:9 214:13 225:20
253:7 257:14
- challenging** 14:6 35:9
68:13 194:12 225:22
314:22
- chance** 78:6 102:14
167:15 171:7 174:14
184:12
- chances** 76:21
- change** 16:16 22:8 51:9
73:10 75:18 100:1
130:18 142:17 144:10
- 160:2 162:8 163:2,10
176:1 191:3 205:22
210:5 212:10 214:10
234:7 247:2 308:14
- changed** 59:19 60:16
149:3 210:22 265:13
313:1
- changes** 59:22 103:4
104:2,3,5,5 106:15
113:7 161:1 180:20
191:14 211:3 265:17
286:3 298:10 299:3
- changing** 71:21 74:19
75:13,15 94:1 130:3
149:9 154:18 160:20
161:1 163:19 175:2,3
177:9 214:6
- channel** 234:8
- chapter's** 265:19
- chapters** 26:6 30:17
31:4 33:16 55:17 96:6
109:15 137:3 265:20
282:16 284:3,4
294:17 296:1,11,22
297:7
- character** 48:12
- characteristically**
260:14
- characterizing** 107:21
- charge** 10:2 22:20 54:6
54:8 60:15 152:6
246:20 309:20 310:3
- charged** 10:8,17 15:10
51:16 282:15 310:5,6
- Charles** 1:15 6:7,8 90:8
90:9 95:8,12 103:1
115:10 124:5 145:10
147:2,12,13 148:3
- Chase** 139:6
- check** 33:2,9 83:18
145:12 219:13
- checked** 219:5
- checking** 236:15
- checks** 137:20 218:20
- Chicago** 1:14 2:2,11
- chief** 44:6 139:5 148:9
178:10,10 207:15
- children** 261:4
- choice** 26:19
- choices** 49:11 51:21
120:12 121:16 301:15
- chooses** 204:3
- choosing** 158:7 173:4
274:8
- choppy** 89:2
- chorus** 39:15
- Church** 301:11
- churning** 283:14
- circuit** 41:18 66:10,12
66:13,19 86:17 149:4
149:5 199:17
- circulated** 84:20 95:17
- circumstance** 122:15
283:9
- circumstances** 21:6
120:14 130:22 240:13
248:21
- cite** 228:8 230:19
- cited** 231:4
- cites** 105:19 293:21
- citing** 131:16,16
- citizens** 42:6 97:20
109:2
- citizenship** 44:13
- Civil** 22:3,4 40:17 41:22
- civility** 84:16
- civilly** 89:13
- claim** 20:21 93:6 270:22
292:8
- claimed** 61:11
- claims** 44:22
- clarification** 227:21
245:22
- clarified** 245:17 246:14
- clarify** 75:5 77:6 111:18
290:3 305:21
- clarifying** 258:12
287:15 288:18
- clarity** 44:18 55:21
- classic** 228:22
- clause** 74:20 125:22
- clear** 24:4 25:10 26:5
34:14 43:6 44:12
65:21 95:14 101:11
119:2 146:4 155:7
177:22 180:13 182:16
231:22 232:1,5
233:10 235:3 241:7
242:22 251:2 276:10
288:18 305:11
- clearly** 13:10 24:3
29:20 47:7 71:3 74:5
96:4,15 101:13
116:19 117:3,8,16
119:16 122:21 139:2
140:5
- cliff** 114:15
- Clinton** 100:8
- close** 50:11 107:16
151:17 176:21 201:11
201:20
- closed** 83:3
- closely** 180:11 198:16
217:21 234:22
- closer** 22:6 164:7
- closing** 3:22 177:19
- 215:6 251:14 313:8
- clouds** 89:3
- co-** 18:7 39:13 48:20
52:5 58:19 64:22
208:2 260:12 263:6
- co-author** 162:4
- co-chair** 3:4,5 6:1 8:5
9:3,5,9 12:5,8,9 15:1
17:9 18:8 19:14 23:1
23:11,12 29:14,17
34:16 39:10 45:12
48:17 52:2 56:3 57:12
64:9,10 68:4,6 72:12
78:19 79:1 84:3,8
90:3,5 95:7 102:7
110:5 119:21 123:4
127:16 131:4 133:1
134:20 136:11 139:14
139:19 140:3,8,10,13
145:8,9,16 146:22
147:8,11 148:2
149:14 151:13 153:2
208:5 216:2 217:3
223:5 227:9 232:8
235:20 239:12 243:11
247:22 251:12 254:6
260:9 263:4,7 266:4
267:5 271:9 275:17
277:11,16,19 284:11
284:13 290:5 296:13
299:13 302:18 305:22
309:8,17 311:11,13
311:16 312:16 313:8
313:10
- co-chairs** 1:9 8:22
112:6 154:13
- CO-CHIAR** 238:5
- coalesce** 293:1
- code** 259:13,15
- coherent** 100:16
- coin** 87:13
- cold** 119:15,18
- colleagues** 120:3
- collective** 79:13,18
143:17
- collectively** 12:18 48:13
52:19 79:22
- College** 204:3,4
- collision** 114:14
- color** 236:12,21 237:12
- Columbia** 1:20 2:1
- combination** 130:13
- combined** 116:3,6
238:19
- come** 20:22 47:6 79:22
104:8 106:14 107:1
109:7 113:5 133:7,9
134:2 138:8 140:6

146:15 147:3 150:2
 151:9,10 175:22
 195:16 273:19 302:6
 312:1
comes 44:17 90:14
 167:7 176:20 178:17
 252:16 273:2 301:20
comfortable 79:19
 170:12 261:8 284:1
comfortably 281:2
coming 53:11 67:10
 98:13 133:16,19
 150:6 207:14 313:19
commend 275:21
comment 4:11 11:14
 12:3 37:17 38:16 56:7
 85:3,10 110:7 177:4
 225:16 243:16,17
 248:2 262:22 270:16
 299:10
commentary 31:17
 32:19 46:1,5 110:9
 141:18 206:16 256:19
 278:7 284:22
commentaryship
 206:14
commentators 34:1
 258:7 280:4
commented 194:18
 239:19
comments 11:6,9,11,18
 11:20 14:10 30:9 35:7
 36:17 49:21 52:8 54:1
 68:8 69:1 72:16 79:4
 84:21 90:18,19 91:3,5
 91:13,18 123:9 124:6
 124:16 127:7 138:2
 147:14 149:19 159:3
 171:20 186:7 207:4
 215:4,20 223:16
 225:15 238:11 239:16
 255:12 271:13 278:1
 285:7 287:8 290:9
 299:16 303:15 305:2
 308:1,20 309:21
 310:1 313:4,22 314:1
 314:5
COMMISSINER 266:6
Commission's 12:2,17
 13:4,12 17:8 18:21
 19:10 48:8 96:3 256:7
 314:10
commissioned 273:8
Commissioner's
 290:10
commissioners 5:4,12
 8:20 9:4 14:12 15:16
 17:13,20 18:14 23:6

29:19 45:14 52:9 53:5
 58:9,13 64:12 77:4
 90:20 95:11 102:22
 110:4,13,13 111:11
 117:10 120:8 124:5
 127:19 130:13 134:8
 143:13 154:5,14
 160:12,13 182:10
 193:13 194:17 196:2
 198:4 208:4,7 216:18
 217:4 223:7 247:13
 248:1 251:13 255:4
 255:12 256:8 262:20
 290:15 312:17
commitment 89:12
committed 14:14
 124:13
committee 4:7,19,20
 5:1,2,3 303:6
committees 83:5
common 120:14,16
 128:3 147:17 166:4
 194:15 195:16 272:19
commonality 194:9
commonplace 148:16
communicates 95:14
communities 82:21
community 252:7
company 261:15
comparative 104:17
 187:11
compare 264:22
compel 71:5
compelled 271:15
competing 221:3
competition 192:1
completed 5:7
completely 33:20
 133:12 167:2 168:11
 174:16 185:6 214:8
 297:18
completing 39:17
complex 20:18 98:1
complexities 165:3
 179:3
complexity 14:16 15:3
 128:18 129:12 276:4
 293:18
complexly 129:11
compliance 5:3
complicated 67:13 98:1
 166:19 169:13 228:1
 239:9
complications 128:18
 166:12
complied 229:10
 230:16
complimenting 112:7

comply 75:4,7
components 186:9
comport 64:4
composition 19:16
 103:5
comprehensive 21:16
 96:2 223:15
comprised 213:17
 265:12
compromise 32:7
 63:11 124:10 133:14
 159:6 253:5
compromises 118:5
computing 288:15
 289:10
concept 43:8
concepts 23:22
conceptual 30:6,10
 55:21 250:5
conceptualized 249:14
concern 33:10 62:20
 80:14 83:7 103:21
 108:13 150:8 159:5,9
 159:13 162:2 164:13
 167:6,20 186:17
 187:18 188:19 242:9
 274:5 278:8,9 290:17
 299:7
concerned 19:15
 125:15 233:8 264:4
concerning 19:22
 199:15 228:6
concerns 20:16 33:15
 33:19 80:19 143:12
 155:13 159:4 165:5,8
 171:13 186:11,13
 188:2 224:9 232:15
 257:17 258:9,21
 262:18 267:9 269:15
concession 281:12
conclude 78:1 162:6
 211:19,21 312:14
concluded 152:20
concluding 149:17
 231:21 309:15
conclusion 64:16 79:11
 79:15 93:15,16 94:1
 97:16 134:3
conclusions 37:6 94:13
conclusive 167:5
conclusively 281:6
concrete 228:2 233:6
 245:2 297:11
condemn 280:6
conduct 14:7 259:14
conference 4:16
confidence 15:5 25:17
 86:14 89:22 158:11

confident 87:18,21
confirm 148:12 149:4
confirmation 88:1,11
 105:9,15 107:13
 109:9 157:20 177:21
 181:15 189:22 190:21
 191:10 193:9 201:3
 207:9,12 211:14
 214:12 215:16 312:10
confirmations 100:12
 107:15 310:13
confirming 100:12
conflict 7:9 14:11 21:21
 40:13 261:21 262:5
 314:21
conflicts 5:10 17:1
 190:1 260:2
confront 117:13 174:22
confronting 273:22
confuse 305:20
confusing 268:16
confusion 13:7 229:13
Congress 11:7 16:17
 38:3 59:13,15,19 60:2
 60:5,7,9,12,16,20
 61:1,17,21 62:3,5,7
 70:1,3,10 71:1,3,4,13
 71:16,20 73:16 74:18
 75:1 87:2 100:1
 117:17 118:9,13,17
 119:3 125:15 126:3
 128:6 129:1,5 137:18
 138:9 142:1,2,8,16,20
 148:11,17 160:1
 161:7 173:19,20
 177:13 218:3 219:19
 225:7 228:3 229:1,21
 230:5,7,19 231:2,11
 238:15 240:8,9,9,16
 240:18 241:1,5,6,8,20
 242:12,14,17 243:5
 246:10 249:4 250:3
 251:22 262:4 283:11
 295:15 296:7 308:13
Congress' 59:3 69:17
 73:9,14,19 74:13
 142:13
Congress's 96:15 98:2
 101:13 117:11 229:15
Congressional 119:17
 122:19 136:22 138:21
 220:6 243:19 259:19
connect 184:19
connected 306:9
connection 109:14
 161:16 265:6,15
 267:13 305:3
connective 192:7

cons 113:7 193:14
212:5
conscience 45:2
conscious 302:4
consciousness 146:9
consensus 107:18
134:2 146:5,17 198:4
198:12,14 207:6,11
207:20 261:3,8,9
311:20
consequence 93:19
193:12 233:10
consequences 10:11
75:13 85:6 122:4
136:5 185:20 195:22
232:3 276:6
consequential 301:11
conservative 193:8
196:20
consider 97:2 98:3
149:8 154:17 158:20
172:21 199:14 223:21
235:10 237:21 275:15
285:13,19
considerable 59:14
considerably 96:7
consideration 12:18
70:15 191:11 235:13
considerations 91:9
93:2 94:4 95:5 198:10
215:8 271:7 289:21
305:20
considered 4:18 166:4
235:16 238:19 251:9
251:10 259:22
considering 10:10
46:11 68:15 76:3
91:20 190:3 193:19
252:2 256:9 286:3
consisted 61:5
consistency 306:9,17
307:11
consistent 38:15 73:3
184:19 223:1 282:3,3
282:4,6 297:6 300:7
consistently 125:7
306:21 307:14,20
consists 278:19
constant 121:18 268:12
constituted 106:22
constitution 21:11
28:20 44:22 51:9
59:11,13 69:13 74:2
86:7 88:17,20 89:9
97:4 121:1,8 138:5
142:17,19 157:17
174:3 184:3 192:2
210:15 218:13,15

219:22 228:11,18,21
229:6 231:15 233:6
233:18,19,20 234:13
246:19 251:21 252:10
253:13,15
Constitution's 47:1
184:22
constitutionality 65:12
65:16,20,22 69:10
97:5 150:19 219:1
224:1,4
constitutionally 129:16
248:20
constitutions 231:3
233:4
constraint 33:2
constraints 48:14 49:7
286:6
constrictive 114:7
constructed 121:14
constructions 121:5
constructive 52:10
102:2 124:7 151:20
152:18
construes 233:5
consult 259:14
contemporary 10:6
284:22
contempt 89:20
contended 22:17
content 53:21 154:3
272:12
contentious 177:21
contents 58:12,17
216:17
contestable 288:6
contested 288:14 301:3
context 30:5 80:16
82:22 127:3 131:19
132:4,5 148:7 179:19
225:5,12 233:3,6
238:1 264:6 266:3
267:3 276:5 277:3
287:22
continuation 109:11
continue 11:11,14
116:15 120:15 151:12
197:12 209:6 210:13
215:17 226:22 239:17
257:14 261:5
continues 62:5
continuing 260:6
contraction 131:20
132:16
contrary 22:17 89:2
206:12
contrast 217:14 264:22
contribute 72:21 76:16

210:10 213:10
contributed 275:22
contributes 107:7
contributing 56:18 77:7
contribution 209:16
contributions 25:14
control 101:6 128:9,14
136:22 137:15,16
138:8,21 177:7
184:12,14 199:10
controlled 60:12
controls 138:17 174:12
controversial 40:14
68:16 110:12
controversies 21:17
37:14 38:11 155:6
233:7 235:2 248:16
controversy 18:22
22:11 35:15 37:8
38:20,21 62:15
282:19
convened 138:15
convenient 174:19
232:12
conventional 236:14,19
conventions 121:4
144:3
conversation 56:7
110:17 112:1 127:21
132:8 133:5,6,10,16
143:15 144:1,21
146:3 150:3,7,16
151:12,19 152:4
194:13 195:2 226:16
309:16
conversational 150:21
conversations 108:13
150:15,18 152:14
convey 51:7 137:14
conviction 230:14
convinced 176:5
179:16 200:4 211:8
212:12
cools 193:3
Cooper 38:9
core 73:1 94:19 99:16
119:6
corporations 166:2
correct 100:20 311:9
corrected 101:1 282:22
283:1
correcting 109:8
correctly 96:14 121:12
correlates 306:18
corrupt 32:17
corrupts 200:11
cost 172:16,17,18
costs 218:8 222:1

couched 86:11
count 81:3 111:10
130:2
counted 237:8
counter 192:17,20
193:22
counterarguments
220:19
counterpoint 36:22
counterweight 47:12
countries 187:13 231:4
country 14:5 15:10
52:13 77:2 82:6 120:6
148:1 152:2 154:17
155:12 201:5
County 86:19 87:7
115:19 116:1,14
couple 27:14 39:3
40:10 124:16 127:6
136:13 167:18 232:17
238:12 264:17 302:5
309:9
course 13:16 14:4
18:22 22:4 31:17
33:10 41:22 46:6
47:15 49:6 50:8 51:17
52:12 66:6 96:10
114:14,20 116:10,16
116:18 118:4 123:22
128:16 130:22 139:21
163:4 174:15 183:6
187:7 195:5 211:7
221:10 256:14 264:12
275:7 291:18 300:9
301:6 310:22 312:7
court's 3:16 16:16,21
20:2,5,8 21:2,8 22:8
30:22 31:8 38:7,7
40:3 46:16 47:6,19
48:5,11 59:21 61:16
62:21 74:19 82:21
104:20 114:3 123:2
126:15 128:15 143:11
172:17 191:3 219:13
219:20 220:16 221:8
222:15 226:11 228:20
230:8,10,15 237:5
255:20 256:1,5,10
257:10 258:4,12,14
263:13,22 264:7,18
267:14,17,21 268:5,8
269:14,16,19,21
280:5,17 285:20
287:10,17,18 288:14
289:14,16 295:16
304:14
Court-curbing 226:4,9
court-packing 125:20

128:19
courtroom 256:6 257:6
 260:4
courts 31:9,9 37:3
 50:15 63:21 106:10
 113:17 117:19 128:7
 128:9 156:9,10,19
 162:5 165:22 166:6
 167:22 175:14 184:10
 185:6 192:16 193:11
 193:20 199:16,17,17
 200:19 207:16 218:6
 220:9 221:12,18,22
 222:3,16 223:22
 236:15 238:16 239:22
 240:8,11 241:3,17
 242:6 257:15 268:2,9
 268:12,19 270:22
 271:1 276:13 297:21
 298:8 305:4,7
courts' 218:6 222:16
cover 35:9
covered 31:1 257:2
covering 265:19
COVID 280:12 281:8
 301:11 304:19
crafted 100:11
Crawford 114:2 116:14
create 63:8,22 80:12
 119:8 173:19 188:16
 229:2
created 109:5 157:18
 268:22
creates 158:3 173:16
 233:19
creating 185:12
creation 51:11
credential 215:8
credentials 41:16
crept 170:7,8
Crespo 1:15 6:9,10
 95:9,10 102:8 103:1
 103:15 115:11 127:9
 130:13 136:2 148:6
 290:7,8 296:14,16
 297:4
Crespo's 303:15 308:1
cries 170:17
crime 229:22
criminal 230:13,14
 304:18
crisis 62:15 63:4,6
crisp 55:11
Cristina 1:9,11 8:4
criteria 16:1 19:11
 20:12 23:17,19 26:9
 26:13,15,17 30:19
 46:16 47:13 53:7,9,15

144:17
criteria---legitimacy
 20:14
criterion 54:20
critical 15:9 152:9
 278:21 297:13 298:7
 298:8 310:8
critically 107:14 121:3
 135:20 312:3
criticism 78:1 111:1
 150:8,10,12 151:5
 281:12 306:19
criticisms 78:10 86:8
 108:2 151:1,3 302:12
 303:6
criticize 220:20 280:5
criticized 43:10
critics 221:6 229:17
critique 77:16 194:20
 299:6
critiqued 308:12
critiques 78:14,16,18
 272:6
cross 312:6
crosses 176:22
crucial 24:2 29:10,12
 103:16
crux 55:17
cry 170:21
crying 77:18
cultural 217:18 241:15
 242:7
cured 103:11
curing 103:17
current 30:3 33:6 35:3
 38:20,21 49:20 50:3
 58:21 73:6 95:12
 96:13,21 98:9 99:8,15
 101:10 103:1 106:16
 109:22 114:20 116:11
 122:12 154:18 157:4
 158:2 179:14 180:8
 181:9,15 184:11
 191:16 193:11 201:2
 245:19 286:17 293:21
 310:8
currently 30:21 33:16
 68:4 70:16 73:12 77:4
 92:6 109:22 111:16
 158:19 197:5 206:5
 227:22 232:15 235:10
 235:16 249:13
curve 217:15
cycle 63:9 180:13
cycles 174:4

D

D 2:7

D.C 41:18 66:10,13,19
 86:17 149:3
damage 86:4
damaging 132:11
damning 120:19
Dana 2:17 4:6 9:18
danger 173:21
dangerous 75:22 77:12
 86:14 91:16 119:17
 122:10 175:13 231:20
dangers 33:20 77:18
 101:12 122:21
dare 114:15
data 272:18 308:21
date 11:20 313:18
David 2:4,11 7:18 8:10
 18:3 23:17 24:17
 164:18
day 9:15 15:14 49:20
 89:4 94:20 152:16
 182:2 186:14 194:7
 208:21 216:10 295:3
 309:11 312:15 314:14
 315:4
day-to-day 4:22
days 10:21 89:17 95:18
 102:17 213:21 249:6
dead 230:6
deadlocked 131:1
deal 22:5 29:21 39:2
 61:16 65:6 67:8
 113:18 157:5 179:20
 181:8 211:16 244:16
 263:15 266:21
dealing 225:21 243:1
 261:19 279:6
deals 249:14 251:5
death 157:12 269:7,11
 276:14,15 290:19
 291:4,14,21 292:10
 292:11,16 293:3
 300:10 303:10 304:3
 304:12,13,17 307:21
 308:3
debate 10:6,20 12:17
 13:16 14:19 17:7 18:4
 22:22 28:8 46:1,5,7
 46:14,18 54:5,7 55:18
 57:2 68:20 96:9,12
 97:22 98:16 99:3
 102:3 103:2 111:3,16
 128:19 135:3,17
 139:13 145:7 151:12
 152:7,10 209:20
 210:8,11 222:21
 226:17 244:18 245:7
 245:13 247:21 259:22
 284:22 300:11 310:8

312:4 313:14,17
debated 210:14
debates 16:1,3 21:18
 23:22 28:1 35:3 43:3
 47:21 48:5 50:3 51:7
 54:15 62:10 135:19
 137:11 140:19 226:8
 253:18 255:16 256:9
 257:8,17,22 286:17
 287:9,10,15,16,18
debating 15:4 17:15
decades 33:8 40:9
 59:19 61:20 82:1,5
 99:18 101:5 104:8,8
 158:22
decide 32:17 34:3
 47:22 64:1 143:10
 185:9 198:8 258:18
 271:1
decided 147:6
decides 28:17 66:10
 257:20
deciding 20:9 43:15
 66:15 259:1 269:16
 281:6
decision 38:22 45:1,4
 50:9 53:19 55:3 68:1
 79:13 86:18,20 87:15
 114:2 129:7 136:2,5
 151:2 221:5 222:13
 228:4 230:4,20
 234:10 252:1 279:11
 279:16 282:6 298:11
 298:22 299:3 305:16
decisional 34:1,7
decisions 21:3,4 66:11
 88:4 113:13,16 114:1
 114:6,9,11,11,12,13
 114:16 115:18 116:3
 116:10,13 117:21
 125:16 128:15 151:4
 218:4 219:17,20
 232:21 236:8 241:14
 241:16 252:13 265:9
 268:16 279:1 281:4
 285:3 287:11,19
 289:17 300:22
declare 20:2 48:1
declared 88:6
declining 214:18 265:9
decrease 55:5
decrepit 193:22
deep 25:1 37:5 52:13
 94:5 96:20 180:5
 296:10
deeper 193:17
deeply 9:22 14:11 44:5
 91:6 122:14 133:4

178:2
defeat 41:7
defend 280:6
defense 1:21 207:21
defer 183:13
deference 218:2 225:7
 225:9 240:9,17 241:4
 241:8,9,12,22 243:19
 244:4,7
deferential 38:2
define 20:18 43:7
defined 55:1
defines 67:18 99:22
definitely 196:17
degree 161:2 165:8
 171:6 174:14 187:19
 201:21 235:12 296:20
delay 292:14
delegates 121:8
delegations 121:10
deliberate 102:15
 112:12 313:12
deliberately 185:2
 271:1
deliberating 14:14
deliberation 9:13 13:13
 18:14 58:1,8 153:12
 234:10 255:2,4
deliberations 9:8,17
 13:19,20 14:3,17
 17:17 23:7 49:16
 57:13 58:6 98:12
 102:4 110:15 152:17
 154:1 215:18 216:3
 263:2
deliberative 12:11
 111:7,21 194:18
 270:20 313:2
delicate 261:18
delivered 174:1
delivers 172:8
Dellinger 1:16 6:11,12
demands 32:2
democracies 105:3
 156:10
democracy 20:15 21:9
 21:13 23:20 24:7,15
 26:14 27:1,15 28:15
 28:18 29:2,9 47:8
 53:10 76:11 78:11
 81:8 82:19 106:7,8,12
 108:8 114:16 119:1
 122:1 144:12 156:16
 186:15 192:8,18
 193:18 218:19,22
 224:9 241:14 242:10
Democrat 193:9 196:20
democratic 22:18 28:19

87:4 91:21 114:8
 118:3,4 119:6 146:20
 183:17 185:6 193:5
 221:13,17 234:10
 239:6 252:3 253:3,12
Democratic-Republic...
 60:9
democrats 60:13 81:19
 83:15 85:14 105:22
 107:6 108:2 126:19
demographic 109:4
demonstrated 89:11
demonstrating 209:17
deny 177:12
departmental 248:13
departmentalism
 228:16 232:13 245:17
departmentalist 229:17
departmentalists
 230:18
departure 122:14
 184:13
depend 222:11 226:19
dependent 261:4
depending 54:22
depends 157:9
deprive 249:2
depth 263:16
derives 74:19
describe 26:12 38:18
 56:15,16,17 59:8 85:5
 151:11 155:8 156:11
 228:15
described 19:14 63:16
 88:11 103:15 112:19
 212:21 214:6
describes 19:3 172:6
 294:19
describing 35:2,4
 266:16
description 229:18
descriptive 35:20 51:16
 93:6,8 290:21 291:3
 291:14 293:8 299:18
deserve 94:17
deserves 70:15
design 70:5 71:22
 120:20 179:1,4,6
 190:6 209:9 253:1,7
 268:21
Designated 2:17 4:6,21
designed 13:17 17:13
 18:13,17 42:5,11 58:3
 61:15 116:2 128:14
 153:20 185:8 192:3
 216:14 223:1 229:19
 254:21
designing 179:13

desirability 66:1
desirable 55:8
desire 64:13 146:18
 160:14 289:5
despite 89:14 210:19
destabilize 159:10
destroying 76:16
destruction 77:7
destructive 271:14
detail 63:16 160:5
 215:13 227:14 286:15
detailed 35:21
details 207:20 222:11
 235:1
termination 218:12
 219:1
determine 47:14 184:10
 185:9
determines 141:9
 160:21
determining 47:9 179:4
develop 188:5
developed 180:1
 238:17
development 13:22
 180:4
developments 244:1
deviate 28:22
deviation 264:15
devoted 16:5,9
diction 232:3
die 193:6
Diego 2:7
differ 183:6 257:19
 258:7
difference 46:4 54:13
 71:9 90:6 108:5 118:1
 143:9 208:21 303:16
 303:22
differences 55:12
 102:18 146:11 196:17
 196:19 269:8 304:6
different 12:16 14:13
 16:15 24:19,20 25:6,9
 29:4,5 31:5 50:5
 55:13,17,18 56:22
 57:19,20 60:17 66:18
 68:16,19 71:6 80:12
 88:15 96:6 103:8
 118:10 126:9,21
 132:3 138:1 157:22
 157:22 161:3 163:5
 167:2 181:22 183:6,7
 183:10,15,21 184:4,7
 194:11 196:18 205:2
 205:3 213:18 224:10
 265:1 269:4,7 272:8,9
 274:22 275:1,14,15

276:15 279:17 284:2
 284:3,8,10 285:16
 289:11 290:19 291:4
 291:15,21 292:5,7,10
 292:11,17 293:4
 298:22 299:18,20
 300:1,3,8 304:4,7,17
 304:18 307:1,21
 308:3
differentiation 213:14
differently 270:6 273:5
 273:20 274:21 292:18
 293:3,4
difficult 20:18 51:14,21
 80:7 90:16 91:16
 120:5 133:14 137:6
 137:13 146:5 168:6
 169:9 179:6,8 202:11
 208:14 219:20 220:1
 314:22
difficulties 26:16
 179:17 182:4 211:15
 214:14 233:1
difficulty 14:2 15:3
 233:2 252:17
diffident 260:19
dilemma 242:20
diluting 118:19
dimensions 304:17
diminish 26:1 67:7
dint 204:1
dire 122:3
direct 259:6
directed 45:22 57:16
 165:6 259:20 312:8
directing 12:16
direction 62:20 77:12
 78:7 103:8 104:12
 163:11 176:5 181:19
 181:22 211:9 235:15
 312:3
directive 224:13
directly 46:12 161:12
 175:1 181:9 222:15
 314:11
disadvantage 236:17
disadvantages 236:7
 247:4
disagree 21:3 47:14
 85:8 87:20 97:16
 114:10 118:2 123:19
 123:21 124:8 127:12
 131:1 218:17 230:8
 231:11 293:12
disagreeing 108:11
disagreement 14:15
 19:5,6 52:13,16,18
 53:17,21 54:17 55:7,9

55:14,19 84:16
123:14 143:10 226:15
228:14 231:13
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
discipline 259:18
279:13
disclosure 5:8
discourse 14:7 26:11
51:1 89:13,21
discourses 138:17
discover 306:14
discretion 59:14 121:8
269:16 270:6,7,14
271:4
discretionary 268:14
268:20 269:20 295:17
305:19
discuss 12:12,22 17:6
29:12 46:14 59:6
68:14 153:13 155:11
156:20 159:5,9,19
160:5 193:14 227:16
254:9
discussed 13:1 30:19
50:22 58:10 62:10
190:2 244:13,19
258:10
discusses 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
disembowel 173:20
disempower 221:21
disempowered 237:18
disempowering 221:18
disentangling 244:11
272:5
disfavor 129:3
disfavored 128:13
disloyal 170:21

dismantle 116:3
Dismissing 97:10
dismissively 99:9
101:16
disparate 114:5
disparity 133:19
dispiriting 212:11
disputes 29:6 40:2
disqualification 284:6
disregard 136:3
disregards 89:1
disrepair 193:12
disruption 136:7
dissatisfactions 86:10
dissented 87:8
disservice 80:17 82:16
83:11,12
distance 95:20 104:1
distinct 137:16 308:7
distinction 33:22
137:13 139:12 237:21
249:9,15 296:11
distinctions 129:13
distinctive 176:17
distinguish 70:22 71:3
290:20
distinguishing 137:7
distorted 105:6
distorting 106:20
distorts 96:18
distressed 112:18,20
distributed 154:16
174:7
distribution 115:15,15
district 148:10 267:17
297:17,20 298:2
districting 129:18
disturbing 92:10,12
divergence 55:14
diverse 93:12
diversity 82:7 93:6,8,19
166:16
divest 262:1
divestment 262:5
divide 120:6 226:15
divided 12:14 76:21
181:6,21 204:5
divides 180:5
division 89:19
divisive 120:5
divorce 97:6
doc 140:22
docket 3:19 16:22
257:20,21 263:14
265:11 267:10,12,14
268:6,6 269:5,6,9
270:9 271:20,22
272:1,2 278:9 280:5

287:9 292:14,15
295:16,17 296:7
297:19 299:7 300:22
303:18 304:7,11,14
305:3 306:7,19
doctrinal 136:21
doctrine 138:20 159:11
document 46:9 111:21
171:22 172:3,6,10
176:4,8 266:13 267:8
267:13,16 269:3,18
270:3,10 304:1
document's 47:2
doing 25:5 35:12 92:14
105:1,22 115:13
118:1,10,14 144:14
152:5 182:17 183:21
184:17 195:14 197:4
205:11 227:8 264:12
273:20,21,22 274:1
289:13 301:22 302:8
302:16
domains 55:14
dominance 180:14
dominant 213:22
dominated 214:2
doom 150:18
door 148:17,18
double 145:11
doubt 65:16 66:4
doubts 118:13
Douglass 44:20
downplays 267:13
dozens 249:11
draft's 75:11
drafted 110:1
drafters 199:14 215:6
264:4
drafting 28:20
drafts 13:9,12 110:10
236:6 290:2
dramatic 120:12
dramatically 59:2
104:12 163:2 210:1
265:4
drastic 115:13 116:21
draw 10:15 31:15 37:5
256:19 286:7 301:19
305:2
drawbacks 233:21
drawing 280:16
drawn 34:1 93:12 94:1
219:11 255:22 277:5
Dred 44:1,3,5,12 45:1
driven 289:5
Driver 1:16 6:13,14
39:12,13 45:13 64:21
64:22 68:7 69:2

112:13 124:18 142:5
260:11,12 263:5
311:6,17
drop 266:12
dubious 118:7
due 266:11 293:5
Duke 1:15,16 2:3,4
durable 121:2
duties 46:21 120:21
dynamic 237:13
dynamics 98:2

E

E 1:15 2:16
ear 288:4
earlier 11:3 47:10 90:5
112:14 177:11 183:3
185:1 190:2 219:10
231:22 243:17 244:13
247:13 284:19
early 21:22 28:7 65:8
Earth 44:13
easier 95:1 195:15
233:17 246:18
easy 67:12 103:10
168:14 205:20 208:16
ebb 106:19
ebbs 168:16
echo 29:8 39:20 52:6
84:10 197:18 227:13
268:1
echoing 34:20 284:14
288:20 292:4
edited 13:2
editorial 105:20
EDT 1:8
Educational 1:22
effect 69:20 71:21
101:17 104:4,6
108:18,19,22 109:10
116:3,6 181:21 203:4
203:6 231:7 252:17
257:13 258:14 277:9
281:5 282:8 289:16
297:20
effective 24:18 70:6
71:2 95:1 101:3
effectively 163:20
287:4
effects 211:19 268:17
efficacy 10:11 20:16
30:21,22 31:6,12
53:10 75:12 97:5
222:10
efficiency 117:18
efficient 70:6 71:2
effort 61:7,9 141:1
245:20 308:15

- efforts** 63:10 105:2
108:20 120:8 137:8
194:19
- eight** 46:15 100:5,7
136:6 148:19
- either** 28:13 73:14,21
144:11 145:2 156:12
156:17 167:2 179:18
186:20 206:9 208:12
248:13 250:20 251:6
262:4 281:8
- elaborate** 247:19
- elaboration** 39:22
- elect** 75:9
- elected** 21:14 97:17
100:8,10 161:22
163:7 187:9 201:15
219:7 240:2
- election** 76:3 100:11,13
105:12,13,17 107:13
107:16,17 117:8
122:7 148:15 149:10
156:4 168:18 172:8
177:10 180:13 280:13
281:7,7
- election's** 175:15
- elections** 76:5 169:11
174:4 180:12 181:18
181:18 184:20 185:15
185:19 188:13 202:18
202:22
- electoral** 87:4,16
106:20 159:16 204:2
204:4
- electors** 76:5 122:6
- element** 98:5 279:9,10
279:10
- elements** 90:1 278:16
278:20 279:8 281:1
- elevated** 294:5
- eliminating** 113:19
221:8
- Elisa's** 140:15
- Elise** 1:14 6:5
- elite** 135:12 207:11
219:11
- elites** 207:6
- eloquent** 303:6
- eloquently** 91:2 94:7,8
- Ely's** 77:16
- embed** 106:13
- embedded** 178:2
- embrace** 51:21 292:19
293:7 295:9
- embraced** 26:14
- embracing** 26:17 291:2
- emerge** 212:6 280:9
- emergence** 185:22
- emergency** 16:22 256:1
257:4,11,18 258:1,5
258:13,19 263:13,22
264:8 265:3,12
267:10,12,14 268:5
269:5,6,9 271:20
272:2 276:6 279:7,17
280:8,17,22 282:8
287:17 288:22 289:17
291:19 296:6 301:3
303:18 304:7,11,14
- emphasis** 67:8 295:22
- emphasize** 13:11 43:10
112:10 152:15 186:9
221:6 222:3
- emphasized** 17:9
- emphasizing** 216:9
- empirical** 203:19
236:19 276:19 293:17
293:21 308:21
- Employees** 5:6
- empower** 173:19
- en** 66:16
- enable** 109:1 150:7
247:17 251:21
- enables** 150:3 298:22
- enabling** 106:18
- enact** 96:16
- enacting** 141:21
- enactments** 108:16
224:2,5,12
- enacts** 229:21
- encompass** 20:6
- encounter** 137:12
- encounters** 251:5
- encourage** 39:3 109:21
198:6 201:14 209:6
270:5
- encouraged** 52:21
308:13
- encumber** 55:6
- endanger** 116:7
- endeavor** 42:21
- ended** 37:18 40:1
296:16
- endemic** 214:11
- endnotes** 294:3
- endorse** 69:1 74:6,8
175:12 182:12 241:11
261:9
- endorsed** 290:18
311:21
- endorsement** 197:21
- endorsing** 70:13
- ends** 80:5,12 88:21
245:20 274:2
- energetic** 110:16
268:13
- enforce** 99:13 101:9
252:22 297:2
- enforceable** 121:20
- enforced** 231:17
- enforcing** 21:10 252:17
- engage** 38:16 146:19
197:10
- engaged** 137:11 138:15
152:19
- engagement** 98:15
152:1
- engages** 89:12
- engaging** 215:7
- enhance** 55:6 69:19
71:13,18 72:8
- enhanced** 69:7
- enjoins** 230:12
- enjoy** 300:2
- enjoyed** 314:14
- enlarge** 271:4
- enlargement** 118:17
- enlarging** 119:10
- enormously** 314:20
- enshrined** 252:9
- ensure** 5:2 21:12 42:5
42:11 63:17 109:10
- ensured** 42:1
- ensuring** 82:4 106:21
221:8
- entails** 208:16
- enter** 151:6
- entertaining** 196:15
- enthusiasm** 212:10
- enthusiastic** 179:14
212:6
- entire** 23:13 66:12
80:15 82:15 96:19
114:6 117:7
- entirely** 138:6 205:9
225:5 295:17
- entities** 166:3
- entitled** 173:3
- entrench** 172:15 175:6
- entrenched** 214:21
- entrenches** 47:4 176:8
- entrenchment** 213:10
214:3
- entrusted** 46:22 270:20
- enumerated** 74:14
- environment** 286:22
287:3
- envision** 75:3 170:2
- envisioning** 75:7
- episode** 37:19 41:3
- episodes** 22:7
- equal** 167:15
- equality** 40:19 41:9
- equally** 29:12 137:11
199:16 200:19
- equation** 181:1,3
- equitable** 267:21 268:2
268:14 305:4,17,19
- equivalence** 106:3
- equivalency** 105:5
107:3
- equivalent** 106:5
- era** 22:5,5 36:18 39:5
132:15 173:6
- erased** 250:11
- err** 276:17
- erudition** 265:22
- especially** 49:15 51:4,6
66:13 67:4 75:9 135:7
205:10 207:2 208:9
209:13 219:22 239:5
257:10 271:6 285:20
301:17
- essays** 37:1
- essential** 167:16
- essentially** 114:3 115:6
116:20 136:3 250:9
262:7 279:13 298:21
- established** 18:21
- establishes** 24:11
- et** 263:19
- ethical** 17:2
- ethics** 5:5,9 20:7 257:5
259:10 274:17,18,19
297:2
- ethnic** 238:1
- evaluate** 20:13 222:7
- evaluated** 19:12
- evaluating** 16:2 23:19
46:16
- evaluation** 23:17 24:1
30:7 54:9
- evaluative** 21:5 26:9,15
26:17 53:6,9
- evenly** 204:5
- event** 38:22 103:6
- events** 18:20 30:4 35:5
- eventually** 173:3
- everybody** 9:4 27:19
45:19 133:4 134:14
145:20 154:12 204:13
215:20
- everybody's** 25:20
- everyone's** 163:10
- eviction** 301:7,8
- evidence** 165:1 293:17
293:22
- evil** 40:22
- ex** 139:1
- exacerbated** 272:14
- exact** 201:13
- exactly** 45:22 65:10

168:22 169:19 235:3
251:4 266:20 296:21
examine 236:18
examines 217:15
example 19:19 21:1
24:20 25:18 27:13
28:3 31:7 32:3 36:1,2
37:22 54:22 58:22
60:8 62:16 64:2 70:4
77:14 86:16 93:5
104:17,19,22 126:14
129:14 149:3 161:10
181:14 184:8 228:22
230:1 231:21 237:9
257:22 268:7 295:5
examples 128:2
excellent 23:2 29:20
35:12 111:16 196:2
excepts 146:14
excesses 236:16
excessively 66:8
exchange 12:21 135:3
exclusive 228:10
exclusively 195:3 286:9
excuse 236:12 280:7
execution 291:17,22
292:1,14
executions 276:18
executive 10:4 45:21
52:20 126:3 138:16
224:1,7,12 239:3
242:1,2 250:20 251:7
310:2,4
exercise 62:8 83:10
119:2,16 166:20
211:20 267:21 268:22
272:10 299:22
exercised 59:15
exercises 233:3
exercising 218:14
250:2 268:2,19
exhaust 47:21 48:2
exhaustively 303:14
exist 276:22
existence 67:19
existential 22:16
existing 99:12
exists 97:14 158:19
expand 30:15 50:21
58:20 61:11 117:12
131:19 172:15 287:3
expanded 60:9,13
expanding 31:11 65:5
79:14 82:10 93:7
95:14 96:10 118:19
132:19
expansion 16:6 28:3
33:11 57:8 59:2,6

62:13 63:2,5,7,9,12
72:3 80:4 85:9 91:15
92:9,13,17,20 93:6,10
93:18,20 95:19 96:1
96:18 97:2 98:16 99:5
99:10,17,20 100:19
101:11,15,18 104:14
110:2 117:14 122:15
122:20 125:13 131:14
131:20,21 132:9,10
132:16,17 136:22
143:3,7 144:5,13,20
282:20
expansive 43:5
expect 27:3 111:2
161:2 192:5 281:18
281:20 292:21
expectation 55:16
expected 101:22
expecting 174:1
experience 84:14,18
152:13 162:12 178:17
188:7
experienced 201:21
experiences 183:7
experiment 248:18
expert 256:13
expertise 73:1 195:8
204:22 276:20
expertly 276:13
experts 11:2,8
explain 9:9 15:13 27:10
36:9 75:10 122:18
126:20 141:2 199:20
308:22
explained 306:10
explains 88:7 96:14
140:21
explanation 258:4,11
282:6 288:22 289:6
306:12 307:2
explanations 307:17
explicitly 78:6 81:12
128:8 175:12 276:4
exploration 80:17
283:3
explore 59:1 64:7
282:16 303:13
explored 15:17 303:3
expose 182:4
exposing 179:3
exposition 251:4
express 15:4 115:7
133:3
expressed 14:8 45:14
52:7 81:12 89:13 94:7
94:8 143:13,21
216:18

expresses 37:2
expressing 231:12
expressions 86:9
expressly 225:8
extend 244:14
extended 64:14
extension 167:22
extensive 20:20 36:8
extent 19:3 71:16 82:14
106:9 132:13 135:11
166:6 168:20 169:15
174:20 198:11 208:11
220:14 221:20 252:2
287:20 288:12 303:21
external 32:12
externally 296:4,7
extraordinarily 153:11
248:6
extraordinary 43:1 45:5
200:13 236:3 309:11
extreme 32:22 130:21
161:15 212:11
extremely 64:11 127:2
151:20 159:7 219:20
246:7
eye 37:12 135:6 286:1
294:18
eyes 41:14 83:20,21
166:18 283:16

F

F 2:4
fabric 114:17
FACTA 4:20 5:3,5
face 56:15 102:15,15
120:12 174:10 225:21
268:12
faced 49:14 180:3
faces 62:14
facial 249:9
facilitate 18:13
facilitated 252:19
facilitating 9:21
fact 56:21 57:19 67:2
81:22 97:8 107:17
108:3 125:1 138:6
142:16 144:14,15
145:1 149:1 166:21
178:1 185:21 189:17
195:15 202:20 203:20
209:22 210:5 213:7
221:11 227:1 231:19
237:2,15 252:19
259:12 272:14 273:15
281:13 282:9,11
290:16 291:14,17
292:10 298:1 305:12
308:17 313:2
facts 89:1 133:21 249:8
305:18
faculty 43:15
fad 306:6
failed 40:15 62:17
failing 158:4 192:9
fair 77:22 96:8 98:15
99:6,7 100:3 102:2
151:5 158:16 212:4,5
224:20
fairly 14:18 101:18
115:13 151:11
faith 25:3,20 26:1,2,4
106:18 146:18
fall 79:4 114:15 239:8
257:3 283:10
Fallon 1:17 6:15,16
23:9,10 29:15 30:16
47:2 53:5,22 133:2,3
134:21 146:1 147:16
Fallon's 30:8 146:13
152:3
fallout 263:19
false 105:5 106:2,4
107:3
familiar 31:16 118:12
families 262:7
famous 36:7 77:16
193:2
fanciful 130:6
far 25:15 53:1 62:11
127:10 169:3 171:11
204:5 223:18 229:7
238:10 239:4 255:18
far-reaching 262:6
farther 77:12 262:10
fault 108:1
favor 34:4 80:4 91:14
92:17 95:19 99:5
101:15 104:14 142:10
175:20 198:8,12
favor 96:4
FDR 37:19
fear 34:3 45:2 65:14
66:3,8 132:9 150:14
201:6
feast 42:17 112:17
feature 21:19 174:9
179:1 185:7 214:11
252:7
features 253:16
federal 2:17 4:7,18,20
4:21 31:9,11 37:3
63:21 97:17 128:7,9
129:19 148:8 150:9
163:9 183:18 199:17
224:5,11,22 225:1,13
238:15 244:5 250:21

259:6,15,16,17 268:2
269:11 277:7,7
federalism 222:4
Federalist 22:1 36:5,7
36:10 37:11
feel 79:19 84:1 116:13
149:1,2 160:15
271:14 281:2 284:1
298:18
feeling 80:12 200:12
feels 270:16
Feldman 174:5 178:3
212:20
fellow 52:9 61:3 97:20
134:8 154:14 262:20
felt 22:14 40:1 133:6
ferret 118:8
fewer 212:22,22
fidelity 88:13
fight 182:21 184:16
fight 193:11
figure 23:22 77:10
194:14 209:5 210:14
302:11
figuring 56:21 272:6
fill 60:11 157:14 158:9
179:15 184:16
filled 96:22 211:18
filling 117:7 157:18
179:5
final 21:7,15 98:12
102:1 122:18 172:5
188:14 198:6 212:15
218:22 231:7 251:9
254:1 275:13 290:2
291:22 309:17 313:21
finally 16:19 44:19
54:16 159:19 173:21
178:6 195:1 200:21
222:6 247:12 260:3
265:13 305:1
finances 261:20
financial 5:8 260:16
find 11:21 12:2 29:9
120:14,16 124:9
137:14 176:16 184:2
194:21 198:18 222:17
234:14 248:21 272:19
275:10 294:1 314:9
finding 124:13
fine 117:19 229:6
311:15
fire 117:13
first 9:8,18 12:20 15:13
15:21 17:4,18 18:5,10
18:17,19 19:15 21:15
23:8 26:6,15 28:7
30:20 38:15 44:14

46:8,11 49:3 51:8
55:22 56:14 58:15
59:16 67:13 76:21
79:5 80:4 85:3 86:2
95:18 98:20 102:13
106:4 112:12 114:1
118:4 128:1 135:2
137:2 140:14 151:18
152:16 155:7 156:1,8
157:1 169:22 177:4
179:20 198:7 202:8
208:8 218:12 223:8
227:13 230:2 236:2
243:15 255:7 257:4,7
266:3 267:9,12
270:15 277:22 278:3
287:5 290:11 303:17
304:1,5 309:21
313:11 314:18
fit 57:1
five 12:12,12,15 31:2
46:13 59:21 100:18
270:18
five-year 252:13
fix 140:2 141:22 142:19
207:17
fixed 61:22 145:12
154:20 199:9
fixes 103:11,18
flag 98:18 229:22 230:4
230:14,15 250:10
flatly 88:2
flavor 169:6
flesh 51:4
fleshed 127:10
fleshing 50:19
flexible 121:2
flies 200:20
Flight 120:12
floor 58:18 95:9 217:1
244:1 255:13 277:19
flow 106:19
flows 150:17 168:17
fly 199:19
focus 4:12 23:19 69:5,9
91:8 99:8 104:9 105:4
115:17 234:18 258:21
286:8
focused 110:9 161:17
165:14 170:4 220:4
257:22 273:3 285:20
286:22
focuses 30:22 32:1
focusing 31:1 206:22
232:20 282:13 286:14
folks 135:14 170:13,14
follow 21:3 79:16 90:19
followed 117:7

following 69:14 131:13
133:11 156:21 302:9
follows 143:7 288:10
footnote 70:18,19,20
72:4 82:22
for-tat 132:22
Forbes 261:14
force 120:18 268:22
295:7
forcefully 141:19
forces 89:19
forcing 166:13
forecast 111:10
foreground 72:2
foremost 79:5
foresee 185:17
foreseeable 172:2
foreseen 172:3
forget 170:13
forgotten 41:4
form 35:1 87:6 102:1
114:17 121:5 207:9
207:11 273:15 279:12
285:5
formal 150:9
formalist 66:9
formally 187:14 234:12
259:13
formation 256:8
formed 10:3
former 41:17 148:8
192:15 206:2
forms 55:19 218:5
247:15
formulated 134:5
forth 13:10,14 26:2 82:3
87:11 279:4 281:10
284:9
forthrightly 94:11
forum 83:22 235:15
forums 191:3
forward 25:7 63:10
134:17 150:3,7
197:13 227:1 228:13
234:21 247:21 257:14
275:10 290:1 291:22
292:8
found 42:18 92:10,12
197:19 198:15 226:4
foundation 9:12 47:18
foundational 23:3
founding 21:22 36:18
four 19:13 20:14 30:12
56:4 58:22 82:22
201:10 257:3
four-year 155:19 157:7
157:14,16
fourth 4:4 16:12 20:5

216:3 257:6 260:3
Fowler 2:17 4:3,6 5:18
5:20,22 6:2,5,7,9,11
6:13,15,17,19,21 7:1
7:3,5,7,12,14,16,18
7:20,22 8:2,4,6,8,10
8:12,14,16,18,20 9:18
11:3
Fox 206:13
fragile 89:5 150:12
frame 12:5 30:6 31:12
46:17 85:6 91:7
135:12,19 236:10
245:11
framed 13:1 79:10
80:15 85:10,13 92:6
296:21
framers 121:10 179:8
185:2 192:4
frames 46:9 82:14
framework 30:10 95:3
173:2 179:13
framing 33:4 83:9 90:21
99:16 110:22 146:12
260:14 296:9
Franklin 50:20 61:8
frankly 235:13 308:15
Frederick 44:20
Frederickson 6:17,18
Fredrickson 1:17 196:7
196:8 216:22 217:1,2
223:6,11
free 74:20 129:2,3,6
160:16 272:10 299:22
freedom 32:16,22
frequent 159:11
frequently 86:8,11 90:1
218:18 224:15
fresh 166:18 181:16
190:5
FRIDAY 1:5
front 13:9 34:21 112:11
181:11 202:22 291:5
299:4 311:19
fruitful 252:6
frustrations 148:10
fuel 117:12
full 13:20 14:18 20:9
42:6,18 95:17 99:6,7
102:16
fully 249:14
function 56:9 64:20
93:1 127:20 204:10
functionally 187:14
functioning 121:21
functions 193:1,4 210:9
252:7
Fund 1:22

fundamental 21:9
46:21 143:12 179:1
221:16 234:11
fundamentally 25:6
123:19,20 124:8
172:14
funds 262:15
furnishes 167:3
further 14:1 19:5 51:3
149:18 172:15 173:20
313:21
future 103:7 109:6
131:16,17 144:12
214:12 219:18

G

gain 42:2
gains 262:2
game 132:22
games 114:21
Garland 62:18 105:10
149:8
Garland's 136:4
garnered 65:6 244:20
244:21
gather 250:14
gathered 9:7
gauge 25:3
gauges 25:6
gay 114:12
gender 82:8
general 9:19 11:9 41:17
51:2 82:6 107:5
170:12 204:11 233:1
289:17
generalized 289:20
generally 35:19 37:12
43:2,21 48:6 63:10
140:4 166:16 168:12
179:5 218:11 258:17
generate 67:19
generated 211:8
generation 47:11 187:8
generational 166:16
genesis 17:7
genuine 80:19 89:16
geography 82:9
George 2:14
Georgetown 1:17
Gerken 1:18 6:19,20
194:3,4
gerrymandering
108:22 113:18 116:6
129:15,22 130:2
gerrymanders 128:13
Gertner 1:18 6:21,22
102:9,10 110:6
113:14 115:11 149:20

149:21 151:14 296:14
296:15 299:14
Gertner's 305:2
gestures 252:8
getting 50:11 95:4
111:5 120:4 266:17
267:20 281:4 305:11
307:2
Ginsburg 178:12
give 16:17 36:1 42:18
81:19,19 86:16 99:6,6
102:12 104:16 115:6
136:9,13 141:11
148:6 149:15 171:7
185:8 187:22 292:14
given 20:19 43:3 70:16
72:21 73:4 75:19
87:15 92:1 142:7
157:17 177:2,7
180:18 200:22 217:14
246:7 247:1 253:18
261:18 263:11,21
289:19
gives 18:19 21:16 40:5
59:13 70:3 115:8,12
262:17
giving 33:13 68:18
181:20 309:4
glad 75:16
glaring 45:3
glass 113:11 130:16,17
gloss 303:19 304:21
goal 98:18 233:17
goals 221:22 253:20
goat 78:2
golden 147:10
Google 11:22
gotten 307:12
governed 4:19 48:8
308:9
governing 297:1
government 5:6 10:12
14:6 69:21 89:7 101:7
104:5 114:18 120:21
121:9,17 138:5 173:8
181:6,21 216:8 218:7
220:17 228:17 230:3
250:21 269:12
Governor 40:20
governs 259:18
grab 181:7
gradual 132:17
Grant 61:3
granted 169:4
grapple 179:12 180:9
205:13 208:10 240:5
304:10
grappled 179:16

grapples 178:22
grateful 9:22 23:11
39:18 45:11 65:3
217:5 277:22
grave 65:16
gravely 86:20
gray 168:5,7
greater 39:22 65:19
83:15,16 203:21
218:2 309:5
greatest 83:7 242:6
Griffith 1:19 7:1,2 84:5
84:9 90:4,20 115:5,20
124:6 176:11,12
182:10 183:2 197:18
197:20 266:5,6 267:6
268:7
Griffith's 103:21
grim 122:11
grips 20:22
ground 120:15,17
128:3 130:11 147:17
194:15 195:16 265:19
272:19
grounded 88:18 289:4
grounds 93:8 125:14
126:21 236:9 252:12
group 17:10 57:22
84:14 93:13 110:14
111:7,20 153:16
213:4 236:18 254:13
275:5 312:1
group's 15:7 116:12
212:18
groups 12:13,15 15:6
40:17 84:20 112:8
140:18 216:11 238:1
Grove 1:19 7:3,4 58:16
58:18,19 64:11 65:1
65:11 123:6,7 127:17
138:12 223:9,10
227:10 239:1,18
Grove's 227:14
Groves' 243:17
growing 60:4
guarantee 93:11,19
172:7
guaranteed 173:5,13
guarantees 191:11
guarding 214:7
guess 31:19 77:9 85:7
136:20 139:10 278:12
299:18
guidance 31:8 259:8
298:8
guide 121:5
guiding 105:9
guilty 274:7

gutting 113:20
Guy-Uriel 1:15 6:7

H

H 1:17 2:3,6,12
habeas 277:7,8
half 162:17 181:1,3
204:4
hallmarks 146:20
hamburgers 42:12
Hamilton 36:9,12,16,22
37:4
Hamilton's 36:5
hammer 273:2
hand 12:4 32:21 33:9
56:9 64:19 76:12
127:20 147:6 160:16
240:7 242:15 243:3,6
handed 68:3 93:3 98:15
handedness 94:5,10
95:4
hands 58:13 248:3
hanged 78:2
happen 157:10 201:20
231:8 281:8 283:4,20
283:20,22 306:16,21
307:19,20
happened 38:17,19
41:12,14 87:14
115:21 117:6 261:13
happening 80:21 279:8
281:21
happens 86:3 161:19
161:22 283:5
happy 9:5 254:6 271:22
302:13
hard 29:5,21 39:17 92:7
120:14 124:9 125:19
127:3 141:8 168:22
201:19 217:5 234:12
236:3 246:7
hardball 184:15 214:10
harder 92:14 272:20
273:18
harm 288:8
harmful 87:6
harmless 205:4,10
206:6
Harty 77:16
Harvard 1:15,17,18
2:12
hate 178:16
head 111:10 132:5
health 263:19
healthy 206:22 212:8
226:17
hear 5:14 23:8 29:15
34:17 39:11 48:18

52:3 57:21 62:11 84:6
110:9 111:2 139:18
139:22 140:4 145:14
145:16 148:17 160:13
186:18 187:1 188:22
194:13 208:4 215:15
227:10 232:9 235:21
238:6 239:13 259:1
269:17,20,20 311:8
311:11,15
heard 10:22 14:8 33:3
52:8 53:12 64:17 69:2
78:11 83:2 84:1 134:7
136:1,8 141:4 152:11
221:10 256:12 273:15
285:7 286:20 288:4
302:2 312:9,17
hearing 88:1,11 105:10
108:3,4 111:1 216:16
256:22 263:2 308:3
311:8
hearings 10:22,22
42:14 62:17 177:21
201:3 211:14 256:15
heartened 194:9
heat 43:16
Heather 1:18 6:19
heavier 304:9
heavily 46:10
heavy 307:10
heckler's 47:5
held 10:21 14:11
190:15 219:16 248:19
256:22
help 14:17 33:17 63:2,3
97:11 98:18 116:2
172:7 186:1 194:20
222:21 245:11 246:1
247:20 256:4 272:19
helpful 11:15 34:14
36:21 42:22 43:21
52:10 53:7,8 55:22
64:11 68:12 72:11
131:2,11 132:2
133:15 134:3 189:4
209:13 215:3 265:10
271:14 287:14 288:17
308:20 314:6
helpfully 55:15 131:9
helping 162:3
helps 41:6
hem 121:16
hesitate 247:6
hi 135:1 145:14 153:8
160:18 186:5 275:19
high 15:5 43:13 78:8
162:10 191:22 233:20
235:10 271:18 276:4

high- 280:14
highest 156:19
highlight 71:9,10
156:22 159:3 215:14
highlighted 56:14
172:4
highlights 269:18
highly 11:4 148:9
276:11
Hillary 100:7
historical 30:5 35:5,8
35:15,18 49:18 50:18
51:6,15 125:1,3
history 16:4 21:17,19
22:14 35:10 39:21
40:7 41:4 43:20 44:16
45:7,9 50:17,19 56:17
59:11,15 67:1,22
86:15 126:2 201:7
228:15 243:22 264:6
266:2
hold 14:12 62:17
139:17,22
Holder 86:19
holds 230:2
hole 193:4
Holloman's 263:19
Holman 301:7
Holmes 178:11
Homeland 291:10
honest 203:11
honored 43:17
hope 14:16 98:11 102:4
109:19 111:17 120:15
122:18 125:9 133:9
134:19 161:14 179:9
191:18 221:22 232:4
271:5 290:1 315:6
hoped 44:18
hopefully 145:7
hoping 55:15 235:4
horizon 89:3
horns 181:8
host 196:17
hostile 237:6
hotels 42:3
hour 15:18 134:7
152:12 310:12
House 126:17,18
167:14 256:22
Huang 1:20 7:5,6 255:8
255:13,14 260:10,13
263:8 266:15 309:1
huge 28:1 250:16 311:8
hundreds 142:2 249:12
Hunton 1:19
hurdle 233:20
hydraulic 234:6,13

hypothetically 101:9
hysterical 298:13

I

idea 36:15 38:10 39:20
44:15 66:2 76:13,14
82:10 86:21 88:2
146:13 166:17 167:21
170:20 177:12 187:17
189:9 190:17 196:15
198:5,17 199:2 207:7
211:11,22 240:17
241:13 251:17 291:3
293:1
ideas 10:17 166:9
identifiable 308:19
identification 114:4
identified 71:15 175:21
213:13 220:13 253:9
identifies 19:13 20:13
172:10
identify 5:9 69:17
201:12 222:1 247:16
262:3 283:3
identifying 202:3
283:19
ideological 107:19
ideologically 161:15
174:19
ideologies 126:9
ideology 189:9,15
226:2
ifill 1:21 7:7 78:20,22
79:2 84:4 85:8 90:20
94:8 95:12 102:22
107:8 115:10 124:5
277:13,15,18,21
284:12,15 288:20
298:10 306:1,2 309:9
ifill's 91:18 135:7 287:8
ignored 109:9
II 76:9
III 64:5
III's 65:13 67:3
ill 31:7
illness 157:11
illuminating 20:20
illustrate 27:16
illustrated 207:13
illustrates 211:20
illustration 37:10
300:13
imagination 205:17
imagine 42:9 205:20
264:4 276:22 294:6
295:10
imaging 144:6
immediate 122:3

immense 268:15
impact 43:1 54:19,20
92:20 104:7 114:5
151:4
impacted 148:9
impacts 293:19
impartiality 82:3
impeccable--a 41:16
imperative 32:3
implement 285:14
294:21 295:1,4,8
implementation 211:16
implementing 160:7
implicated 309:20
implicates 98:1
implication 142:15
198:4,22
implications 228:2
implicit 74:8,14 197:21
implicitly 175:12
implies 177:8 240:20
importance 14:5 42:19
222:3 249:16 256:2
258:19 268:1,4
important 32:10 41:5
44:21 46:3 72:20 75:5
77:8 81:14 94:3 102:3
113:7 114:9 115:17
119:5 121:3 135:3,20
139:12 147:22 150:1
152:2 159:7,20
167:20 174:8 178:22
179:10,22 187:4
215:8 220:18 241:15
246:7,11 248:9
263:17 266:9 267:18
276:5 279:5 281:3,14
282:12,17 283:2
286:14 290:20 291:5
294:10 305:13 309:4
importantly 30:5 36:11
141:10 228:19
impose 16:15 156:17
161:7 241:1 244:15
imposed 296:4,7
imposes 156:12
imposing 73:18 165:4
impossible 97:6
impressed 68:10
152:11 248:7 312:15
313:4
impression 119:9 166:1
300:18 302:1,2 306:5
311:5
impressive 223:15
imprimatur 83:4
improper 128:12,14
improve 25:20 26:1

- 45:9 117:18 259:4
improved 266:2,17
impulse 200:8
inaccurate 86:2 87:5
inadequate 263:16
inadvertently 35:14
 46:18 47:5 176:8
inappropriate 281:20
inauguration 174:2
incentive 158:19
incentives 163:2,10
 173:16 206:1
incentivized 164:3
incentivizes 188:8
incisive 260:14
inclined 69:5
include 15:20 32:22
 113:9 125:10 131:11
 258:11 279:2 286:12
 287:22
includes 219:7 255:21
 256:3
including 4:10 16:15,22
 19:16 20:1 31:7 77:16
 97:17 119:12 164:13
 211:1 222:2,12 226:5
 230:18 238:22 259:19
 288:7 289:12 306:12
inclusive 13:17 17:14
 58:4 153:20 216:14
 254:22
inconsistent 250:19
increase 55:5
increased 59:2 203:9
 265:4 267:1
increasing 19:4 69:10
 99:11 116:9 270:8
 306:18
increasingly 146:8
 193:22 220:3
incredible 315:6
incredibly 65:2 194:13
incurring 262:2
independence 20:15
 23:20 24:7,15 26:14
 26:22 27:15,18,19
 28:6,11 29:9 31:15,20
 32:1,2,7,8,11,19,21
 33:5,13 34:2,4,7,9,12
 53:10 54:21 55:5,6
 63:11 118:5 150:11
 159:8 174:10 178:5
 186:19 187:19 296:19
independent 32:15,16
 252:21 289:18
index 262:15
indicate 64:19 306:15
indicated 17:20 58:9
 64:13 154:5 160:14
 255:5 265:14
indicates 236:12
individual 21:11 34:3
 115:18 118:18 140:18
 183:16 185:13 220:22
 222:4 236:17,21
 237:3 253:14 255:11
 260:1,17 261:5,19
 262:1,8,10
individually 48:13
inducements 32:13
inevitability 131:13
inevitably 49:8 56:22
infect 89:20
inferiority 44:8
inflammatory 199:11
influence 28:16
influenced 164:8
inform 9:16 145:7 152:6
 222:21 247:21 310:17
 311:1 312:2 313:16
informal 120:19
informally 259:14
information 286:22
 287:4
informational 258:22
 259:4
informative 152:18
informatively 134:10
informed 133:7 302:17
 310:7
informs 57:2
inherent 97:9 172:11
 269:19
initially 61:11 216:20
injects 209:10
injunction 298:2
injunctions 267:15,18
 297:22 305:8
ink 128:6,10
innuendo 203:3
input 259:5,6
inputs 258:22 259:4
inquiry 139:9 191:16
 288:1
insert 277:9
insight 210:10
inspired 38:12
instance 50:14 95:22
 101:5 163:6 184:6
 263:15 264:14
instances 121:14 134:6
 237:14 291:19
instantiate 295:13
instincts 175:19
institution 56:16,19
 86:6 106:9 144:15
 150:12 159:18 179:22
 185:13 192:15,17,21
 193:10 213:17 240:10
institutional 34:4 60:1
 71:22 92:19,21,21
institutionally 310:19
institutions 34:13 89:7
 163:6 195:11
instructive 53:22
insulate 220:10
intellectual 42:17,20
 112:17
intellectualism 206:16
intellectually 112:16
intelligible 100:16
intend 307:14
intended 28:22 36:9
 110:14 148:5
intends 311:1
intense 22:11 110:9
 191:22 192:8
intensified 257:9
intent 128:14 129:3
intention 289:1
intentionally 106:17
intentioned 183:19
intently 170:4
interaction 290:4
interbranch 98:2
interest 5:10 15:9 17:1
 17:21 45:14 58:9 83:6
 154:6 216:18 255:5
 260:2 275:9 288:9
interested 125:11
 205:19
interesting 15:8 23:3
 125:17 196:10,12
 197:1 265:16 276:18
interests 288:16 289:11
interfere 142:8,20
interference 128:7
 156:4 160:3 168:14
 173:12,22 175:9,14
 181:4,21 183:16
 187:4
internal 16:21 20:6
 283:13 285:21 310:14
interplay 202:17 203:11
interpret 47:22 228:11
 228:18
interpretation 51:19
 124:22 141:7 183:12
 219:17 228:21 230:8
 305:18
interpretations 221:3
interpreted 235:7
interpreting 233:4
 249:21
interrelated 218:12
intervention 38:7 96:15
 97:11,13 145:19
 263:10 264:1 268:13
interventions 296:6
intricacy 248:8
introducing 8:22 144:7
introduction 3:2 31:13
 105:6,20 107:4
 251:17
introductory 30:1 33:18
 55:12
intrude 302:13
intruding 299:8
intrusion 28:5
intrusions 242:6
invalidate 118:12
 217:16 248:19 249:3
 250:2
invalidated 250:10
invalidates 252:10
invalidating 61:16
 118:16
invalidation 249:10,10
invalidations 16:18
invested 67:6
invitation 313:21
invite 15:16 17:18 23:5
 56:5 127:17 149:18
 160:11 223:7 248:3
 262:22
invited 17:22 303:8
invocation 225:4
invoke 304:2
invoked 209:8 245:6
invokes 224:20
involve 16:12 26:18
 258:2 261:14 280:11
 281:22 300:10 310:13
involved 37:9 111:9
 207:16 280:10 282:10
 298:14
involves 310:16
involving 16:21 26:4
 310:14
irrelevant 139:2
irreparable 288:8
irreversible 113:15
 291:17,20
issue 26:8 52:14 70:7
 79:8 80:18 83:12,14
 85:10 102:3 103:4
 110:12,16 111:12
 135:5 151:15 159:16
 159:20 160:14 175:18
 197:10 205:1 210:3
 228:1,6,9 234:19
 238:14 249:5,7 260:4

260:16,20 266:9
 267:17,19 268:2
 275:2 280:7 281:6
 290:12 294:11 299:1
 299:2 301:6 303:1,12
 307:6 308:1 313:21
issued 301:4,4
issues 9:14 12:22 14:5
 14:13 15:4,16 16:20
 21:9 22:22 47:18 48:1
 57:15 58:14 62:12,21
 64:14,15 90:4 110:22
 111:13 120:5,6
 123:18 126:16,22
 127:13 133:12 151:3
 160:6 202:11 203:6
 217:18 219:8 220:13
 222:7 225:22 229:8
 231:16 232:20 245:12
 254:18 255:21 256:13
 257:2 259:8 260:15
 262:22 267:22 268:3
 278:21 281:16 282:17
 282:20 283:3 284:16
 286:2 292:22 294:17
 294:20 296:18 298:2
 304:13 309:12 310:10
 310:17 311:3 312:19
 312:20
issuing 297:21
it'll 155:7

J

J 40:16
jabbering 107:9
Jack 1:13 5:20
Jackson 22:2 60:15
 229:3 301:7
Jacksonian 60:13
James 225:4
Jefferson 60:11
Jeffersonians 22:2
jeopardy 206:11
job 25:4 35:2,12 68:18
 72:10 161:2,4,11
 164:22 166:8 179:3
 212:3 227:6 240:6
 272:5
jobs 161:17 187:7
 273:20
John 40:16 77:15 249:6
Johnson 2:1 7:10,11
 60:22 186:4,5 194:8
join 78:21 91:4,4
 102:22 112:7 127:20
 201:14
joined 81:6,8 87:6
joining 4:9 7:9

Journal 105:19 107:11
JR 1:17
judge 27:20 32:14 33:1
 34:3 40:16,17 41:7,13
 41:15,18 42:14 43:5,6
 43:10 62:18 86:17
 87:6,7 88:13,19
 112:14,18 118:1
 136:4 148:8,9 150:9
 188:8 197:18,20
 279:11,13 297:17
judges 32:2,4,6,13
 59:12 63:20 88:15
 156:14,18 174:17
 175:4,7 182:13,19
 183:1,6,12,20 185:4,9
 185:10,13 189:10
 207:15 250:13 256:20
 259:7,15,16 262:21
 268:12,15 278:14,22
 297:20 299:10
judging 47:18 177:12
 183:5,9
judgment 97:7 166:20
 218:14 252:21 269:1
judgments 195:11
 240:11 288:6,14
 289:9
judicial 20:6,14 23:20
 24:7,15 26:13,22
 27:15,18,19 28:6,11
 29:8 31:15 32:7,19
 33:13 34:9,13 47:1
 53:10 54:21 55:5,6
 60:4 77:22 88:3,12
 138:18 149:11 150:11
 159:7,10 162:10
 168:1,1 172:7,14
 174:3 178:5 186:19
 187:19 189:16,16
 217:10 219:15 220:11
 220:12 226:1 227:18
 227:19 228:6 229:18
 232:2,13,21 242:14
 245:16 248:14 250:22
 257:5 259:10,18
 262:12 268:13 270:21
 274:16,18,19 296:19
 311:7
judicially 121:19
judiciary 33:21 34:5
 36:17 148:11 174:10
 174:17 179:5,15
 180:17 185:14 209:11
 218:20 220:16 227:4
 240:1 243:4,7 248:19
 251:3 268:22
judiciary's 271:3

July 256:16
jump 65:8 173:11
jump-start 110:15
jumped 36:3
June 256:16
junior 164:11
juridical 241:10
jurisdiction 16:16 28:5
 33:12 126:10,12,16
 128:5,11 129:2
 138:22 191:4 217:22
 220:5 223:20,22
 224:4,11 226:5,11
 238:13,15 239:7
 240:14 244:22 248:21
 253:5 286:13,15
 295:14 303:2,10
jurisdictions 104:22
 190:7
jurisprudence 62:21
 118:4,11 123:3
 143:11 291:8
jurisprudential 63:4
 119:5,18 183:11
jurisprudentially
 174:13
jury 306:22
justice 27:20 44:7
 48:10 63:1 88:1,7,10
 100:12 132:20 139:5
 160:21 164:11 168:17
 169:16 170:22 171:2
 178:10,10,11 183:3
 206:3 261:3 291:10
 291:11
Justice's 178:8 270:1
justices 3:14 19:17
 28:21 38:1 43:15
 47:10 48:12 61:1,13
 64:1 67:1,5 81:22
 85:19 88:8 89:15
 116:10,13 117:5
 118:19 131:15,17
 132:1 141:22 154:19
 154:20 155:1,16,21
 157:10 158:4,6,17
 159:15 161:9 162:20
 163:3,6,16,18 164:6,6
 172:10 173:3 175:10
 178:1,9 184:12 191:7
 200:7 201:16 203:22
 204:7 205:11,14,18
 206:10,17 218:17
 219:10 220:2 238:21
 256:20 259:12 260:1
 260:17 261:19,22
 262:7,14 269:22
 270:5 273:3,13,16

289:10 292:13 295:5
 295:8,11 299:9,10
Justices' 16:11 19:19
 217:15 289:7
justifiability 24:22
justifiable 304:3
justification 157:21
 192:19
justifications 156:21
 159:2
justified 148:22
justifying 144:13
Justin 1:16 6:13 39:12

K

Kagan 88:2 291:10
Kang 2:1 7:12,13
 160:17,18
Kate 1:12 5:18 153:8
 154:12
keep 51:22 98:4 100:7
 119:1 159:2 177:9,10
 215:17 250:21 313:10
keeping 141:20
Keith 2:16 8:18
kept 77:19
Kermit 2:8 8:6
key 137:21 234:19
 299:1
kinds 31:5 33:15 55:9
 82:5 141:3 145:4
 165:19 186:22 209:17
 245:3 269:9 286:2
 297:11,15 304:7
knew 201:22 277:1
 298:17
knock 98:8
knockdowns 99:1
knocked 96:1 113:3
knowing 181:16 307:13
knowledge 286:16
known 61:8 159:14
 256:6 259:2
knows 201:9
Korematsu 38:5
Kovarsky 293:22
Kramer 228:8
Kuhn 303:4
Kurth 1:19

L

L 2:2
lack 34:12 83:8 263:17
lacks 46:20
LaCROIX 2:2 7:14,15
 48:19,20 52:3 136:15
 136:16 139:15 143:8
 185:1 213:13 225:19

- laid** 23:18 120:22
land 299:19
lane 308:19
language 44:4,10 67:3
88:22 135:18 188:14
189:2 232:15 243:1
253:4 277:8 296:10
311:22
lapses 199:8
large 40:18 120:6
125:20 133:12 197:11
261:17
largely 26:11 41:3
84:21 86:6 195:3
203:1 289:6
larger 93:12 123:11
192:9
Lastly 51:13
late 264:9
lately 255:22
launch 63:9
Laurence 2:12 8:12
law 1:10,11,12,13,14,15
1:16,17,17,18,18,20
2:1,2,2,3,4,4,5,6,7,8
2:10,13,15 21:7 31:11
41:17 43:14 67:18,20
72:21 81:2,9,11,15
82:9,19 88:5,13,14,14
89:12 114:7 135:16
135:16 137:6,7,10
195:6 197:5 206:7,11
221:3,7 229:11 230:9
231:18 244:21 249:19
250:10,19 251:4
252:11,16,22 257:13
257:14 276:12 288:15
305:18 308:10
lawful 76:8,10 98:4
laws 16:18 20:2 47:22
99:12 175:2 242:8
lawyer 188:7
lawyers 256:19 258:3
276:12,20 278:18
lay 17:6 29:11 51:12
111:13 276:10 309:2
laying 30:6 79:20,21
lays 293:12
lead 18:20 35:5 38:8
93:7 131:14,22 132:4
177:20 178:5 211:19
211:21 212:5 214:3
leader 60:10,14
leaders 97:17
leadership 23:14
295:11
leading 38:11 41:17
97:18 161:11
leads 79:10,17 80:11
142:22 163:20 250:16
lean 211:9
leapfrog 161:14
learn 9:15
learned 123:8
learning 143:15
leave 37:4 56:2 136:5
139:10 157:10 251:18
268:15,16 275:14
306:4
leaves 49:22 66:4
214:15
leaving 62:19 174:17
lecturer 206:8
lectureship 206:11
led 271:21
ledger 33:20
Lee 7:3 293:22
left 39:2,20 45:16 56:5
65:11 102:11 109:15
113:20 117:6 171:21
196:20 219:2 279:8
legacy 40:3
legal 1:21 64:2 72:22
98:9 120:21 136:21
195:5 199:19 206:13
215:9 231:7 257:13
259:8
legality 10:11 72:19
238:17
legally 247:20
legislation 106:10
125:20 126:10,13
127:4 128:12 160:2
217:16 219:2 220:11
225:1,1,13,14 226:4,5
226:9 229:4 236:9
239:7 244:6 248:12
285:17
legislative 100:1
108:16 122:22 218:3
224:2,5,11 231:6
232:21,22 233:14
234:1 239:2 245:4
246:1,6 247:1 251:6
251:14
legislature 74:9 129:20
legislatures 76:4 122:5
129:19 251:22
legitimacy 21:1 23:20
24:7,15,21 25:3,12,16
26:3,7,13,22 27:13
29:8 47:3,6 53:9,17
53:20,21 54:4,12
62:14 63:6 81:1 83:19
83:20,20 86:12
104:20 106:9 108:17
132:11 186:15 214:17
224:9 283:15 296:18
297:3 299:2
legitimate 91:15 119:16
184:1
LEIGH 1:19
leisurely 302:9
Lemos 2:3 7:16,17
29:16,17 34:17 53:5
284:12,13 290:6
294:19
length 3:13 49:6 162:14
187:16,17,22 188:6
264:5 303:7
lengthy 286:12
lesbian 114:12
lessons 190:6
lest 114:16
let's 59:10 107:12
170:21 171:2 234:21
250:10
letting 207:14
level 97:18 112:21
123:13 146:17 162:2
162:7,12,16 163:9
224:6 265:21 271:19
levels 174:17
Levi 2:4 7:18,19 147:2
148:3,4 149:15,22
199:6
Levy 199:5
liberal 193:8 196:21
liberty 183:17 280:13
lie 144:8,9 230:5
life 11:13 19:20 57:4
154:18 160:2 161:10
164:2 220:2 304:12
304:17 314:2
lifetime 81:22 160:21
210:12
light 13:7
likelihood 121:15 204:1
288:2
Likewise 150:14 295:14
296:3
limelight 205:22
limit 73:9 87:3 155:13
157:20 161:8,13
162:6,16 163:1,1
164:1 168:19 187:5
220:12 241:19 242:3
242:12,13 276:12
limited 20:3 73:16
103:10 162:1 242:16
289:4
limiting 178:7 236:16
limits 16:10,16 73:18
74:8,13,15,18,21 75:1
75:4,8 153:14 155:1,8
155:11,15 156:12,17
156:21 157:1 158:13
158:18 159:2,4,6,10
159:21 160:7 162:5
165:2,4,13,21 166:3
166:10 167:9 171:7
172:1 173:1 175:20
177:2,17,20 180:19
180:21 184:9 186:1,8
186:11,18 188:21
189:21 190:4,18
191:2,20 196:15
197:21 198:1,3,5,12
198:17 200:2,3,10,13
204:20 205:9 207:4
211:19 212:7 213:5
214:15 215:10 233:8
244:15 251:16 288:19
295:7
Lincoln 60:19
line 24:4 114:9 124:7
169:1,3 176:22
186:10 204:10 209:19
301:12,13,20 304:3
312:7
line-drawing 285:2,4
lines 54:1 69:7 114:1
149:19,22 245:18
286:7
link 12:2
links 314:10
list 170:15 178:9 202:2
202:3 203:4
listened 312:21
listening 95:6 133:16
207:2 225:16 295:6
314:17
literally 102:13
literature 20:20 31:18
238:17 244:17 250:16
278:6
litigants 251:6
litigation 294:11
litmus 203:6
little 7:10 15:13 31:14
48:15 66:4 69:7,14
72:8 115:12 136:19
161:18 164:5,7 167:7
169:6 203:14 207:10
225:10 239:17 266:2
live 4:16 20:7 191:21
260:6 303:12
lively 65:4
lives 43:1
local 162:2
Lochner 78:4,5
Lochnering 77:21

locked 82:1
long 40:3 70:19 77:13
 78:3 99:18 101:5
 109:3 162:13 163:13
 166:9 167:9 168:15
 169:4 180:2 187:5,10
 187:14 190:18 197:6
 200:9 270:16 304:9
 309:11
long- 260:3
long-standing 236:14
 256:3
long-term 168:9
longer 48:15 164:2
 187:6,8 193:1 211:10
 245:12
look 41:7 55:18 91:18
 104:2 107:14 126:11
 166:2 187:11,13
 190:5 202:16 207:12
 217:20 252:6 271:2
 307:10
looking 85:14,19 104:1
 104:4 139:4,7 166:18
 226:4 275:1 314:3
looks 217:8,21 220:14
loose 89:20
Lord 200:11
lose 78:17 114:16
 178:16 298:20
lost 109:6 139:13 178:7
lot 30:2 32:19 35:10
 37:21 38:14,16 39:6
 47:13 49:17 73:7
 75:14 78:9 123:8
 124:21 127:7 128:6
 129:15 131:3,8,12
 169:11,12 188:4
 206:21 207:6 227:21
 232:12 239:16 244:21
 265:19 271:16 275:11
 285:10 300:21
lots 183:18 255:22
 304:6 314:22
loud 299:4
love 131:18
lovely 112:16
low 81:10
lower 31:9 63:21
 166:14 188:7 199:16
 200:18 220:9 222:12
 235:11 267:15 268:11
 268:19 276:13 298:8
 305:4,6,8
lowering 234:3,5
lucid 65:2
lumped 300:4
lunch 15:19 152:21

M

M 1:13
machinations 165:20
magazine 41:21 43:11
Maggie 29:16
main 49:2 155:10,15
 156:21 167:8
maintain 86:4
maintaining 167:9
major 99:5 103:5,18
 108:4 156:10,16
 209:14 212:10 217:17
majoritarian 47:12
 192:17,20 193:22
majorities 236:16
majority 87:7 101:6
 165:16 217:22 237:16
making 10:18 41:10
 44:11 133:18 176:21
 195:10,13 221:5
 222:13 229:22 233:17
 234:11 246:18 283:21
 289:10 292:3 298:22
 299:3 301:15 310:5
malapportionment
 116:5
malfunctioning 83:3
manage 4:22
managed 272:18
management 17:1
mandatory 156:12,17
 166:11 270:8 286:13
 286:14 303:2,9
manifest 53:14
manner 310:19
Manuel 1:15 6:9
map 174:3
Marbury 248:17,22
Margaret 2:3 7:16
marking 98:9
marks 14:21
marshaled 79:9
marshaling 165:1
Marshall 178:10 249:6
marvelous 164:22
marvelously 134:9
Mason 2:14
match 116:9
material 13:3,3 38:15
 44:10 49:2 196:6
materialize 145:1
math 126:11
matter 11:8 55:11 57:9
 65:9 78:3 87:19 105:1
 105:2 115:14 119:10
 135:9 153:4 169:10
 182:22 215:21 226:11
 230:6 254:3 261:18

283:6 284:4 292:11
 295:21 296:9 298:1
 315:8
matters 14:15 15:9 24:3
 35:15 43:16 66:11
 113:13 124:21 182:19
 203:7 241:15 263:1
 280:9,15 281:3
 283:13 295:15,22
 304:12,16,18 305:17
maximize 182:14
McCardle 139:1
McConnell 9:19
mean 21:4 26:12 27:6
 54:12 68:1 76:19
 126:7 130:10 138:1
 138:10 155:18 164:6
 183:1 186:17 187:6
 187:11 202:17 205:17
 229:15 230:5 249:8
 300:12 301:12 302:12
 307:7
meaning 53:17 54:18
 231:15 251:4 253:13
 279:16
meanings 29:1
means 27:20 81:22
 88:20 100:21 126:8
 137:22 152:22 228:17
 229:11,12,21 230:11
 230:19 252:15
meant 48:15 54:8
 227:19
measure 24:21 42:1,5,7
 42:10 190:8 209:10
mechanics 15:14
mechanism 66:15
 157:18 169:5 235:5,8
mechanisms 109:8
 138:7,8 217:21
 222:14 261:21 287:2
 297:2
mechanistic 204:13
media 51:1 244:17
mediate 29:6
meet 104:22 127:14
 181:13 294:18
meeting 1:3 4:4,12,15
 12:5,11,21 102:12
 128:16 154:6 218:15
 313:20
meetings 5:2 9:21
member 41:16 43:14
members 11:6,8 57:19
 58:22 59:18,21 60:10
 60:14,21 61:6,10 62:1
 64:2 74:6 125:14
 126:2 142:1,2 148:10

148:17 158:1,3
 164:20
membership 3:11
 57:16 122:22 177:9
 180:21
memory 272:22
men 104:15
mention 44:20 104:21
 246:22
mentioned 11:3 122:4
 132:18 183:2 185:1
 185:18 188:9 219:9
 220:4 284:19
mere 189:10
merely 70:11 261:8
 269:1
merits 28:1 71:11 85:8
 113:6 115:18 127:7
 196:21 210:2 222:20
 257:20 265:9,12
 272:7 274:14 278:10
 279:22 280:2,2
 281:13 282:9 287:10
 287:18 288:1,3 289:1
 289:5,7,13,19 300:16
Merrick 62:18 105:10
 149:8
message 96:20 97:7,12
 116:22
messages 307:12
messier 234:22
met 1:8
meta 112:21
metaphor 193:2
methodology 189:16
meticulous 223:14
Michael 2:1,7,13 7:12
 8:2,14 34:18 160:17
 303:4
Michelle 1:12 5:16
Michigan 1:12 291:11
microcosm 123:12
mid-20th 62:2
middle 192:1
Mike 72:18 73:8
Miller 291:9
millions 97:19 280:11
 281:22
mimic 239:9
mind 100:20 144:1
 215:17
mindful 49:3,4
minds 175:7,7 282:20
mindset 175:4,6
minimally 27:20
minimize 188:1
minimum 291:13
minor 103:11 223:16

minorities 21:12 108:21
 237:8,11,15,20
minoritized 237:22
minority 109:2 221:1
 237:7
minute 57:7
minutes 45:16 56:5
 149:16 151:16 232:18
misdirected 274:3
misguided 116:18
Mishkin 67:17
misleading 245:21
 300:18
misleadingly 77:7
missed 129:12 277:14
missing 248:10
mission 17:9
mistake 101:20 117:2
 175:5,13 269:2
mistaken 86:20
misunderstand 231:10
misunderstanding
 232:6
mix 59:22 305:19
mixing 80:9,10
mode 213:8
model 146:7
moderator 149:18
modern 39:4 40:4 51:11
 291:7
modify 59:4 62:4
moment 43:16 51:8
 56:10 78:16 86:15
 91:19 103:14 106:3
 106:12 107:2 108:7
 113:11,11,14 130:16
 143:3 178:3 244:12
momentarily 140:7
moments 50:3
money 108:21
month's 313:12
months 87:10 105:12
 105:16 148:19,19
moratorium 301:8,8
morning 4:3 7:9 9:3
 52:7,9,22 53:8,12
 54:1 79:2 153:12
Morrison 2:4 7:20,21
 52:4,5 56:4 311:14
motions 20:18
motivate 108:12 252:4
motivated 208:22
motivating 112:1
motivation 143:6
motive 108:18 117:20
 118:22 139:2,8 292:7
motives 74:9 117:17,18
 118:8,10,18

move 29:12 93:16
 177:15 201:4 254:8
 275:10 290:1 300:5
moved 61:2
movement 168:3
 170:14
movements 234:7
movie 42:4
moving 48:4 60:18 67:6
multiple 97:17,18
multiplied 265:3
multitudinous 118:9
muscles 192:7
mysteriously 74:10

N

NAACP 1:21
name 4:6 5:15 153:8
Nancy 1:18 6:21
narrative 46:18
nation 60:4 112:18
 173:17 178:15
nation's 59:16 243:21
national 41:20 45:2
 185:15 188:12 229:2
 268:1,4 280:10
 304:15
nationwide 267:17
 297:21
natural 166:13
naturally 310:10
nature 12:10 42:3 56:19
 73:5 102:19,20
 112:15 198:19 233:11
 262:16 299:3 305:16
navigating 120:9
necessarily 35:11 66:2
 68:1 70:13 73:21
 135:14,15 138:10
 150:5 163:10 167:4
 196:19 203:9 204:20
 213:20 221:12 239:8
 244:8 252:21 284:10
 303:13 307:7
necessary 35:16,22
 36:14 37:7 69:19
 73:15 74:20 104:3
 125:21 258:6
necessity 120:21
need 29:3 36:15 37:8
 37:15 46:6 53:13 54:2
 54:10 74:3 77:9 85:4
 89:7 130:8 135:8,13
 163:7 169:22 181:12
 182:3 188:13,15
 191:10 192:19 227:6
 258:6 259:8 279:19
 286:6 303:13 304:9

308:21
needed 87:2 120:13
 247:9
needing 26:19 203:18
needn't 48:2
needs 51:5 101:3 177:9
 212:13 218:20 226:12
 227:20 234:3 242:22
 243:1,9 249:14 250:5
 251:8 283:1
nefarious 87:3
negative 169:2 189:3
neither 97:13 268:22
 275:2
NELSON 2:5
nervous 35:20 207:22
net 104:4,6 108:17,19
 108:22 109:10
Nettie 84:10
neutral 104:11
neutralize 101:4
never 142:8,19 173:4
 173:13 206:3 270:11
 298:17
nevertheless 82:4
 94:21 190:3 203:19
new 1:10 2:6 22:5 39:2
 43:11 61:16 103:6
 122:10 141:11 156:2
 167:16 172:6,9,14
 191:7 192:13 257:13
 285:17 301:8
newly 100:11
news 206:13 264:9
 302:9
newspaper 43:13
newspapers 299:5
NFIB 249:18
nicely 91:1
nine 32:8 58:21 60:14
 61:2,6 62:1 100:9
 141:20,22
nominate 155:20 158:1
 159:15 161:3 164:3,4
nominated 163:14
nominates 203:22
nomination 40:15,18
 41:1,6 105:16 107:17
 136:4 149:5,7 156:1
 157:19
nominations 19:1,2,4
 40:14 62:16 140:20
 141:5 149:11 156:3,7
 157:6 167:16 202:19
 202:21 203:10,12
 204:6
nominee 62:18 108:3
 170:5

nominees 60:6 61:4
 148:12 158:21 161:14
 163:14 164:3 191:12
 203:4
non-acquiescence
 250:17
non-originalist 74:7
non-partisan 272:12
non-political 272:12
norm 62:3 73:17 76:16
 99:18,21 100:4 101:2
 101:5,9 128:13
 129:17,22 136:8
 141:9 203:1 214:7
 295:9,13
normalize 167:21 168:3
 171:9 186:21
normalized 171:11
normalizes 171:8
normalizing 171:14
normative 67:16 142:6
 288:6 290:22 292:20
 293:7 295:7
norms 74:8 77:8 99:14
 100:21,21 105:9,15
 109:9 121:4,15,19
 122:3,9,14 141:11
 144:3 175:3 176:6
 206:12
North 40:21
Northwestern 2:1
notably 257:12
note 14:4 28:8 33:19
 41:5 51:13 55:13
 66:22 67:9 128:17
 138:19 152:20 178:6
 195:1 210:4 219:14
 245:21 261:12 262:19
 276:18 277:6 291:5
 309:22 311:19 314:5
noted 17:5 110:14
 173:1 174:5 303:8
 309:22 311:6 312:13
notes 20:17 76:20
 261:2 265:8
notice 281:21
noting 24:19 261:8
notion 173:2,11 203:16
 208:17
notions 47:3
notwithstanding 71:11
 146:11
November 11:15,16
 314:4,7
nuance 46:3 128:18
 134:6 246:12
nuanced 134:15
number 19:16,21 61:2

77:3 98:17 99:11
101:8 116:9 118:20
131:15 132:1 136:6
141:22 154:21 156:6
157:5 162:21 165:17
249:19 261:17 265:2
265:8 270:11 295:2
304:13 306:10
numbers 130:3 238:2
numerical 237:16
numerous 97:18 291:6
NYU 2:4,13

O

o'clock 15:19,19
oath 262:13
Obama 105:11
Obama's 62:18 100:6
object 85:15
objection 115:22
objections 105:5 272:7
objective 81:7 110:18
objectives 52:19
obligation 73:3
obligations 5:6
oblique 277:2
obscure 237:12
observation 56:7
209:12 223:17 248:2
291:14
observations 56:13
208:6 223:9,19 278:3
297:15
observe 256:4 296:8
observed 174:6
observers 261:3
observing 295:2
obvious 47:9 116:9
128:20 157:21 182:1
211:4 233:16 253:18
301:14
obviously 44:6 49:1
110:11 117:9 119:2
135:5 137:10 148:13
161:1 167:1 181:4
208:14 279:6,18
310:12
occasions 60:17 121:7
occupies 249:11
occurred 181:6
occurs 158:9,10
OCTOBER 1:6
odd 286:1
oddly 37:18
odious 44:4
offer 145:6 194:19,20
250:4 288:21 290:9
305:7

offered 56:12 258:8
306:11
offering 43:21 246:9
offers 261:22 282:5
office 16:11 61:4
155:17 162:11,22
200:14 213:2
office's 175:9
Officer 4:7,22
offices 161:14 162:1
Official 2:17
officials 11:7 120:22
121:9,17 219:7
officials' 221:9
often-stated 290:18
Olatunde 2:1 7:10
old 162:19 163:14
166:9
older 164:5,6 188:10
ominous 89:3
omit 40:8
once 29:3 83:13 154:2
180:1 198:17 301:6
302:21
one's 49:13 226:20
ones 24:13 115:18
164:14 165:14 222:16
252:3 258:10 268:19
272:10 301:4,5
310:11
ongoing 146:18
online 256:18
open 14:3 45:3
opening 3:4 9:2
operate 221:12 245:4
operated 229:19
operates 5:3 287:1
operating 82:18
operation 46:2 121:6
285:1
operations 5:1 16:21
20:6 310:15
opinion 25:18 44:5,7,13
102:18 168:10,12,16
168:16 169:4,6
170:14 298:3,3,5,10
298:16,16,19,21
301:5 305:12,21
opinions 87:9 256:21
258:14 300:21 305:7
opponent 60:22
Opponents 63:5,8
opportunities 158:1
213:3 271:3
opportunity 23:13 40:6
112:12 147:15 155:20
157:6,13 159:15
160:8 195:18 261:22

264:10 314:19
opposed 40:17 107:21
109:21 126:18 164:1
177:2 224:12 225:13
241:8
opposing 41:21 133:21
opposite 90:2 117:1
opposition 21:14 43:5
opt 286:3
optimal 190:5
options 98:4
oral 20:7 258:2
orally 134:12
order 5:11,14 9:15 10:4
10:4 35:16 40:4 45:21
52:20 61:2 71:21
120:20 121:18,22
123:2 175:16 224:12
229:9 230:15 231:16
238:21 246:12 282:8
291:19 295:12 310:2
310:4
orders 16:22 229:10
256:1 257:4 263:13
263:22 264:8 265:3
265:12 279:7,17
280:9,17,22 287:17
288:22 292:14,15
301:3
ordinary 106:1 160:1
246:6
organizations 11:8
organizing 24:6
orientation 170:12
original 209:9 248:21
originalist 47:16 73:20
73:22 74:1
originally 28:22 29:1
origins 15:22 50:3
ought 25:10 67:20 77:6
143:20 150:22 174:22
208:12 233:15 247:14
266:12 268:8 312:11
outcome 86:10 87:11
87:20 122:7 184:20
289:19
outcomes 71:5,18
outlets 234:14
outline 16:1
outlines 19:9 20:11
outset 26:19 34:15 48:2
48:7 55:22
outstanding 9:20 34:22
overall 204:11 223:17
237:5 265:11 297:9
overarching 96:20
101:17
overcome 117:5 251:22

252:13 253:14
overcoming 253:8
overcompensating
309:14
overlap 287:15
overplaying 188:18
overridden 253:2
override 16:18 228:4
230:20 231:6,6 235:4
249:7 253:8
overrides 218:3 220:6
232:21,22 233:14
234:1,22 245:4 246:1
247:1 251:15
oversee 31:8
oversimplification
239:2,4
oversimplify 238:21
oversimplifying 35:13
overstate 305:5
overtly 203:2
overturn 106:10 129:6
overturned 86:18
overturning 108:16
overturns 230:14
overview 3:7 43:22
65:2
overwhelmingly 126:17
126:18
owe 77:2 240:8
owning 260:17 262:8
262:10,15
oxygen 75:20 115:7,9
115:12,15

P

P-R-O-C-E-E-D-I-N-G-S
4:1
p.m 152:21 153:1,2,5,6
215:22 216:1 254:4,5
315:9
pack 50:21 61:9 77:5
packed 100:18
packing 37:19 73:6
75:21 99:19,22 129:6
130:12 141:2
page 12:3 13:9 32:8
47:7 107:3 223:21
231:21 261:2 270:10
pages 36:5 39:4 40:10
46:13,15 69:12 299:5
paid 263:21
pair 36:21
panel 63:22 64:3 65:12
65:16,22 66:1,5,11,11
66:14,16,18 67:2,7,21
69:3,6 86:17 124:19
125:6

panels 64:1 125:5
 256:14
paper 46:13 116:12
 202:9,15 203:13
 204:14 299:4
papers 119:8 202:9
paragraph 70:21 80:5,5
 231:21
paragraphs 80:10
 134:11
paralysis 211:17
parenthetically 69:1
Parker 40:16
Parker's 40:17
parliamentary 252:11
 252:20
part 18:19,21 19:8,12
 20:11 32:18 35:7,8,9
 38:19 40:18 41:2,5
 49:22 51:6 54:6 60:3
 62:14 63:6 69:12 72:7
 87:2 103:14 117:9
 124:2 126:20 130:2
 139:9 165:2 183:5
 209:9,20 269:4,12
 270:3 272:15 275:8
 275:13 280:19,20
 282:13 293:2 297:6
 299:18 300:11,13
 303:17,19 304:1,10
 308:22 309:16
parte 139:1
partial 178:9
partially 180:22 280:1,3
participants 54:5,14
participate 84:12
participated 133:5
participation 40:22
 183:18
particular 13:5 17:13
 24:12 25:5,14 27:21
 27:22 28:17 35:1
 37:22 38:9 53:4,18
 54:19 55:3,4,13 58:3
 70:12 71:5,17 82:12
 86:10 98:8 111:11
 113:12 123:10 127:4
 132:15,15 140:22
 152:3 153:18 158:8
 175:18 179:19,20
 180:10,19 181:10
 189:15 195:2 196:13
 204:15 209:1,4
 212:18 213:11 214:3
 215:1 216:13 219:18
 220:22 233:2 235:1
 240:8 244:14 246:1
 247:15 251:22 253:11

254:19 260:20 271:6
 272:7 274:8 285:3
 308:4,9,11 312:4,7
particularly 13:6 21:20
 38:2 40:14 103:13
 150:16 151:22 197:22
 240:10 248:7 264:7
 285:5 310:1
parties 85:21 126:8
 167:13 179:9 184:16
 192:5 199:10 203:5
 203:18 204:6 213:22
 219:18 229:9 252:16
 298:13
partisan 19:5 22:13
 32:9,18 60:2 63:18
 70:12 75:2 80:16 81:7
 82:12 83:10 85:13
 88:20 90:21 95:2
 100:3 107:9 108:22
 113:22 116:6 125:14
 126:7 127:5 129:14
 129:17,18,22 137:8
 137:16 138:1,11
 139:11 142:9,21
 143:4,5,7,9 161:16
 180:5 182:13 183:2,4
 184:4,15 186:21
 188:3 203:16,19,21
 207:11 208:18 213:14
 213:21 214:20 227:3
partisans 85:19 88:9
 189:10,14
partisanship 95:2
 103:22 126:21 150:15
 150:17 185:16 186:16
 189:8 226:3,7,13,19
partly 26:20,20 28:1,2
partnership 9:22
parts 18:19 43:17 50:13
 91:3 124:17 193:21
 194:11 228:17 274:11
 284:19 288:7 300:3
party 22:1 60:8,10,14
 81:18 106:13 109:1,2
 114:22 116:2 126:5,6
 142:11 148:14 168:2
 170:19 177:6 185:17
 185:22 191:22 208:19
 209:1
party's 109:10 167:22
pass 231:12 308:13
passages 169:7
passing 97:4 213:2
passion 134:6
passionate 84:16
 134:16
passionately 134:10

passions 193:3
passively 314:17
path 113:15 116:19
 122:10,17 199:1
patience 302:22
Patrick 9:18
Paul 67:17
pause 313:7
pausing 276:17
paying 190:21
penalty 269:11 303:10
Pennsylvania 2:8
people 21:2,3,6 22:13
 24:11,19,21 25:2,3,15
 26:1 28:15,19 29:4
 34:8 42:2,6,11,17
 44:8 47:13 50:4,11
 51:1 67:15 75:9 76:2
 76:6,12 77:19 80:19
 81:4,6,14 82:17 83:17
 91:20 97:16 100:16
 103:3 105:17 110:7
 111:19 113:9 115:7
 118:9 123:18,20
 124:8 127:12 129:15
 132:9 133:18,21
 134:4 136:13 140:4
 144:16 161:8 164:4
 166:8,22 170:19
 182:20 183:6 188:9
 189:15 192:16 196:18
 200:9,12 201:13
 202:2,4 204:3,20
 205:20 206:18 209:2
 212:5 218:17 226:10
 232:1 236:11,21
 237:11,14 239:6
 262:18 275:15 276:14
 280:11 282:1,21
 292:22 300:9 304:18
 309:2 311:8
people's 26:12 138:7,8
 143:19,20 199:7
 302:21
perceive 158:4
perceived 32:4 158:6
perceiving 135:17
percent 261:13
percentage 265:11
percentages 265:13
perception 46:10
 133:20 158:10 269:22
 270:1
perceptions 48:4
 159:18 186:22
percolated 125:18
perfect 139:19 187:17
Perfectly 111:15

perform 92:22
performing 86:7
performs 245:3
period 39:2 50:7 64:14
 180:2 181:6 191:21
 252:14 281:10
periods 22:11
permitted 231:3
person 149:7 170:6,11
 170:15 202:3 226:6,7
 227:2,3
personal 88:3
personally 262:9 277:1
 294:4
personnel 60:4 61:12
 82:4
perspective 28:18 63:7
 74:2 92:11 180:15
 213:11 222:2 226:20
perspectives 68:16
 126:9,22 133:18
 134:16 145:6 214:4
persuade 173:15
persuaded 295:6,18
persuasion 144:19
persuasive 100:17
 294:2
pertains 20:15
petitions 261:14
phenomenon 44:16,17
philosophies 183:11
philosophy 88:12
 189:16
phonetic 303:4
photographic 114:4
phrase 87:13 290:19,21
 290:22 311:6
phrased 66:4
picayune 65:9
pick 171:21 185:5 287:7
picking 225:18 239:11
 274:7 307:1
piece 282:10 307:21
Pildes 2:6 7:22 8:1
 154:8,10,11 160:11
 164:1 165:7 227:11
 227:12 232:9 245:15
 246:13 250:7,15
Pildes' 232:14 245:22
place 32:2 34:5 68:21
 73:2 81:14 83:1,22
 111:16 189:14 261:21
places 76:20 165:1
 237:16 272:4
placing 94:2
plan 61:14,18,18 71:18
 72:3 179:9 181:2
plausible 73:14 184:1

play 21:10 24:8 137:19
169:18 230:6 236:15
253:12
played 41:9 89:10
114:22
playing 32:4
plays 169:16
pleading 73:4 269:13
please 5:12,14 18:5
56:9 127:21 147:4
160:15
pleasure 8:22
ploy 86:13
point 12:4 13:6 23:5
25:15 36:19 49:18
50:2,9,10 51:4 64:17
91:8 103:16 104:17
106:4,7 108:6 113:8
120:4 124:21 125:8
128:3,4 131:10 135:7
141:17 142:10 145:22
148:13 154:4 162:13
167:13,19,20 168:6
171:6 180:15 187:2
187:15 192:12 200:1
200:5 203:15 213:16
214:22 237:10 239:10
246:15 248:10 249:15
250:6 257:16 259:1
269:14 272:3 288:18
290:20 291:3,15
292:2 293:7,8,15
294:2,10,12 296:8
297:19 305:10 307:3
312:4
pointed 24:18 127:9
138:12 192:4 198:21
236:14 246:13
points 13:11 49:2 53:2
77:17 92:4 110:8
124:13 131:8 135:4
136:1 143:20 164:16
176:17 177:1,19
199:7 211:12 215:13
236:5 239:18 299:17
303:15 314:21
poised 30:2
polarization 191:22
polarized 25:19 180:5
policy 85:20 91:9 92:5
92:8 93:2 94:4 95:5
241:15 242:7
political 21:21 22:12
32:5 33:7,13 38:8
46:19,20 60:1,8,22
71:5,17 73:5 81:18
83:2 85:21 88:9 100:2
114:21 126:5,6,8

137:8,15,17,22
139:11 142:11,21
143:9 146:8 151:5
157:18 165:15,19
166:1 167:10 168:20
173:7,9 174:11
177:14 182:14 183:13
184:16 185:8 186:15
186:20 187:20 189:2
192:5,14 193:21
203:12 208:13 209:10
213:11,15,17,18,19
213:22 214:4,10,19
217:17,19 218:2
219:2,6 221:17 235:5
236:16 237:12,13,19
238:4 240:2 241:9,12
241:14 242:7,10
245:14
politically 174:18
politicization 203:10
politics 22:13 40:22
77:8 80:16 106:1,20
108:21 159:17 172:19
178:2 189:8 192:3
226:3
polity 91:19 104:5
polls 25:18
pool 161:13 162:8
popular 25:16 122:7
214:18
population 82:6 219:12
portion 248:6 263:9
266:3 290:11,14
pose 32:6 33:12 222:7
285:4
posed 140:16,17
248:22
position 27:21 30:14
35:6 40:18 80:8 95:14
96:4 103:20 148:14
149:17 169:18 171:11
171:12 222:19 231:15
244:9 248:14 253:11
259:7 278:22 293:13
positions 35:14 134:5
170:4
positive 115:12
possibilities 74:12
141:16 273:10
possibility 74:12,17
119:10 121:11 122:5
205:11 206:6 221:2
233:14 260:5 282:17
possible 25:19 32:14
73:4 77:22 134:1
143:2,18 147:19
155:3 160:9 211:3

217:20 236:7 251:18
270:11
possibly 25:11 47:20
284:20 300:2
post 39:1 50:7
post- 164:10
post-Court 164:10
posted 11:2 13:10
255:9 314:11
posting 13:8
potential 5:10 10:11
55:14 63:3 72:2
101:11,12 122:21
144:5 158:21 193:14
195:20,21 203:4
218:8 222:1 233:11
260:2 262:3
potentially 66:20
122:11 225:2 274:3
302:8
poured 119:18
pours 119:15
poverty 262:13
power 16:13,17 19:22
20:2 22:1 33:14 38:7
47:1 59:4,15 62:5,8
67:6,7,16 69:18,18,22
70:3,10 71:3,4 73:14
73:19 74:19 75:6
96:15 100:1 101:13
106:13 109:11 115:16
117:11 118:19 119:3
119:17 121:9,10,11
122:19,22 128:7,8
142:6,13,17 172:16
173:6,9 175:14,15
176:7 182:14 185:2,9
188:22 200:11,13
213:10 216:6 217:9
217:13,17 219:14
220:12 222:16 226:12
228:4,11,18 229:1,16
230:7 233:4 237:13
238:3,14 241:18
243:4 248:11 250:2
268:15,20 269:20
270:6,7 283:7,7,12
301:7
powerful 101:6 127:11
135:2 179:21 192:20
312:10
powerless 113:18
powers 22:9 46:22
48:14 69:20 74:14,18
98:3 120:21 188:12
192:18 267:22 268:3
270:21 305:4
practical 160:6 172:11

187:2 250:11
practically 291:20
practice 125:2,3 149:12
166:5 264:19
practice-based 74:15
practices 3:20 121:4
156:9 254:9 255:21
256:11
practitioners 303:7
praise 227:14
pre-clearance 87:1
113:19
pre-dates 155:5
precedent 100:11
289:22
precedential 258:13
268:16 282:8 289:16
precise 53:13 243:2
244:3
precisely 69:17 110:17
111:2,17 138:16
152:1 176:6 295:13
312:2
predicated 42:8
predict 214:11
predictable 157:3
158:16 184:19
predictions 195:13
predominant 213:8
predominately 221:15
prefer 68:2 158:8
preference 169:1 277:3
preferences 88:3
213:21
preliminary 12:10
14:20 30:11 75:6
305:8
premise 99:16
preparation 58:8 111:9
154:5 255:4
prepare 12:15,18 98:12
217:6
prepared 9:12 12:13
17:10 29:19 57:22
153:16 216:10 254:12
254:18 257:3
preparing 56:11
present 1:10 5:15 91:10
96:7 98:14 122:15
125:4 126:2 169:10
172:1 199:1 216:5
223:4 226:10 238:21
304:16
presentation 79:7 83:8
229:14
presentations 146:15
presented 22:15 79:12
80:4 95:20 165:7

216:21
presenting 24:3 27:5
 102:2
presently 106:22
presentment 246:5
presents 184:9 230:21
preserve 173:18 181:14
preserves 174:9
preserving 121:21
presidency 187:9,10
 202:17 204:5 205:19
President 10:3 12:19
 13:22 14:18 15:10
 22:20 45:20 60:6,7,15
 60:18,22 61:8,10
 62:18,19 76:7 85:20
 100:6,8,9 105:11
 137:18 138:9 152:8
 155:19 156:5 157:6
 158:8 159:14 165:18
 169:19 170:3,12,13
 173:12 185:3 201:22
 203:3 206:4 219:19
 229:3 239:8 273:8,9
 273:12 276:9 283:11
 283:19 310:7,17,22
 311:1 312:3 313:16
President's 52:20 156:1
 169:15 188:18 245:11
presidential 1:1 4:4
 122:6 155:19 156:2,6
 157:7,9,16,19 172:8
 172:16 174:4 175:15
 176:7 180:12,12,14
 180:14 181:18 184:20
 201:8 202:18,22
 224:13 263:18
presidentially 172:20
Presidents 157:13,15
 157:22 158:20 161:3
 164:2 165:17 171:7
 173:2,6,15,17 175:8
 177:13 200:10 201:8
presiding 1:9
pressure 234:6,8,13
 258:18
pressures 234:17
presumably 67:10
presume 278:12
presumption 107:13
presumptuous 98:7
pretty 62:3 146:4
 191:16 307:9
prevent 60:21 63:3
 101:1 144:21
preventably 247:20
preventing 41:9
preview 31:19 33:17

previous 90:19 91:5
 171:1
primarily 32:1 46:19
 286:8
Princeton 2:16
principals 218:22
principle 10:9 42:8
 142:12 226:2,6,12,18
 227:2
principles 42:10 223:2
prior 153:14 188:7
prison 280:12
Pritzker 2:1
privileging 135:12
pro-expansion 98:21
probably 34:8 76:8,10
 76:11 77:2,6 97:3
 127:3 162:7 163:13
 163:15 164:4 179:7
 195:9 199:22 210:21
 211:6 212:1 238:16
 239:3 272:14 301:10
 302:14
problem 56:17,19 97:2
 97:8,12 102:19 107:3
 123:15,15 140:2
 174:21,22 181:5,11
 191:1,2 198:20 205:7
 205:8 211:14 212:12
 212:20 221:14 233:9
 233:22 234:2 238:20
 249:21 261:10 263:18
 273:1 274:13,18,19
 297:3 300:13 311:9
problematic 80:7
 163:11
problems 27:3,16 47:6
 86:1 96:21 103:9,13
 103:17 166:19 172:11
 172:22 175:21 179:20
 189:21 193:17 198:22
 253:9 269:19
procedural 308:19
procedure 263:17
procedures 20:9
 191:15 254:10 255:21
 256:10 258:6,7
 267:22 268:3 278:9
 280:5,17 286:1 308:8
proceeding 144:22
proceedings 64:9
 110:8 256:5
process 10:2 67:12
 105:9 106:21 151:5
 157:2 158:14 172:14
 174:12 179:4 181:15
 182:22 185:7 186:20
 188:3 189:18 190:21

190:22 192:10 193:9
 203:12 207:10,12,17
 208:13 209:10 211:21
 214:1 215:16 234:9
 234:17 237:13,19
 238:4 246:5,6 247:3
 253:3,12 269:15
 273:17 274:14 279:7
 279:15,20 285:21
 287:3 304:19 305:14
 305:15 308:2,6,11,14
 312:11,18,22 313:3
processes 83:2 172:6
 173:18 214:12
proclamation 224:13
produce 14:17 93:11
 107:5
producing 49:5
product 84:19 87:9
productive 153:11
 314:20
Products 83:1
professes 301:18
profession 80:21 82:8
 279:12
professor 41:20 42:4
 67:17 70:8,18 71:6,15
 119:22 174:4 178:3
 197:5 198:15,20
 212:20 213:13 227:13
 228:8,8 239:18,19
 266:12 291:15 292:3
 292:9 293:10,22
professors 195:6
profile 280:15
profit 166:3
profitably 137:4
profound 117:1 119:4
 172:1
profoundly 114:7
 116:18 269:4
profusely 56:11
programs 61:17
progress 120:16
Progressive 22:5
prohibit 262:6,10
project 22:19 36:14
 81:16 277:8
prolong 309:10
prominence 43:3
prominent 12:22 21:21
 61:7 101:14
promote 17:16 31:10
 260:20
promoting 24:12
prompt 103:5 143:5
promptly 215:19
prompts 253:17

prongs 289:11
proof 94:2
proper 69:19 73:15
 74:20 121:21 125:21
properness 203:17
property 175:10
proponent 139:6
proponents 25:9 93:18
 99:10,20 100:19
 157:20 198:3 221:22
proposal 19:15 53:19
 55:3,4 63:18 71:13
 142:15 155:5,14,15
 155:18 158:15 160:7
 173:10 196:22 206:20
 243:4,6
proposals 10:13,20
 11:10 13:1 16:2,3,7
 16:13,15 19:9,11,14
 19:18,22 20:1,5,13
 21:18 22:8,9,15 23:19
 26:12 30:4,7,13 31:6
 57:16 59:7 63:14
 68:15 75:3 126:14
 132:17 154:17 155:2
 155:22 171:22 172:12
 182:5 191:2 205:4
 206:21 216:6 217:8
 217:12,14 218:8,11
 220:7,15,19,20
 221:21 222:8,11,20
 223:22 242:12,13,15
 242:18 244:14 255:19
 256:10 258:9,15,17
 259:3,19,22 285:14
 285:17 286:9 303:5
propose 40:15 44:9
 65:18 191:14 274:22
proposed 53:18 105:11
 125:6 126:3 162:4
 191:8 284:9
propriety 203:17
pros 113:6 193:14
 198:1 212:4
prosecute 230:3
prosecution 230:13
prospect 181:5
prospective 169:16
protect 21:12 253:3
protecting 222:4
 236:20 237:2 242:9
 242:10
protection 32:12
protections 220:22
prove 144:22
provide 9:12 15:22
 17:19 18:18 22:21
 31:8,10 33:9 51:17,20

54:9,11 60:3 152:9
 159:1 160:8 166:10
 166:15 209:14 245:9
 245:10 255:8 258:3
 264:11 273:9 277:8
 315:2
provided 4:10 23:15
 44:13 47:11
provides 300:19
providing 10:5,8,19
 310:7 315:1
provincial 252:11
provision 88:16 113:19
 249:1
prudent 75:12 76:10
 77:5 160:1 204:21
prudential 59:5 195:4
 205:5 215:15
PSCOTUS 11:22
public 4:9,10 10:6,13
 11:6,7,9,12,14,18,21
 12:3 13:16 14:7,10,19
 24:4 25:18 26:4,11
 27:3 28:16 42:1 51:1
 54:5,7,15 80:21 83:21
 83:21 89:17,21
 102:12 135:6,9
 139:13 141:18 144:7
 152:6 158:3,11
 159:17 168:10,11,16
 168:16 169:4,6
 178:15 193:3,5 197:7
 201:9 204:11 206:16
 222:21 238:22 244:18
 245:6 247:21 255:16
 255:19,22 256:2,4,21
 257:8,17 258:3,11,19
 259:5,11,22 264:11
 264:13 266:21 273:10
 273:12 276:9 283:16
 283:19 288:9 289:6
 299:11 311:2 313:17
 313:21 314:1
public's 46:10 269:22
 312:12
publically 13:10
publicly 261:5
publish 313:19
pull 276:12
pulling 204:10
pulse 288:21
punished 27:21
punishment 308:6
purely 51:15 83:10,14
purport 144:10
purporting 221:16
 249:2,4,7
purports 282:7

purpose 12:11 70:12
 109:20 111:22
purpose- 74:14
purposes 37:7 111:8
 250:11 308:4
pursue 53:19 55:4
 143:3 144:16 209:19
 210:3,8 275:2
pursuing 222:22
push 181:19,22
pushes 199:12
pushing 175:3
put 11:22 32:8 67:8
 77:19 83:13 100:15
 112:9 114:20 120:3
 122:9 134:12 147:5
 163:15 164:21 169:2
 189:3 197:9 202:1
 217:6 228:12 242:2
 245:4 302:4
putting 72:3 109:12
 114:14 188:8 286:5
 303:19 304:21
puzzles 130:1

Q

qualified 20:3 148:14
 149:7
quality 68:11 112:8
 305:13
question 17:16 27:8
 31:5 48:9 50:16 62:7
 64:2 70:9 76:4 86:12
 92:2 108:10 115:1,2
 117:17 128:20 135:21
 141:8 142:18,22
 143:17,19 144:2
 160:19 169:9,14
 184:8 187:21 205:6
 208:10 214:5 221:11
 232:20 239:3 240:1,3
 241:5 244:9 250:5
 268:8 279:21 280:18
 281:17 294:13 312:2
questionable 97:5
questions 9:14 16:20
 17:2 20:19 21:8 30:22
 64:8 67:12 94:6
 111:14 118:21 140:15
 140:16 145:3,5
 147:18,21 188:11
 189:13 194:12 195:4
 205:13 209:17 220:18
 221:17 224:8 252:3
 256:4 288:14 303:10
 304:15,16 314:18
queue 65:8 136:14
 145:9 277:17,18

queued 145:20
quick 30:18 110:7
 135:4 177:19 236:5
 276:1 299:16 309:10
quickly 27:15 37:16
 145:11 197:18 208:6
 236:10 279:19 302:22
 309:15
quiet 135:22
quite 32:14,15 40:1
 43:21 49:13 51:3
 59:16 66:6 70:1,19
 78:6 90:16 141:18
 148:13,16 149:1
 185:2 187:5 199:11
 205:13,17 208:14
 212:8 224:20 231:19
 232:12 284:1 293:17
 306:15 307:16 308:20
quo 11:11
quotation 44:2
quote 36:6 64:5 107:10
 170:6 174:6
quotes 293:11,11

R

race 82:8
raced 105:16
racial 41:9 108:21
 114:5 237:8 238:1
radical 139:6
raise 20:18 56:9 58:13
 64:18,19 127:20
 141:17 144:20 160:16
 214:22 228:9 248:3
 267:9
raised 9:14 21:9 57:15
 58:10 70:8 71:15
 82:17 94:6 111:14
 141:18 146:1 162:2
 164:13 186:7,11
 216:15 221:19 239:18
 257:17 265:5 279:21
 306:21
raises 16:20 93:17
 141:7 155:14 196:17
 241:5 281:15
raising 216:19
rallying 199:3
Ramsey 2:7 8:2,3 34:18
 34:19 39:11,20 40:1
 68:8,9 72:13,18 75:2
 117:10 197:16,17
 239:14,15 243:12
Ramsey's 243:16
random 174:16 184:12
randomly 174:7 207:15
randomness 157:5
range 10:16 13:15
 121:16 163:16 255:16
 256:9
ranging 9:10 13:19
 14:10 154:1
Rapporteur 1:13 153:9
rare 44:15 146:8
rarely 86:9
ratchet 113:16
ratification 28:21
ratifying 108:20
re-enact 230:9
re-oriented 271:7
reach 146:17 162:11,14
 221:22 250:1
reached 270:12
react 243:15
reaction 279:22
reactions 94:14
read 31:2 81:17 88:16
 101:18,19 109:14
 165:9 237:5 291:1
 311:22 312:19
reader 303:20 304:21
readers 40:6 43:21
reading 10:12 11:4 27:5
 58:7 77:15 79:17
 134:14 200:4 211:7
 255:3 270:3 304:22
reads 79:7
ready 117:10
real 37:16 50:16 52:15
 85:6 92:7 102:18
 173:21 181:5 191:20
 196:12 233:22 234:2
 256:5 264:11 265:22
 303:22 314:19
realistic 170:1
reality 174:11 179:13
 180:9 280:22
reallocate 270:13
realm 280:18
realms 166:22
reap 101:5
reason 74:19 75:18
 82:3 87:21 93:10
 96:12 112:19 119:7
 129:8 130:21 142:7
 147:5 161:21 173:5
 173:14 175:17 185:11
 192:10 209:15 210:2
 210:7 241:19 273:7
 276:14 286:11,14
reasonable 100:20
 111:15 179:2 184:2
reasonably 134:19
 261:11,17
reasoned 89:13 298:16

- reasoning** 87:12 258:4
258:12 279:14
- reasons** 60:2 73:11,12
73:16 75:2 80:6 82:7
82:9 83:7 100:3
103:14 118:14,16
119:14 142:9,10,22
155:10 158:6 165:21
166:5 191:15 243:18
243:21 294:7
- recall** 256:12
- receive** 270:22
- received** 5:4 11:5,20
42:14 96:2 102:16
244:15 245:5
- receiving** 11:12 314:2
- recess** 152:21
- recognition** 284:7
- recognize** 29:4 41:13
72:13 81:11 132:10
147:3 172:21 195:20
195:21 243:12 255:6
277:13 280:7 281:13
290:7
- recognized** 129:17
253:15
- recognizes** 242:22
- recognizing** 175:20
258:5 260:11
- recommend** 11:4
- recommendation**
176:22 189:1
- recommendations**
10:18 150:6 176:20
212:3 310:5
- recommending** 312:7
- reconcile** 134:2
- reconsider** 251:2
- reconsidering** 235:6
- reconstructing** 141:6
- reconstruction** 44:1
139:5,6 243:22
- reconvene** 57:7 215:19
253:22 313:11
- record** 57:10 153:5
215:22 237:5 254:4
275:8,9 315:9
- recorded** 4:15
- recounting** 43:5
- recurring** 31:3 257:17
- recurs** 27:16
- recusal** 17:1 261:13
- recusals** 260:1,16
- recycle** 166:9
- redirect** 234:16
- redraft** 232:5
- reduce** 16:13 216:6
217:9 222:15 243:7
- 270:7 271:3 272:6
- reduced** 44:8 60:20
121:15 226:12 241:18
- reducing** 212:10 239:21
243:4 258:18
- reduction** 28:4
- reestablish** 99:13
- refer** 13:8 21:2 25:16
154:22
- reference** 25:1 37:20
57:21 70:17
- referred** 33:4 67:15
- referring** 46:12 170:22
237:7,11 311:18
- refine** 30:15
- reflect** 17:11 18:15 28:5
58:1 90:14 98:11
107:20 153:17 216:11
221:4 254:18 313:14
- reflected** 25:17 47:10
102:17 133:10 240:14
240:17 285:6 310:1
- reflections** 132:13
- reflective** 208:12 209:8
- reflects** 73:12 103:2,2
103:20 106:2 110:3
142:4 187:17
- reform** 11:10 12:17,22
13:16 14:19 16:2 17:8
19:9,11,13,18 20:13
21:18 22:15,17 25:20
30:3,13 31:5 46:14
51:7,9 53:18,19 54:19
55:3,4 57:16 58:5
61:14 63:13,17 96:11
98:8 103:6,16 126:4
144:5,6 150:19
153:22 155:3 190:20
191:17 209:15,19
216:15 247:17 252:4
255:1,20 273:2,10
285:17 302:4
- reformers** 94:2
- reforming** 10:10 141:16
217:12 270:8
- reforms** 16:7 24:13
25:22 48:9 75:7 126:4
175:12 191:8 193:15
193:15,19 215:16
220:21 221:7 222:22
255:17 273:2 282:17
283:4,7,20 284:8
- refraining** 43:22
- reframe** 95:1
- refuse** 136:3 149:4
- refuses** 191:6,7
- regard** 36:20 85:2
114:13 122:20 189:20
- 242:16 244:5 300:4
- regarded** 250:18
- regarding** 5:5 73:6
131:15 154:16 176:7
214:22 215:10
- regardless** 109:4 114:4
210:2 252:15
- regimes** 104:19
- regular** 191:11 201:2
258:14
- regularize** 157:1 180:20
- regularized** 203:11,20
- regularizing** 158:12
- regulate** 69:18 70:5
108:21
- regulation** 88:18
- regulations.gov** 11:19
11:21 12:1 314:8,12
- Rehnquist** 184:6
- reinforce** 175:13
- reinforces** 46:18 85:18
- reiterate** 18:11
- reject** 86:21 169:22
177:12
- rejected** 45:1 61:19,21
88:2 125:7 251:1
- rejecting** 101:18
- rejection** 96:17
- rejects** 99:15,16
- relate** 82:7 83:18
- related** 51:13 136:17
167:7 249:15 282:18
282:19 297:19
- relatedly** 73:17 250:6
- relates** 117:20 144:2
194:6 246:14
- relating** 71:17 203:15
243:21 247:9 256:10
- relation** 16:14 216:7
218:7 220:17
- relationship** 21:8 22:12
193:20 245:14 287:8
- relative** 173:7
- relatively** 44:15 65:8
141:4 158:20 211:4
223:16
- relevant** 133:20 141:14
271:7 284:21 287:4
289:12
- religious** 280:13
- reluctant** 33:8 247:7
271:12
- remain** 106:22
- remaining** 64:18 151:16
160:15 196:5
- remark** 149:17 309:15
- remarkable** 84:12,15
- remarks** 3:4,22 9:2
- 12:10 59:9 215:6
236:11 309:18 313:8
- remedy** 102:20
- remember** 88:5 133:6
- reminded** 89:4
- reminders** 4:14
- remove** 158:18
- renew** 224:1
- repeat** 53:4 176:16
199:7 284:18
- repeated** 167:17 251:5
- repeatedly** 89:11
176:19 192:13 226:8
- replacing** 122:5
- report** 5:8 12:18 13:12
13:22 14:17 20:21
24:4,8,16 25:8 30:2
31:21 34:11 47:20
49:6 50:12,13 52:15
56:1 73:12 76:7,13,15
80:2 82:14 90:2 96:19
98:13 101:10,17
102:1,16 111:20
112:11 115:2,12
116:22 119:15,18,19
120:5 122:18 131:11
131:16,18 132:19
133:11 134:15 165:6
165:7 167:11,12
172:5 175:21 182:16
212:6 230:21 263:9
265:7,8,20 266:17
269:13 271:6 275:3
275:13 276:8 284:6
287:14 288:17 291:1
291:2 292:18 293:6
293:21 294:3 297:9
300:3,22 301:18
303:14 309:6 311:1
313:13,20
- reports** 115:8 175:11
249:12
- represent** 13:4 52:17
54:7 82:20 126:8
276:13
- representation** 93:8
- representative** 219:12
- representativeness**
200:17
- representatives** 21:14
- representing** 208:18
227:7
- represents** 14:18 108:9
- reproductive** 63:1
114:11
- republic** 43:11 89:2,5
146:20 245:13
- Republic's** 86:15

Republican 60:16 61:3
76:4 87:3 108:2 116:2
193:8 196:20
republicans 81:20
83:16 85:14 105:8,14
105:21 107:7 108:1
126:18
repudiated 44:12
reputation 80:22
172:17
requests 268:12
require 103:17 159:21
166:19 207:9 210:6
210:21 215:12 218:2
218:22 235:18 249:4
253:10 262:5
required 208:10 209:22
requirement 64:4 65:13
225:11 236:8,13
requirements 4:19 5:5
87:1,17 218:1 220:6
224:22
requires 51:19 141:7
162:11 173:15 209:5
218:14 231:18 274:20
274:20
requiring 67:3
research 12:15
reshape 61:7 122:22
resist 132:21 177:15
resisted 177:8
resisting 24:12
resolution 147:19
150:2 151:9
resolve 97:21 183:14
217:17 220:18 221:16
248:15
resolved 210:11,12
219:7
resonates 197:7
respect 14:15 27:18
28:14 53:9 54:19
55:18 65:13 72:9 81:9
81:11,13,15 82:19
83:6 84:17 85:15
89:15 93:5 96:5
102:18 110:2 212:21
220:12 242:8 266:11
291:21 293:5 296:6
303:14
respectful 15:8 308:16
308:17 310:20 312:6
respects 35:13 70:5
90:13 94:17,18
respond 63:5 119:17
213:7 278:2 302:22
306:3
responding 118:3

290:15
response 27:8 50:22
61:15 77:22 101:13
136:1,9,13 148:5
290:10
responsibilities 167:1
268:9
responsibility 212:19
responsible 19:6
190:15 283:21
responsibly 121:17
responsive 168:10,15
185:14 186:12,13
208:12 209:1 299:10
306:6
responsiveness 168:21
186:15 187:20 188:12
189:3 208:11,15
rest 25:8 173:7 175:7
175:11 194:6 207:20
218:11 269:6 296:21
restaurants 42:3
restore 63:2
restrict 108:20,22
restructure 63:15 210:1
restructured 98:21
240:15
restructuring 51:10
59:7
rests 107:11
result 29:21 80:7 93:19
116:1 174:14 250:1,1
results 25:1 70:13
122:11 177:10 185:15
234:15
resume 57:13 216:3
resumed 57:10 153:5
215:22 254:4
retaining 11:10 67:6
retains 206:5
retaliation 143:5
rethink 73:7
retire 158:5,7 162:18
retirement 156:13,18
157:11 161:12 162:15
163:16,20 164:7
166:11,13
retirements 214:7
retiring 158:4 162:21
295:10,12
retroactively 43:17
return 152:21
returned 100:9
returning 250:21
revealing 280:21
reveals 282:4
revelations 89:4
reverse 107:12 149:1

reversed 308:5
reversing 116:10
review 3:19 67:13
220:11 224:3,11,22
227:18 239:2 242:14
244:22 248:12 254:11
255:10
reviewed 5:9
reviewing 68:12
reviled 44:6
revised 98:14 125:9
revision 91:5 245:10
revisions 98:17 102:5
revival 38:6
revolves 209:20
rhetorical 199:8
rich 9:10 38:15 49:1
217:7
Richard 1:17 2:6 6:15
7:22 23:9 47:1 227:11
Rick 154:8
RIDRIGUEZ 239:12
rightly 115:11
rights 21:12 40:17
41:22 62:22 113:17
113:20,21 114:11,12
116:4 129:4 203:7
219:8 220:22 221:1
222:4 236:11,17,20
236:21 237:3,7 253:2
253:2,4,14 280:11
281:22
rigorous 15:7
rise 20:19
rising 241:12
risk 76:1 104:18 122:16
158:3
risked 121:11
risks 121:13 144:20,22
172:1,3
Robert 1:8,10 41:7
Roberts 184:7
robust 13:19 58:6
153:22 255:2
rock 304:8
RODRIGEZ 313:10
Rodriguez 1:9,11 3:4
8:4,5 9:1,3 12:9 14:22
15:1 18:8,9,12 19:14
23:1,11 29:14,18
34:16 39:10,14 45:12
48:17,21 52:2,6 56:3
84:11 90:6 112:7
140:8,11,13 145:9
208:3,5 216:2 217:3
223:5 225:18 227:9
227:13 232:8 235:20
238:5 243:11 247:22

251:12 263:7 309:17
311:11 312:17 313:9
Roe 38:13 77:17
role 3:16 4:21 10:6
16:14 21:10,14 24:6
36:17 37:3 41:9 45:20
46:2 57:3 82:21 86:7
88:19 89:11 91:21
92:19,21 137:19
169:16,18 179:10
188:17,18 198:8
216:7 218:6 221:8
236:15 239:20,21,21
243:7 245:13 253:11
285:1 297:9
roles 89:8 92:21 206:15
270:2
roll 3:3 5:11
room 66:4 87:13 88:3
115:20 195:7 315:4
Roosevelt 2:8 8:6,7
38:1 50:20 61:10
182:7,8
Roosevelt's 61:8
213:16
rooted 122:14
Ross 2:9 8:8,9 131:6,7
133:2 208:4,7 212:15
212:16 225:19
rotate 63:20
rotation 63:19 64:3
rough 201:1
roughly 167:14 174:7
round 152:14
routinely 66:10
row 276:14
rubrics 27:7
rule 81:2,9,15 82:19
89:12 220:16 221:7
229:11 231:17 240:15
241:2,4 250:19
rules 3:20 16:17 180:7
191:5 218:1 234:11
234:21 235:6 242:1
244:5 296:22
ruling 108:11 118:2
rulings 61:16 104:6
108:19 109:1 257:11
257:19 258:1,13
276:7
run 22:3 66:20 148:15
206:3 212:19
running 40:20 166:12
205:19
Rutgers 1:14

S

S 2:1 61:3

- sacrifice** 186:18
safe 161:7
salient 97:10,22
San 2:7
sandy 207:21
sanitize 44:4
satisfaction 143:19
satisfied 141:13
saucer 193:2
save 139:5
saw 59:11 83:1
saying 30:18 39:7
 57:18 76:8 93:17
 113:17 116:20 125:12
 151:17 189:11 226:10
 251:1 253:6 292:16
 298:18 301:17
says 69:8 70:2 99:17
 105:14 125:4 138:5
 139:2,7,8 167:11,12
 167:12,13 168:8,8
 223:21 229:1 265:2
 285:8 291:12 292:4
 299:22
SBA 272:9
Scalia 2:15 178:11
 291:11
scandalous 45:3
scarcely 133:6
scene 35:4
schemes 207:14
scholarly 120:19
 128:10
scholars 36:12 72:22
 97:18 227:17 228:7
 230:17 256:19
scholarship 231:2
school 1:10,11,12,13
 1:14,15,16,17,18,18
 1:19 2:1,1,3,3,4,4,5,6
 2:7,8,10,13,15 41:17
 43:13,14 82:9 206:8
 206:11
Schumer 107:12
scientists 192:14
scope 14:19 28:4 59:3
 122:19 217:13 261:10
 289:21
Scott 44:1,3,5,13 45:1
scratch 180:17
search 198:19 205:8
seat 117:8 158:9
seats 58:22 62:8 96:22
 99:11 100:5,7,9 157:8
 157:14,18 173:22
 203:18
Sebelius 249:18
second 16:5 19:8,18
 37:16 49:17 63:18
 80:14 86:3 91:8 99:4
 106:7 108:6 118:5
 139:17,22 156:2
 177:5 180:3 198:11
 209:12 215:14 218:19
 224:18 229:4 237:10
 244:11 257:4 258:20
 267:10 269:14 301:7
 304:1
Seconding 147:13
secondly 56:20
section 21:15 39:21
 44:14 50:18 51:15
 58:17 68:3,12,14 73:6
 79:9 104:17 178:22
 197:22 199:9 223:20
 223:21 224:20 232:16
 264:3,5 276:2,3
 281:19 283:6 290:17
 308:4
secure 21:11 109:3
securities 261:6
security 304:15
seeing 56:10 294:5
seek 101:5
seeking 106:13
seen 78:21 81:12 192:1
 201:6 214:19,20
 224:14 226:14
sees 174:21
seized 270:12
select 60:6 61:4
selected 207:15
selecting 61:1
selection 3:19 51:18
 254:11 257:5 258:21
 267:11 269:15 274:14
self- 109:7 302:3
self-government 114:8
 116:7
senate 62:17 100:4
 136:3 157:20 172:18
 173:11,15 181:15,17
 185:3 187:10 191:6
 192:11,22 193:1,10
 211:12,17 257:1
 310:14
Senate's 19:2 188:17
 191:14
Senates 173:17
Senator 107:12
senators 192:15
send 90:7 97:12 116:22
 119:4
senior 43:14
seniority 162:12
sense 24:5,9 27:7 44:20
 51:2,7 67:19 69:15
 73:20 83:21 91:22
 106:8 107:8 109:15
 118:22 132:3 164:15
 184:18 197:3 202:13
 203:8 209:2,3 242:11
 248:18 252:5 263:11
 268:5 286:7 287:17
 296:17
sensitive 110:12,15
 227:1
sensitivity 14:2
sent 96:20
sentences 104:16
sentiment 204:12
separate 12:15 274:6
separately 256:22
separates 296:11
separation 188:12,21
sequence 113:2
series 113:16 114:2,6
 117:20 151:4
serious 71:12 97:8,14
 98:1 198:21
seriously 75:20 78:14
 78:17 92:1,16 130:8
 190:8
serve 19:21 60:4 67:7
 86:13 144:15,16
 153:9 154:20 156:5
 158:17,21 205:12
 220:2
served 178:9
service 3:13 63:20
 178:8,14,15 264:11
Services 9:19
session 3:7 15:13 16:5
 16:9,12 17:5,5 18:5
 62:12 65:7 142:5
 144:18 153:13 216:4
 253:22 254:1,8
sessions 12:12 15:18
 153:15 225:17 247:14
set 9:8 13:10,14 15:21
 16:19 35:16 52:19
 55:15 58:12 70:4 71:1
 98:1,22 104:15 113:2
 118:21 121:3,15
 122:20 130:21 154:3
 161:3 163:18 166:18
 177:21 185:5 186:6
 194:18 195:11,12
 198:9 207:15 213:18
 216:3 266:16 283:3
 284:9
sets 12:12 15:15 94:5
 256:15 285:22
setting 35:3 46:9 59:20
settled 221:4
setup 180:18
seven 40:9 59:20 60:10
 60:14,21 102:16
 187:7
shade 92:9,13 168:7
shades 168:5
shadow 40:3 263:14
 268:6 271:21,22
 278:9 280:5 287:9
 292:14,15 297:19
 299:7 300:22 305:3
 306:7,19
shape 59:14 60:19
 167:15 171:7 183:8
shapes 96:18 269:21
shaping 253:12
share 204:19 232:14
 274:4
shattered 203:2 266:13
She'll 7:9
sheep 78:2
Shelby 86:19 87:7
 115:19 116:1,14
Sherrilyn 7:7,8
SHERRILYNN 1:21
shifting 217:17
shifts 161:13
shoddy 306:5
short 35:10 89:17
 145:18 146:14 156:4
 156:22 187:8 202:3
 263:10 281:9 306:12
 307:17
shorter 177:20
shortly 9:9 255:6
shot 162:3
shouting 309:13
show 274:12 312:3
showed 272:8
showing 279:14,14
 301:22 309:3
shown 274:17 288:2
shows 59:15 124:12
shrunk 100:4
shut 148:18,18
side 19:6 33:11,19 99:3
 106:5 107:19 115:13
 122:16 167:4 171:15
 184:17 211:18 226:13
 276:17 282:11
sides 96:8 98:15 101:12
 111:2 133:21 151:11
 198:10 227:7 293:13
 313:4
signal 119:4
signals 81:15
significance 280:10

significant 135:9
261:11 264:15 265:1
265:16,21 286:17
311:5
significantly 162:7
signing 119:20
Silence 147:9
silences 82:16
similar 63:9 128:21
156:6 162:21,22
163:8,18,21 207:9
269:15 300:8
similarity 294:16 305:5
similarly 129:4 156:15
312:9
Simple 88:12
simplify 37:13
simply 53:3,16 93:9
94:1 100:15 109:7
113:11 117:18 145:22
149:10 169:10 191:6
191:7 192:9 198:9
203:16,20 204:1
312:14
single 52:14 125:5
162:13
singling 274:5
sinister 89:19 266:14
sir 95:9
sit 45:7 273:17 308:18
sits 125:5 283:7
sitting 60:6
situate 16:2 140:19
situating 30:3
situation 25:19 116:21
214:16
six 46:13 59:18 60:10
61:9 148:19
sizable 120:18
size 3:11 19:15 28:3
57:17 58:21 59:4,19
59:21 60:3,16,20
61:22 62:4 69:10 70:4
70:11 71:1,13,18,21
73:10 74:19 75:13,15
75:18 100:2,5 128:9
142:9,21 149:3,9
191:4
skeptics 236:13
sketch 30:12 45:6
63:14
skilled 202:10
slants 80:3
slate 122:6 150:6
slavery 44:9
slide 208:16
slides 78:7
slightly 161:3 232:19

slippery 131:14,22
132:5
slope 131:15 132:1,6
sly 203:2
small 41:2 77:5 131:10
165:11 238:13
smaller 165:12 223:19
so-called 299:7
sober 313:5
social 217:17 241:15,16
242:6
society 115:16 123:11
123:13,18
soften 188:1
softening 189:2
solace 187:22
solely 208:17
solicitor 41:17
solidified 73:17
solidify 144:17
solution 194:20 198:19
205:8 234:5 262:6,17
270:4
solutions 233:12 262:4
270:11
solve 193:17 211:13
233:10 234:1
solved 175:1 234:3
solving 181:10
somebody 136:12
something's 301:17
somewhat 31:12
112:20 186:13 260:19
268:20 277:2
soon 61:13 315:7
sorry 112:5 153:3 240:8
277:7 300:6
sort 30:12 35:5 36:15
36:18,22 37:4,18,18
39:1 42:20 43:12,16
44:2 49:9,18 50:7,15
50:19 55:17 65:18
74:1,14 76:16 78:7
128:17 130:6 131:13
132:8,21 138:17
169:17 196:21 199:2
201:6 205:5 206:10
206:15 214:10 251:19
258:13 264:18 265:14
265:22,22 271:12,15
271:18 272:11,15
273:19 274:2,6,18
277:2 286:22 291:2,8
296:10 297:5,10
299:17 300:6 301:18
301:20 302:7,8
sorts 138:17 178:16
263:1 294:6

Sotomayor 88:10
sought 61:11
sound 170:6 266:14
source 40:22 69:17,22
233:22
sovereignty 183:17
space 35:10 82:18
286:6 294:7 309:5
spare 66:7
spark 278:1
speak 15:16 58:13
64:13 66:12 85:12
145:21 147:7 151:15
175:17 251:13 260:15
271:12 284:16 294:1
297:14
speaking 45:15 65:22
110:20 148:8 174:13
294:15 310:16,21,22
speaks 44:7
special 5:6 73:2,4
192:19 204:22 241:8
241:9,12 268:7
269:13 277:3
specialized 276:11
specialty 36:4
specific 10:18 105:4
124:17 154:21 170:4
186:10 229:8,9,9
233:2,6 235:1 267:17
272:16 308:18
specifically 46:12
220:7,13 237:7 243:5
258:16 277:6 303:8
specified 19:21
specify 168:22 209:2
spectrum 10:17 107:19
196:14 211:6
speculation 94:13
speculative 93:2
speech 129:2,3,6
speedy 191:10
spend 232:17 274:11
spending 314:14
spends 263:12
spilled 128:6,10
spoils 177:14
spoke 247:13 302:21
spoken 64:16 134:9
295:2
spouses 261:4
squarely 234:19
staff 180:16
stage 15:21 35:17 46:9
49:15 55:15 259:2
287:1
stake 83:5
stakeholders 4:9

stakes 46:14,20 281:15
stance 104:11
stand 168:17
standard 76:19 93:17
standards 17:2 268:14
282:4 287:21 289:12
standing 132:12 260:4
stark 285:5
start 27:5 30:18 34:20
39:7 59:10 102:11
154:8 176:18 182:9
207:14 247:7 272:20
296:15
started 26:9 260:7
272:3 291:8
starting 27:9 36:19
52:10 57:5 62:2
180:15 181:16
state 31:9 47:8 76:4
122:5 129:19 156:9
156:11,13 162:1,5,7
162:16,20 163:3,4,6
183:17 187:11 222:13
224:6 225:1,13
238:16 242:8 243:20
250:20
stated 96:3
statement 14:1 212:4
statements 36:21 67:10
256:21
states 1:1 4:5 40:8 41:2
41:11 42:7,16,20 45:8
66:15,17 67:22 81:13
93:9 156:15 192:11
192:22 219:19 225:9
227:18 229:2,4 230:1
242:5 249:11 269:12
stating 5:16 293:13
statistics 265:5
status 11:11
statute 88:17 206:2
215:11 218:13 228:5
229:22 230:21 231:3
231:12,16 250:12,15
251:19 259:17 308:13
statute-able 37:2
statutes 97:4 233:5
270:8
statutory 249:2
stay 166:8 187:6 240:12
stays 169:5 294:8
step 82:5 117:4 134:17
177:10 202:3 244:12
Stephen 87:7
stepped 219:6
steps 295:19
stick 99:2 304:9
sticks 230:12

stock 262:1
stockholding 311:7
stocks 260:17 262:8,11
stop 49:19 84:2 109:21
 116:20 127:15 160:8
 166:9 184:16 189:11
stopped 132:15
stopper 132:8
stopping 150:21
stops 110:1 150:15
storm 89:3,7
story 141:1,5,14 178:11
 309:4
straight-forward
 260:21,21
strain 192:8
strategic 158:5 184:14
 213:3,8 214:2,7
strategies 246:11
strategy 87:3
Strauss 2:11 8:10,11
 18:3,5,7 23:2,18
 24:17 164:18,19
 171:17,21 177:6
 182:11
Strauss' 189:1 200:1
straw 104:15
streamed 4:16
streaming 260:6
Street 105:19 107:11
strength 238:2,3
 289:21
stricken 223:20
strike 32:20 67:4 165:9
 236:8 304:22
strikes 32:10 96:5
 250:7 268:20 269:13
 285:18 294:15
striking 163:16
strip 129:2 223:22
 239:7
stripping 33:12 126:10
 126:12 128:5 138:22
 217:22 220:5 226:5
 238:13 240:14 245:1
 295:15
strive 53:13 54:11
strong 62:3 185:21
 190:2 225:6,9
stronger 186:1
strongly 22:14 176:5
struck 90:21 104:15
 207:1
structural 16:7 63:13
 96:14 104:2,3 118:22
 151:3 255:17 274:6
structure 22:8 62:6
 95:13 133:13 144:10

191:4 193:21
structures 195:12
 222:5
struggle 214:14
struggling 213:12
student 43:12
students 137:14 192:14
studied 176:3
studies 276:19
study 46:1,6 131:16
 275:5
studying 46:4 211:7
 307:9
style 78:1 113:1 115:1
subject 11:8 14:9 19:4
 20:8 71:19 138:22
 197:12 212:9 218:20
 237:17 259:17 282:18
 283:6 284:4 303:9
subjects 15:20 22:22
submitted 11:16,18
 102:1 286:20 303:4
 314:6,7
subsequent 26:6 59:19
 104:16
substance 95:13 99:4
 117:20 123:1,2 180:7
 281:14
substantial 102:5
 103:13 121:8 221:18
 228:13
substantially 98:14
 127:13
substantive 26:20 28:2
 28:12 75:21 91:19
 264:20 272:12 280:15
 281:3,22
subtler 172:4
succeed 262:12
succeeded 110:17
success 87:4 288:2
successful 22:10 86:6
successfully 24:10
 243:10
successors 185:5
sudden 117:7
suffer 297:3
Suffice 97:15
suffices 26:3
sufficient 46:21 92:13
sufficiently 93:3 162:13
suggest 28:8 43:22
 44:11 46:15 69:14
 70:20 79:22 107:20
 155:22 191:21 225:3
 226:16,21 231:20
 237:6 241:1 264:2
 281:19 307:4

suggested 40:21 63:13
 191:15 241:3
suggesting 75:17 247:5
suggestion 35:17 72:6
 152:4 275:16 287:13
suggestions 297:12
 309:6
suggestive 299:17
suggests 30:16 113:14
 116:12 118:12 142:16
 245:18
suited 145:5 237:1
summarize 18:3,10
 20:21 26:11 31:18
 62:9 154:15 155:10
summarizing 154:9
summary 17:19 58:11
 58:16 154:3 216:16
 216:20 223:4,12
 255:9 263:9
summer 10:21 256:15
 257:10
super 101:6 217:22
supermajority 220:5
 224:19,22 225:11
 236:7,13 240:15
 242:1,18 244:5 249:5
supplemented 121:1
supply 89:17
support 11:9 61:17
 76:17 82:10 141:19
 142:2,7 200:3 214:8
 214:18
supported 24:14 85:22
 109:2 126:5,17
 190:17 211:5
supporters 158:15
suppose 34:9 147:10
 206:1 242:21
supposed 198:18
 298:15 313:3
suppressing 113:17
suppression 237:18
supremacy 183:18
 219:15 227:19 228:7
 229:18 232:2,13
 245:16 248:14
sure-footed 195:17
surely 109:18
surface 92:15 278:21
surfaced 171:13
surfacing 147:17,20,21
surprise 294:7
surprised 95:16
surprising 67:5 278:4
surrounding 18:22 46:7
 62:15 294:11
survey 156:8

surveyed 257:8
survival 115:2 116:7
 119:1
suspect 34:10 149:6
swamped 119:11
swath 197:10
swift 268:12
swiftly 271:2
switch 26:8
sympathy 246:17
symptoms 170:10
 171:4
system 3:17 10:7,12
 14:6 20:1 22:13 34:6
 57:3 63:19,19,22 66:5
 66:14,16,18 67:2,7
 69:4,6 91:21 119:6
 121:6 154:18,19,22
 155:8,11 157:4 158:2
 158:13 159:5 160:2
 170:2,8 173:13,14
 175:8 179:6,10 180:1
 184:11 185:7,12,17
 185:22 186:2 199:19
 201:1,2,12 210:6
 223:1 227:17 229:19
 231:5,8 248:11
 250:22 252:7,20
 268:10
system's 173:4
systematic 271:19
 301:1
systems 64:3 65:12,17
 66:1,2 67:21 124:19
 125:6

T

table 97:11 98:4,8
 119:2 151:1,2 247:15
 303:2
tactical 109:3
tactics 214:10
taken 18:15 92:1 101:9
 117:4 130:7 273:6,6
 278:11 300:21 303:16
 305:4 309:7 312:4
takers 56:10
talk 43:8 49:10 57:8
 65:9 76:22 77:9 106:3
 106:11 107:2 113:5
 123:18 128:15 132:19
 137:1,4 139:1 146:10
 203:5 224:7,21 226:1
 226:2,17 236:6
 272:16 276:19 284:20
 286:2 290:22 314:19
talked 77:13 144:17
 208:20 275:11 278:14

- 307:5
talking 25:8 26:3,7,9
 49:10 50:2 111:19,20
 112:22 113:1 123:17
 186:14 199:10 201:1
 226:18 232:18 235:17
 244:4 273:11 278:15
 291:16 296:18 306:7
 312:18
talks 104:18 105:8
 296:5
Taney's 44:7
Tara 1:19 7:3
target 220:8
targeted 240:16 270:13
task 14:2 88:13 90:15
 150:4
tasked 45:22 120:4
 256:8 307:8
tasks 10:4
taste 102:13
Tatel 87:6
teach 135:16 137:10
teaching 137:14
team 9:19 32:5 170:21
teed 95:22 177:17
teeing 65:4
tell 12:6 27:3 77:2 87:21
 140:20 190:7 273:19
telling 77:19 141:4
 273:3,4 282:14
 283:18
tells 140:22
tempted 205:21
ten 105:12
tend 32:11 47:17 67:8
 213:19,19 279:12
 281:2
tended 60:5
tends 67:18
tension 94:6
tensions 92:15 94:11
 183:14
tentative 195:7
tentatively 95:20
tenure 19:19,20 81:22
 154:18 160:2,21
 161:10 162:14,17
 164:2
tenures 16:11
terminological 28:2
 55:21
terminology 266:13
terms 24:19,21 26:22
 27:4 28:10 29:4 46:10
 48:13 80:11 82:3 83:8
 86:11 119:1 124:4
 130:20 135:18,19
 147:17 155:17 169:2
 177:20 187:9,10,11
 188:13 189:8 190:4
 203:21 204:11 212:17
 214:19,21 226:1,2,15
 228:14 251:20 265:21
 282:10,11 310:3
 312:1
terrific 223:12 236:3
 275:20
territory 299:8 302:14
test 288:7
testified 71:7
testimony 11:1 14:10
 33:3 70:9,18 78:12
 174:5 215:15 256:14
 277:7 286:21 288:5
 292:12 303:4,9
 312:10
tests 203:6 288:12
text 59:11 66:6 70:21
 79:6,12 88:17 120:22
 265:6 279:18 294:5
 311:18
textualist 47:16
textualists 47:20
texture 146:2
thanking 45:10 84:11
thanks 29:17 39:6
 45:11,18,18 52:6,8
 65:1 72:10 78:18
 94:18 128:1 133:4
 154:11 164:16,20
 171:20 197:17 215:20
 223:12 227:12 236:2
 239:11,15 255:15
 260:13 263:2 267:7,8
 284:13 299:15 302:20
Thayer 225:4,6 240:20
 240:20 241:1 242:17
Thayerism 240:22
theaters 42:4
theirs 203:18
theme 113:1,8 286:17
themes 31:16 297:6
theoretical 119:9
theoretically 237:1
theories 128:11
theory 47:5 200:15
 221:17 252:3
thereof 34:13
They'd 164:4
thick 264:20
thin 35:19 36:16 69:14
things 23:16 27:14
 38:19 39:3 42:3 46:3
 46:9 47:14 49:1 54:3
 56:14 57:1 58:15
 66:15 68:19 72:20
 73:21 78:11 87:16
 97:3 116:11 123:17
 124:4 129:21 130:15
 133:15 143:14 182:15
 183:19 196:12 202:15
 205:11 207:17 208:8
 213:4 225:18 235:17
 238:13 253:17 262:15
 271:16 275:10 279:5
 294:20,22 295:2,3
 296:3 299:21 300:1
 303:1
thinks 128:22 249:20
 293:3
third 16:9 19:22 35:7
 49:22 51:4 63:22
 74:22 257:5,20
 259:10
Thomas 1:19 7:1 60:11
thorny 276:11
thorough 152:9
thoroughly 177:11
thought 12:9 37:18
 38:22 39:16 49:17
 53:7,12,22 71:22
 77:21 78:21 87:15
 90:5 111:11 121:12
 124:5 150:4 164:22
 176:3 186:6 188:13
 194:5 248:17 260:18
 270:4 275:20 276:2
 290:9 312:20,21
thoughtful 90:17 91:20
thoughts 48:21 128:3
 136:17
threat 33:12 144:11
threaten 193:17
threatened 100:7
threatens 119:5
threats 32:6,12 108:8
three 18:19 30:20 45:13
 49:2 55:10 60:17 64:2
 69:12 74:11 86:17
 87:10 156:3 299:16
 307:6
thrown 181:2
thrust 289:17 303:17,22
thumbnail 40:6 45:6
tie 92:4
tied 235:1
ties 138:2 180:11
tilt 103:8
tilts 104:11
timeless 47:21
times 21:21 22:14 49:9
 57:20 59:20 167:18
 224:15 238:16 242:5
 291:7 293:19 314:16
timing 158:7 180:20
 181:1 184:15 293:19
tipping 103:16
tissue 192:7
tit- 132:21
tit-for-tat 131:13,22
 132:10
title 12:1 41:21
today 4:10 9:6,7,13
 12:6,12,20 14:1 17:16
 44:6 57:13 62:7 63:9
 102:12 123:9 141:16
 146:7,15 147:21
 177:11 190:22 192:6
 193:3 234:15 244:13
 255:18 257:3 270:16
 284:20 312:17 313:4
 315:4
today's 4:12 10:20
 15:22 16:3 22:22 49:8
 98:12 192:19 256:18
 313:14
told 78:3 119:12 176:19
 200:11
tomorrow 297:11,15
ton 128:10 242:11
tone 80:13 95:13 113:1
 124:4 127:9 197:19
tools 33:9,11 132:21
top 156:9 309:1
topic 73:5 246:19 275:3
 287:6
topics 17:21 31:1 58:10
 154:7 244:13,15,19
 255:6 259:20 270:18
totally 86:21 300:14
touch 168:11 283:15
 287:6 302:7 307:15
 315:7
touched 311:4
touches 232:19
tower 299:11
track 31:19 138:13
tracking 26:11
traded 261:5
tradition 43:18 148:21
 149:1
traditional 118:5
traditionally 195:5
trail 39:1 201:15
training 5:4
trains 294:10
trajectory 163:19
trans 272:11
transcend 27:11 29:10
 29:13
transfer 22:1

transform 313:15
transforming 262:12
transmission 20:7
transparency 17:3
 20:17 257:6 263:18
 289:3 299:2 300:12
 300:14,19 306:8
treat 113:12 129:10
 175:8 292:17
treated 293:3,4
treating 98:21 173:22
treatment 19:2 43:9
 44:1,2 49:19 96:2
 99:6,7 269:4 274:6
treats 99:9 101:16
tremendous 39:16
 282:19 283:14
trend 119:5,18 174:16
 307:7
trends 109:4 113:12
 173:20
Trevor 2:4 7:20 52:4
trial 279:2
Tribe 2:12 8:12,13
 112:3,3,5 119:22
 130:14 140:12 145:10
 147:1,4,5,9,12 152:22
 208:4,7 210:17,18
 248:4,5
Tribe's 127:2
tries 35:9 230:3 281:19
triumph 265:21
TROs 305:8
trouble 119:20 150:13
 311:8
troubled 119:8
true 42:13 67:20 70:2
 73:22 78:9,15,18 89:8
 99:21 106:6 126:10
 129:21 150:11 163:17
 193:7 206:8 274:16
truly 39:18
Trump 100:10 201:22
 203:3
truncated 279:20
truncating 279:7
trusted 60:5
try 25:10 27:10,10 29:6
 29:9,13 38:17 54:3
 55:20 73:3 79:3 98:8
 129:6 165:10 175:6
 176:16 194:14,21
 199:7 209:6 227:1
 234:14,16 240:5
 247:16 275:5 284:18
 301:1 302:21 308:13
 308:15
trying 31:17 37:5 43:17

97:2,13 120:16 134:4
 139:5 144:21 146:2
 166:7 195:22 233:9
 234:1 272:16 275:9
 282:16 295:20
tune 57:20
tuned 152:16 254:14
tuning 110:7 111:19
turn 5:12 8:21 14:21
 18:6 23:6 57:14 58:15
 64:8,12 68:7 84:7
 95:8 102:8 112:2
 119:22 123:6 131:5
 134:21 160:12 216:21
 223:7,8 255:7 309:17
 312:16 313:8
turned 140:9
Turning 140:5
turnover 3:13 159:12
 213:9 214:1
twice 100:18
two 10:21 35:7 54:3
 56:14 61:20 71:6
 72:16 79:4 86:1 90:18
 94:14 98:19 105:4
 128:2,3 129:9 138:4
 155:20 159:15 165:5
 172:8,9 174:1 177:19
 179:20 187:9,10
 201:10 202:4,21
 208:5 213:21 215:5
 218:11 223:15,19
 225:15 236:5 240:5
 256:15 262:3 267:9
 278:2 290:9 293:12
 307:6 314:16
type 129:17 160:21
types 55:10 252:12
typically 49:12 162:18
 163:7 218:14 228:16

U

U.S 163:5
uglier 42:10
ugliness 42:9
ultimate 28:19 116:1
 222:20
ultimately 52:15 61:18
 79:7 131:22 185:14
 222:10
Ulysses 61:3
unanticipated 195:22
unavoidable 7:8 191:16
unavoidably 288:5,13
unbecoming 33:1
unbroken 99:18
uncertainty 13:7
unchecked 33:21

unclear 47:2 233:9
uncomfortable 280:8
unconstitutional 20:3
 66:3,5 68:2 119:13
 125:13 127:5 129:1,4
 222:18 231:17
uncontroversial 211:5
underlining 264:13
underlying 28:20 92:15
 97:7,12 176:6 252:2
undermine 22:18 86:14
 104:20 105:2 158:10
 214:16 220:21 221:7
undermined 191:9
undermines 150:10,13
undermining 29:2
underscore 15:2
 244:12
underscores 123:10
 141:13
understand 40:6 43:9
 54:12 108:12 111:6
 116:8 120:11 133:12
 133:17 134:4 141:15
 188:15 193:20 195:8
 231:1,11 241:10,11
 242:15 261:17 269:7
 279:16 284:2 288:21
 289:3,7,9,11 309:2
understanding 28:11
 54:12 56:18 183:4
 276:6
understandings 121:3
 141:11
understands 254:15
 264:14
understood 13:4 29:1
 54:4 66:12 110:20
 121:10 137:18 228:10
 266:9 297:18 310:3
undertaking 84:13
underway 100:14
undo 292:1
undone 292:6
unemployed 279:4
unfair 43:8
unfold 194:14
unfortunate 171:5
unfortunately 7:8
unified 304:10
uniformity 31:10
uninformed 274:3
unintended 211:18
unintentionally 106:17
unique 103:13 106:12
 108:7,8 297:9
unit 125:5
United 1:1 4:5 40:7 41:2

41:11 42:6,16,19 45:8
 66:15,17 67:22 81:13
 156:15 192:11,22
 227:18 229:2,4 230:1
 249:11
University 1:10,12,14
 1:14,15,16,19,20 2:2
 2:5,6,7,8,9,11,12,16
University's 2:14
unmute 5:14
unnamed 95:21
unpredictable 122:10
unquote 170:6
unreasoned 298:16,19
unremittable 292:5
unrepresentative 220:3
unsurpassed 42:8
unsurprisingly 287:21
unusual 39:2 240:13
unwilling 148:12
unwise 40:9 79:14 80:7
 98:7
updating 87:2
upholds 249:19
ups 98:22
upsetting 301:13
urge 91:4,5 239:6
urged 107:17 236:18
urgent 97:14
urges 117:13
usage 226:15
use 24:19 25:2 26:10,16
 26:18,21 28:15 29:4,7
 30:17 33:8,22 56:9
 73:19 74:13 104:19
 127:20 135:19 225:10
 237:10 257:10 263:13
 263:22 264:8 266:15
 267:1 285:21 287:2
 290:18,21,22
useful 27:7 36:18 51:4
 51:12 69:16 146:12
 166:18 194:13 199:13
 238:22 245:10 265:6
 285:12 288:5
usual 106:19 109:7
 258:7
usually 109:5 125:21
 257:19 258:2

V

v 37:20 38:8,10,13 50:7
 77:17 233:19,22
 235:11,14 291:9,11
vacancies 157:15 172:9
 174:3,6 179:15 181:1
 181:5 184:16 211:17
 212:21

vacancy 60:11 62:19
117:6
vacant 157:8
vagaries 157:9
validated 24:14
validity 248:12
valuable 47:11 123:16
210:9 235:14 236:15
285:19
value 30:2 56:16 119:6
144:17 159:7 208:15
211:20
values 24:6 25:2 28:12
137:21 183:15,20
222:5 288:15
varied 178:14
variety 11:10 258:8
312:12
various 14:12 20:4,12
22:14 24:12 79:16,20
110:8 113:7 147:20
160:6 165:19 167:17
221:21 236:6 247:8
259:19 269:8
vast 31:18 312:19
venture 140:14
venturing 247:7
verbal 26:20 28:10
versed 135:15
version 141:1,14 201:7
201:15 251:9
versus 46:5 85:14
86:19 139:11 240:1
265:12
vest 173:8
veto 47:5
vetoed 229:3
vetting 170:10 191:5
viable 97:11 121:20
163:13 262:16
video 4:15
Videoconference 1:8
view 11:21 28:9 32:5
37:2 41:6 50:1 51:22
54:2 79:18 85:17 86:2
86:4,22 87:5 88:19
96:7,13,18 100:20
105:7 115:7 142:10
143:20 148:13 149:7
158:14 169:21 171:10
171:10 177:13 182:12
184:21,22 198:7
210:22 219:4,15
227:16 229:5,17,17
230:10,12 236:15,19
240:19 241:17 245:8
248:13,13 251:3
272:8,9 276:17 284:5

285:12 290:18 292:20
300:11 312:19
viewed 219:10
viewing 203:18
views 10:16 12:22 13:4
14:8,13 17:12 18:15
41:3,8 43:9 47:10
50:5 58:1 71:11 72:21
88:15,18 135:12
153:17 178:14 183:8
183:13 204:19 208:18
216:12,19 254:18
256:1 272:22 289:7
312:21

vigorous 89:14 111:3
violate 67:2
violated 100:4,10 101:2
141:9 230:2
violates 218:13
violation 99:12 100:21
122:2,8
violations 100:22
Virginia 2:5
Virtually 126:1
virtues 40:5 89:17
vis-...-vis 229:16 243:5
vis-a-vis 33:14
vital 89:11
vocabulary 26:10 29:7
29:8,11
voice 39:14 42:18 44:21
84:10 92:1 95:21 96:3
99:2 110:21 198:1,2
voices 45:5
volume 202:10
volumes 249:11
voluntarily 285:15
vote 76:6 169:16 204:2
237:16
voter 237:17
voters 186:20 204:2,4
votes 126:12 170:18
voting 16:17 62:22 87:1
100:13 105:18 106:14
108:20 113:17,20,21
114:4 115:16 116:4
217:22 219:8 220:5
236:7,13
vow 262:13
vs 249:18 301:7

W

W 2:4
Wade 38:13 77:17
waiting 149:10
Waldman 2:13 8:14,15
202:6,7
walk 279:15

wall 105:19 107:11
114:15
Walter 1:16 6:11
wanted 23:16 27:13
30:9 31:14 42:15 53:2
65:8 111:18 127:18
140:14 141:17 162:3
168:15 186:9 189:5
190:13 194:16 196:1
197:18 198:13 210:4
215:5,14 232:17
243:15 244:11 247:12
260:15 277:9 278:2
284:16 287:5,6 294:8
294:12 296:2,8 306:3

wanting 112:19
wants 201:18
war 22:3,4 78:10
warning 183:4
warrant 224:16,18
warranted 79:11,13
93:22 243:20
Warren 38:11 40:3 50:8
50:15 184:6
wasn't 43:12 297:18
watch 256:17
watching 9:6 41:15
water 119:15,19
waters 89:2
way 16:13 25:9,12
26:21 27:11 28:9,16
29:6,10 32:18 38:18
39:7 41:10 47:9 49:13
52:11 57:2,6 79:10,21
80:3 82:15 85:5,5,10
85:13 86:3 87:19,22
88:6 91:15 92:5
111:10,10,21 113:16
118:3 130:4,4,16
133:11 134:1,13
138:13,13 141:11
142:14 144:21 149:6
165:6,16 168:9
170:18 174:8 177:16
179:14 180:10 182:14
184:20 188:17 189:14
191:9 194:21 199:2
204:8,12 207:17
208:6 209:7,14 216:6
217:16 230:21 240:12
250:13,14 252:6,18
253:6 257:19 264:15
271:18 275:10 278:13
282:15 287:13 292:1
296:21 301:1 302:17
307:13 312:6
ways 20:4 21:11 24:20
29:5,12 32:22 37:13

53:13 54:4 80:2 82:1
85:19 127:11 162:8
167:17 170:9 183:15
183:21 189:10 221:12
253:8,19 296:5
312:12
weakening 188:16
weakest 195:9
weaknesses 195:20
weave 134:13
website 4:13,17 11:3
12:2 255:10 314:10
weekend 315:7
weeks 98:13 100:13
313:19
weigh 288:15 289:10
weighing 288:8
weight 173:7,9
welcome 4:3 9:4,6
11:11 57:12 153:7,8
254:7 294:5 314:1
well-placed 240:10
well-reasoned 221:4
went 39:17 41:2 57:10
87:11 153:5 215:22
240:21 254:4 270:4
307:16 315:9
weren't 185:15
wheel 193:5
White 2:14 8:16,17
45:17,18 48:18 53:5
54:6 167:14 171:18
171:18,19 172:13
176:15 198:15 211:2
214:6 267:6,7 271:10
278:14 285:8 290:11
290:15 293:6 302:19
302:20 306:1
White's 274:4
whitehouse.gov/pcs...
4:13,17
Whittington 2:16 8:18
8:19 120:1,2 123:5
178:20,21 185:18
190:14,19 198:20
232:10,11 235:21
247:4
Whittington's 207:4
246:15
who've 216:18
wide 9:10 13:19 14:10
153:22 256:9
wide-ranging 17:16
58:6 255:1
widely 168:19 211:5
wield 173:6 270:5
William 1:14 6:2 278:3
Williams 87:8

willing 129:10 134:10
262:9 292:13
win 167:13 169:11
298:19
wing 168:1
winner 202:21
wisdom 188:5
wise 204:21
wish 200:3 251:13
315:3
withstand 89:6
witness 14:9
witnesses 11:1 97:19
237:4 256:13 258:8
258:16 286:20,21
wolf 77:18
won 253:19
wonder 275:12
wondered 164:15
wonderful 23:14 84:18
124:6 145:18
wonderfully 24:18
wondering 162:9
wooden 66:9
word 21:7 30:19 77:20
80:8 212:15 219:16
251:14 276:1
words 30:9 32:13
162:20 190:13 194:5
289:2
work 9:11,21 15:5
17:11 18:18 20:16
29:22 30:6 39:17
46:16 47:19 48:5,8
49:4,5 52:18 61:13
77:16 85:1 92:7 94:16
97:3 102:13 109:8,12
110:19 120:3 127:8
153:17 155:9 162:6
179:11 186:2 216:12
217:5 225:10 236:3
269:21 279:14 289:12
289:13 306:5 307:10
309:3 315:6
worked 90:11,16
138:12 202:9 204:14
223:13
working 12:13 17:10
84:14,20 110:14
111:7,20 112:8
116:12 119:8 124:1
153:16 212:18 216:10
236:18 251:9 254:13
275:5 311:22
workings 120:19
workplace 82:2
works 21:13 165:3
world 183:8

Worman 228:8
worried 161:18
worry 35:12 46:8 47:2,4
73:5 75:11,19 78:9,13
118:18 161:12,16
205:16 207:19 212:9
220:21 246:19 269:21
271:13 272:3 273:14
274:8
worrying 92:18 116:20
150:14 206:10
worse 38:3,4 273:14
worth 168:13 190:8
196:15 222:22 239:11
244:2,11 250:8 252:1
295:1
worthwhile 267:3
worthy 71:8
wouldn't 130:2 162:7
163:2,9 164:8 182:20
182:21 239:8 249:5
294:7 301:14
wrestle 213:4
wrestling 32:20 120:8
194:11 202:11
writ 125:20
write 76:7,13,15 134:11
298:3,3,5
writing 49:14 134:11
226:22 298:10,21
300:21 307:17
written 51:9 111:8
180:10 232:12 244:22
256:21 279:11 292:19
305:12,21
wrong 75:22 76:18 77:1
98:9 107:22 117:21
179:11 301:15,17
wrote 41:20 43:13
183:3 303:7

X

X 170:22 171:2 250:1

Y

Y 250:1
Yale 1:11,13,16,18
43:14
year 100:6,11 105:12
107:13,16 117:7
156:1,3 187:5 188:16
210:12 257:1 260:7
years 19:21 59:3 73:18
100:18 106:14,14,22
107:1,1 109:6,7
125:19 154:21 155:4
155:18 156:4,5
158:17,18 161:19

162:17,19,21 163:17
164:9 178:8,10 187:7
187:14,16 190:1
201:11 229:20 257:9
259:18 265:3 280:9
295:10,12 300:20
302:5
yield 102:5
York 1:10 2:6 301:8
young 158:20
younger 61:12 164:3

Z

0

1

1:00 152:21
10 59:21 60:18,21
261:13
10-minute 15:17
10:00 1:8 4:2
10:58 57:10
100 73:18 238:16
261:14
11 69:12
11:10 57:7,11
113 70:20
12 3:5 46:15 47:7 69:12
162:17
12- 57:6
12:50 153:5
13-14 36:5
14 11:15
14th 44:12,14 314:4
15 1:6 3:7 45:15
150 73:18
153 3:14
1787 50:6 179:7
1789 59:18 125:3 126:2
226:9 248:19
18 3:9 155:18 156:5
158:17,18 161:19
163:17 164:9 178:8
178:10 187:14,16
295:10,12
18- 187:4 188:15
18-year 161:6 163:9,12
163:15 188:20
1800s 21:22
1807 60:8
1837 60:12
1860s 60:16 131:19
1863 60:20
1866 60:20
1869 61:1,6
1930 40:17
1937 50:6,20,20 61:6,18

1950s 61:20
1960s 43:12 50:10,14
1964 41:22
1970s 291:7
1980s 41:7 50:5
1991 291:10
19th 44:21 192:2
228:22 242:18
1st 314:7

2

2 15:19 41:21 96:5
104:9 105:6 106:2
107:4 109:13,14
124:2,17 146:6
2:00 152:22 153:2,6
20 155:4
2004 126:14
2006 126:15
2008 114:2
2012 291:9
2016 62:17 100:8
105:13
2017 141:3
2018 141:3
2020 100:13 105:17
2021 1:6 10:3
20th 256:16
216 3:17
23 11:2
254 3:20
28 261:2
2s 96:17

3

3 51:8 107:3
3:01 215:22
3:10 215:19 216:1
3:46 254:4
30th 256:16
31 231:21
313 3:22
3A 72:7

4

4 3:2 107:4 136:18
137:2
4:10 254:1,5
44 11:1

5

5 3:3
5:06 315:9
50 73:18
50s 264:19 265:15
57 3:11

6

6 223:21
6,500 11:6
60 131:17 132:1
60s 264:19 265:15
64 162:18
65 131:17 132:1

7

78 36:5,7,10 37:11

8

9

9 3:4 10:3
93 120:12

C E R T I F I C A T E

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.

Neal R Gross

Court Reporter

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701