

PRESIDENTIAL COMMISSION ON  
THE SUPREME COURT OF THE UNITED STATES

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5TH PUBLIC MEETING

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FRIDAY  
NOVEMBER 19, 2021

+ + + + +

The Commission met via Video  
Teleconference, at 1:00 p.m. EST, Bob 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

SHERRILYN IFILL, National Association for the  
Advancement of Colored People

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  
RICHARD H. PILDES, New York University School of  
Law  
MICHAEL D. RAMSEY, University of San Diego  
School of Law  
BERTRALL ROSS, University of California,  
Berkeley School of Law  
LAURENCE H. TRIBE, Harvard University  
MICHAEL WALDMAN, New York University School of  
Law  
ADAM WHITE, George Mason University's Antonin  
Scalia Law School  
KEITH E. WHITTINGTON, Princeton University  
  
DANA FOWLER, Designated Federal Official

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

2 (1:01 p.m.)

3 MS. FOWLER: Good afternoon. Welcome  
4 to the 5th meeting of the Presidential Commission  
5 on the Supreme Court of the Unites States. My  
6 name is Dana Fowler, and I'm 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. Discussion materials that will be the  
11 focus of today's meeting are available on our  
12 website at [whitehouse.gov\pcscotus](http://whitehouse.gov/pcscotus).

13 Before we begin, a few administrative  
14 reminders. This meeting is being recorded by a  
15 videoconference, and is also being streamed live  
16 on our website at [whitehouse.gov\pcscotus](http://whitehouse.gov/pcscotus).

17 This commission is considered a  
18 federal advisory committee and is governed by the  
19 requirements under the Federal Advisory Committee  
20 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.

4 All of our commissioners have received  
5 training regarding FACA requirements, and their  
6 ethics obligations as special government  
7 employees. In addition, each commissioner has  
8 completed a financial disclosure report, that has  
9 been reviewed by ethics attorneys, to identify  
10 any potential conflicts of interest.

11 I'd now like to turn the meeting over  
12 to Commissioner Rodriguez for our next order of  
13 business.

14 CHAIR RODRIGUEZ: Thank you, Ms.  
15 Fowler. Before we turn to the work of the day,  
16 we do have some administrative business to take  
17 care of. We'll be voting on an amendment to the  
18 commission's bylaws.

19 The amendment is posted on our  
20 website, with the other meeting materials for  
21 today. And it replaces the purpose language from  
22 the bylaws that we adopted at our May 19th

1 meeting. The edits reflect that our  
2 deliberations required more time than 180 days,  
3 originally provided in the Executive Order.

4 So, now open to entertain a motion to  
5 vote to adopt the bylaws, and we do not require a  
6 second for that motion.

7 COMMISSIONER ANDRIAS: I so move.

8 CHAIR RODRIGUEZ: Thank you,  
9 Commissioner Andrias. Ms. Fowler will do the  
10 roll call to record the vote.

11 MS. FOWLER: Thank you.

12 Commissioners, if you would please  
13 turn on your cameras. I will call each of you in  
14 alphabetic order. Please unmute when you hear  
15 your name. And vote for the bylaws amendment by  
16 saying yea, or yes, or against the bylaws  
17 amendment by saying nay, or no. Your votes will  
18 be recorded and captured in today's meeting  
19 notes. And this vote will also serve as today's  
20 roll call.

21 Michelle Adams.

22 COMMISSIONER ADAMS: Yea.

1 MS. FOWLER: Kate Andrias.  
2 COMMISSIONER ANDRIAS: Yea.  
3 MS. FOWLER: Jack Balkin.  
4 COMMISSIONER BALKIN: Yea.  
5 MS. FOWLER: Bob Bauer.  
6 CHAIR BAUER: Yea.  
7 MS. FOWLER: Will Baude.  
8 COMMISSIONER BAUDE: Yes.  
9 MS. FOWLER: Elise Boddie  
10 COMMISSIONER BODDIE: Yea.  
11 MS. FOWLER: E. Uriel Charles.  
12 COMMISSIONER CHARLES: Yes.  
13 MS. FOWLER: Andrew Manuel Crespo.  
14 COMMISSIONER CRESPO: Yea.  
15 MS. FOWLER: Walter Dellinger.  
16 Walter, you may be on mute.  
17 COMMISSIONER DELLINGER: I am, and I  
18 vote yes.  
19 MS. FOWLER: Thank you.  
20 Justin Driver.  
21 COMMISSIONER DRIVER: Yes.  
22 MS. FOWLER: Richard Fallon.

1 Commissioner Fallon, you may also be  
2 on mute.

3 COMMISSIONER FALLON: Apologies, yes.

4 MS. FOWLER: Caroline Fredrickson.

5 COMMISSIONER FREDRICKSON: Yea.

6 MS. FOWLER: Heather Gerken.

7 COMMISSIONER GERKEN: Yea.

8 MS. FOWLER: Nancy Gertner.

9 COMMISSIONER GERTNER: Yea.

10 MS. FOWLER: Thank you, Commissioner  
11 Gertner.

12 Thomas Griffith.

13 COMMISSIONER GRIFFITH: Yes.

14 MS. FOWLER: Tara Leigh Grove.

15 COMMISSIONER GROVE: Yes.

16 MS. FOWLER: Bert Huang.

17 COMMISSIONER HUANG: Yes.

18 MS. FOWLER: Sherrilyn Ifill.

19 COMMISSIONER IFILL: Yes.

20 MS. FOWLER: Olatunde Johnson.

21 COMMISSIONER JOHNSON: Yes.

22 MS. FOWLER: Michael Kang.



1 Commissioner Kang.

2 COMMISSIONER KANG: Yes.

3 MS. FOWLER: Thank you.

4 Alison LaCroix.

5 COMMISSIONER LACROIX: Yes.

6 MS. FOWLER: Margaret Lemos.

7 COMMISSIONER LEMOS: Yes.

8 MS. FOWLER: David Levi.

9 (No audible response.)

10 MS. FOWLER: Commissioner Levi may be  
11 joining us a little bit later. Sorry.

12 CHAIR BAUER: Commissioner Levi will  
13 be joining us later.

14 MS. FOWLER: Okay. We will not record  
15 a vote for him.

16 Trevor Morrison.

17 COMMISSIONER MORRISON: Yes.

18 MS. FOWLER: Richard Pildes.

19 COMMISSIONER PILDES: Yes.

20 MS. FOWLER: Michael Ramsey.

21 COMMISSIONER RAMSEY: Yes.

22 MS. FOWLER: Cristina Rodriguez.

1 CHAIR RODRIGUEZ: Yes.

2 MS. FOWLER: Kermit Roosevelt.

3 (No audible response.)

4 MS. FOWLER: Commissioner Roosevelt  
5 also had a conflict this afternoon, so no vote  
6 will be recorded for him.

7 Bertrall Ross.

8 COMMISSIONER ROSS: Yes.

9 MS. FOWLER: David Strauss.

10 (No audible response.)

11 MS. FOWLER: Commissioner Strauss also  
12 had a conflict this afternoon. No vote will be  
13 recorded for him.

14 Laurence Tribe.

15 COMMISSIONER TRIBE: Yes.

16 MS. FOWLER: Michael Waldman.

17 COMMISSIONER WALDMAN: Yes.

18 MS. FOWLER: Adam White

19 COMMISSIONER WHITE: Yes.

20 MS. FOWLER: Keith Whittington.

21 (No audible response.)

22 MS. FOWLER: I believe Commissioner

1 Whittington will be joining us in a few minutes.  
2 No vote will be recorded for him.

3 Thank you, commissioners. With a  
4 unanimous vote of more than two-thirds of our  
5 membership, the bylaws amendment is adopted. You  
6 may now turn off your cameras.

7 And I have the distinct pleasure of  
8 turning the meeting over to our co-chairs,  
9 Commissioner Bauer and Commissioner Rodriguez.

10 CHAIR RODRIGUEZ: Thank you so much,  
11 Ms. Fowler.

12 Good afternoon, everybody. Welcome to  
13 all of the commissioners who are here, and to  
14 everyone who is watching.

15 We're gathered this afternoon for our  
16 second set of deliberations as a commission. And  
17 once again, we'll be discussing a set of very  
18 rich and wide-ranging materials that have been  
19 revised since our last meeting.

20 And those revisions reflect and  
21 incorporate the numerous comments and  
22 perspectives that were raised during those

1 deliberations.

2           It's important to underscore that  
3 those materials are still under revision, and  
4 that they do not represent the views of any  
5 particular commissioner. And as noted throughout  
6 the draft materials, there are numerous points of  
7 disagreement among commissioners, just as there  
8 is throughout the public debate.

9           Before we begin these deliberations,  
10 I want to sincerely and deeply thank our team, at  
11 the General Services Administration, Dana Fowler,  
12 Patrick McConnell, Ivana Henry, and all of the  
13 others who have worked so diligently to make sure  
14 that we function and function well. They've been  
15 outstanding in facilitating our work and our  
16 meeting, and we're deeply grateful for their  
17 partnership.

18           So, I wanted to explain just a little  
19 bit about our charge and our process, for those  
20 that might be engaging for the first time. The  
21 Executive Order that stood up the commission, was  
22 issued on April 9th, 2021 by President Biden.

1 And that order tasks us with providing him an  
2 account of the contemporary public debate over  
3 the role of the Supreme Court in our  
4 constitutional system.

5 So, we're charged with providing an  
6 analysis of the principal arguments for and  
7 against reforming the Court. And throughout the  
8 materials, we've considered the legality,  
9 efficacy, and potential consequences for our  
10 system of government, of many of the leading  
11 proposals for reform that have been part of the  
12 recent public debate over this matter.

13 We've been asked, in the Executive  
14 Order, to draw from a broad range of views and to  
15 assess a broad spectrum of ideas, and we were  
16 struck as a bipartisan commission. We've not  
17 been charged with making specific  
18 recommendations, as commissioners well know, but  
19 instead, with providing a rigorous appraisal of  
20 the arguments and proposals that are animating  
21 today's debate. And the materials are written in  
22 that spirit.

1           So, over the summer we held two days  
2 of hearings and heard from 44 witnesses. Their  
3 testimony, and in addition to testimony from 23  
4 other experts, is posted on the commission  
5 website.

6           To date, we've also received  
7 approximately 4,000 unique public comments, and  
8 7,000 total comments. Many of which were part of  
9 organized efforts. These comments have come from  
10 members of Congress, and public officials.  
11 They've come from advocacy organizations, subject  
12 matter experts, and members of the general  
13 public.

14           Many of these comments address  
15 proposals for reform that are considered in the  
16 draft materials. And that are central to the  
17 commission's charge. For example, there are  
18 comments that address the question of whether to  
19 expand the size of the Court, and whether to  
20 impose term limits on the justices.

21           Many of the comments support these  
22 reforms, but many others also support retaining

1 the status quo. And even in some instances,  
2 adopting amendments to the Constitution, to fix  
3 the status quo.

4 We've also received a number of  
5 comments that raise matters that are related in  
6 some way to the Supreme Court, which we  
7 appreciate receiving, and will make part of the  
8 commission record, but that are largely outside  
9 of our charge as a commission.

10 And we want to note today, in  
11 particular, that the commission has received a  
12 series of joint letters from Senators Whitehouse,  
13 Hirono, Blumenthal, and Johnson, urging that the  
14 commission consider the impact of undisclosed  
15 private spending on the confirmation process, and  
16 the direction of the Court's jurisprudence.

17 We have not been charged with directly  
18 addressing proposals for reforming the  
19 confirmation process, or addressing the role of  
20 private spending to influence that process in the  
21 Court. And we therefore, have not taken up these  
22 questions directly.

1           We do however, address aspects of  
2 these issues in our analysis of reform proposals  
3 focused on a judicial ethics code for the Court.  
4 Moreover, and importantly, we will preserve this  
5 and other testimony to this effect, in the public  
6 record of the commission.

7           Having said that about the public  
8 commentary we've received, I want to emphasize  
9 that we welcome further public comments and we'll  
10 be receiving them throughout the life of the  
11 commission.

12           We will continue to accept public  
13 comment until December 15th. However, comment is  
14 most helpful to the commission if it is submitted  
15 before December 3rd. And as Ms. Fowler  
16 suggested, our website [regulations.gov](http://regulations.gov) is where  
17 public comments may be submitted. And the ones  
18 that have been received to date, are also  
19 available for viewing at [regulations.gov](http://regulations.gov), or on  
20 the commission's website.

21           So, with that sense of what we are  
22 charged with doing, and how we have gone about



1 fulfilling that charge, I want to turn it over to  
2 Co-Chair Bauer, to talk a little bit about what  
3 we'll be doing today in this particular meeting.

4 CHAIR BAUER: Thank you very much,  
5 Co-Chair Rodriguez.

6 There will be five sessions today to  
7 discuss five drafts of materials. As you will  
8 recall from our last meeting, the commission was  
9 divided into five groups to research and prepare  
10 materials addressing different aspects of the  
11 reform debate. And these are for the whole  
12 commission's consideration, as we collectively  
13 prepare a report for the President.

14 Today we meet for the second time, to  
15 consider the draft materials which have been  
16 edited and developed to account for the  
17 deliberations of the commission that took place  
18 on October 12th. The materials attempt to set  
19 forth the broad range of arguments that have been  
20 made in the course of public debate, over reform  
21 of the Court.

22 They were defined, designed to be

1 inclusive in their discussion of arguments to  
2 assist the commission in robust wide-ranging  
3 deliberations.

4           Again, they should not be understood  
5 to represent the views of any particular  
6 commissioner, and as reflected throughout the  
7 draft, commissioners have different views,  
8 sometimes very different views, of the matters  
9 under consideration.

10           Now, we will be discussing issues of  
11 great importance to the country and to our system  
12 of government, at a challenging time for the  
13 conduct of public discourse. As a commission, we  
14 are committed to deliberating over these matters  
15 with respect for disagreement.

16           And we hope, and we expect these  
17 deliberations will help us produce a report for  
18 the President that fairly represents the full  
19 scope of the reform debate, one that informs and  
20 advances that debate.

21           And with that, I will turn it back  
22 over to my co-chair and Commissioner Rodriguez.

1                   CHAIR RODRIGUEZ: So, we're convened  
2 today until 5 o'clock. And we will consider the  
3 draft materials in two different blocks of time.  
4 We will first consider the introduction, which  
5 sets the stage for the reform debate, and  
6 provides an account of why the debate over reform  
7 is emerging.

8                   Chapter 1, which provides a history of  
9 efforts to reform the Supreme Court from the very  
10 outset of the republic. And Chapter 2, which  
11 addresses the question of whether to expand the  
12 size of the Court or otherwise reform the  
13 structure of the Court.

14                   In the second half of our  
15 deliberations, we will address Chapter 3, which  
16 discusses whether to adopt term limits, as  
17 opposed to a system of life-tenure for Justices  
18 to the Supreme Court.

19                   Chapter 4, which discusses ways of  
20 potentially reducing the power of the Court in  
21 relation to the other branches of government,  
22 including things such as limiting the Court's

1 jurisdiction, changing its voting rules, or  
2 giving Congress the power to override decisions  
3 of the Supreme Court.

4 And Chapter 5, which discusses a set  
5 of issues involving the Court's internal  
6 operations, including its emergency order docket,  
7 and judicial ethics, and conflicts of interest.

8 We will take a break in between these  
9 sessions, after our discussion of Chapter 2, at  
10 approximately 2:45. And a second half of the  
11 deliberations will resume at 3 o'clock.

12 And so, now we'll begin with the first  
13 session. And I will invite Commissioner Trevor  
14 Morrison to provide us with an overview of the  
15 introduction to the report.

16 And after he's done the overview, the  
17 commissioners who have read the materials and  
18 indicated their interest in addressing the  
19 topics, will provide commentary, and we will move  
20 from there to Chapter 1.

21 So, Commissioner Morrison, the floor  
22 is yours.

1                   COMMISSIONER MORRISON: Thank you,  
2 Co-Chair Rodriquez, and great thanks to you and  
3 Co-Chair Bauer for your leadership of our  
4 commission, thus far.

5                   So the draft materials on the  
6 introduction now appear as an introduction. And  
7 one difference I wanted to emphasize at the  
8 outset from the draft materials that we discussed  
9 at our last public meeting, is that the long  
10 section that had been included here on the  
11 history of Supreme Court reform and debates about  
12 Supreme Court reform is now its own separate  
13 chapter. As Co-Chair Rodriquez just laid out.

14                  It appears now as Chapter 1. The work  
15 of the draft introduction is to provide an  
16 account of the genesis of the current debate over  
17 Supreme Court reform. And to outline some of the  
18 guiding considerations that the commission is  
19 bringing to bear in evaluating various reform  
20 proposals.

21                  The materials begin then, by talking  
22 about the genesis of the reform debate, and

1 noting that there is a long history throughout  
2 American history of conflict over the Supreme  
3 Court, which has often manifest itself in  
4 controversies about particular nominations to the  
5 Supreme Court.

6 After talking about a few historical  
7 examples, the materials then survey three recent  
8 nominations. First the vacancy created by the  
9 death of Justice Scalia, and the nomination to  
10 fill that vacancy of Judge Merrick Garland, which  
11 did not proceed. And then ultimately, the  
12 nomination of Justice Gorsuch to fill that seat.

13 Next, the retirement of Justice  
14 Kennedy, and the nomination, ultimate  
15 confirmation of now Justice Kavanaugh to fill  
16 that seat. And finally, the death of Justice  
17 Ginsburg, and the nomination and ultimate  
18 confirmation of now Justice Barrett.

19 The materials discuss the  
20 controversies around those nominations, and  
21 debates and disagreements over those nominations,  
22 and the confirmation processes that followed,

1 provide one significant motivation for the reform  
2 debate today.

3 As, throughout the materials, the  
4 draft here does not propose a single way to  
5 understand these controversies. It notes that  
6 individual members of the commission take  
7 different views of both the processes that lead  
8 to the confirmations or non-confirmation of the  
9 various nominees in those recent episodes. And  
10 does not take a particular approach. The draft  
11 does not take a particular approach on how to  
12 understand those episodes.

13 The draft materials also note that the  
14 stakes of the Supreme Court reform today are as  
15 high as they are today in part because the Court  
16 is really at the center of escalating partisan  
17 conflict generally. And this period of extreme  
18 political polarization informs debates over  
19 Supreme Court reform.

20 On this point, there is consensus  
21 across the commission. The draft material  
22 suggests that acute polarization, political

1 polarization, is likely to continue to affect the  
2 debate over the Court's role in our  
3 constitutional system, and to perpetuate partisan  
4 conflict over nominees to the Court.

5 From there, the draft materials move  
6 to the various proposals for reform. We  
7 summarized them, the materials summarized them  
8 and refer to the chapters where each of them will  
9 be taken up. That's the outline that Co-Chair  
10 Rodriquez provided just now. And then the draft  
11 materials provided a discussion of some key  
12 themes and principles that might be brought to  
13 bear in evaluating various arguments for and  
14 against reform.

15 Three common and interrelated themes  
16 are frequently invoked in discussions about  
17 reform, and those are legitimacy, judicial  
18 independence, and democracy. Now, one  
19 significant, I think, change in the draft  
20 materials from those that were discussed at our  
21 last public meeting, is an expansion of the  
22 analysis of each of these ideas, legitimacy,



1 judicial independence, and democracy.

2 And the materials make clear that the  
3 commission is not offering single definitions of  
4 any of these concepts, but is instead trying to  
5 lay out the different ways that these concepts  
6 might be deployed for and against various  
7 arguments for Supreme Court reform.

8 And with respect to democracy in  
9 particular, there's a discussion of different  
10 ideas of a democratic check on the Supreme Court  
11 itself, and what kind of forms those might take.

12 The materials conclude with a short  
13 discussion of the value of transparency and its  
14 relationship to the work of the Court, and  
15 arguments for and against reform of the Court.

16 CHAIR RODRIGUEZ: Thank you,  
17 Commissioner Morrison.

18 At this point, I invite all  
19 commissioners to turn their cameras on, and we  
20 will begin our deliberations on this chapter. As  
21 I mentioned, commissioners have read these  
22 materials in advance. And several people have

1 expressed their interest in making an observation  
2 about the introduction.

3 So, I'll begin with Commissioner Tom  
4 Griffith.

5 COMMISSIONER GRIFFITH: Thank you,  
6 Commissioner Rodriguez.

7 And I want to thank the members of my  
8 working group, and especially our chair,  
9 Commissioner Trevor Morrison for the collegial  
10 manner in which they've gone about creating our  
11 contributions to the report thus far.

12 They've been most accommodating to my  
13 suggestions, and they have been serious about  
14 their work. And they are committed to upholding  
15 and preserving the institution of the Supreme  
16 Court.

17 Even so, I'm concerned that the  
18 current draft of the report, gives short shrift  
19 to the remarkable achievements of the Supreme  
20 Court. And may, unintentionally, do damage to  
21 the institution by assuming too often that judges  
22 are mere partisans.

1           Let me illustrate this with a story,  
2           if I might. For a decade or so, around the turn  
3           of the century, I was involved in the American  
4           Bar Association's Rule of Law Initiative in the  
5           former communist countries of Central and Eastern  
6           Europe and Eurasia.

7           I traveled along with others  
8           throughout the region, and met with courageous  
9           reformers who were engaged in the project of  
10          building the rule of law, in their native lands,  
11          after decades of totalitarian rule. Many did so,  
12          under the constant threat of physical danger. It  
13          was an inspiring experience to learn from these  
14          men and women.

15          Without exception, these reformers  
16          hoped to create in their own countries, what we  
17          have in ours, an independent and impartial  
18          judiciary. To them the crown jewel of American  
19          democracy was our federal judiciary, and in  
20          particular the Supreme Court.

21          These reformers knew about and cheered  
22          Marbury v. Madison, Brown v. Board of Education,

1 the Pentagon Papers case, the Nixon tapes case.  
2 In my view, the draft report fails to recognize  
3 and highlight what inspired these reformers.

4 The monumental success of the Supreme  
5 Court in following and preserving the rule of  
6 law. I have no problem with a frank and candid  
7 discussion about the proper role of the Supreme  
8 Court on the Constitution, and cheer those  
9 discussions.

10 But that discussion should take place  
11 in the context of what an unrivaled success the  
12 Supreme Court has been over time. But much of  
13 the call for change, including the proposals to  
14 expand the number of justices and even to limit  
15 their terms, I believe is based on the notion  
16 that judges are just politicians in robes.

17 In my 15 years on the D.C. Circuit,  
18 serving alongside judges supported by Democrat  
19 and Republican presidents, I never once saw a  
20 judge make a decision that was influenced by  
21 partisan sympathies. Now, to be sure, I saw  
22 honest differences in opinion and how to

1 interpret the Constitution, how to read a  
2 statute, or how to make sense of a regulation,  
3 but never a difference based on political  
4 partisanship.

5 To the extent a judge gives into the  
6 temptation to step outside the lane assigned to  
7 her under the Constitution, our response should  
8 be to resist such violations of judicial oath,  
9 not encourage it.

10 President Trump, famously dismissed a  
11 decision he disliked because it was made by what  
12 he called, quote, an Obama Judge. That cynicism  
13 which breeds distrust in an impartial judiciary,  
14 earned an immediate and deserved rebuke by Chief  
15 Justice Roberts, who said, accurately, we do not  
16 have Obama Judges, or Trump Judges, Bush Judges,  
17 or Clinton Judges. What we have is an  
18 extraordinary group of dedicated judges, doing  
19 their level best to do equal right to those  
20 appearing before them.

21 I agree with the Chief Justice  
22 entirely. It's obvious that our toxic political

1 culture is doing great harm to our democratic  
2 institutions. This is a moment when we should be  
3 looking for ways to inspire confidence in our  
4 democratic constitutions.

5 As now written, I fear that too much  
6 of the draft report falls short of doing so. And  
7 to that extent, I believe the commission is  
8 missing an opportunity to assure the American  
9 public that it has good reason to have confidence  
10 in the Supreme Court, even if reasonable people  
11 can disagree about its decisions. Thank you.

12 CHAIR RODRIGUEZ: Thank you very much,  
13 Commissioner Griffith.

14 We'll next hear from Commissioner  
15 Nancy Gertner.

16 COMMISSIONER GERTNER: I actually  
17 think that I want to pass to reserve my remarks  
18 for Chapter 2.

19 CHAIR RODRIGUEZ: Thank you,  
20 Commissioner Gertner.

21 So, in that case, Commissioner Bert  
22 Huang.

1                   COMMISSIONER HUANG: Thank you,  
2 Co-Chair Rodriquez.

3                   Please let me express my admiration  
4 for this excellent introduction to the report.  
5 In particular, I can't imagine it was easy to  
6 distill the essence of the concepts of  
7 legitimacy, judicial independence, democracy as  
8 they relate to the wide-ranging debates about  
9 Supreme Court reform.

10                  And yet, here it's done eloquently.  
11 precisely, with subtlety and precision. And I  
12 believe it very usefully sets up the discussions  
13 to follow in the report.

14                  If I may, my one minor suggestion is  
15 about the very last paragraph in the introductory  
16 section, which is now a sort of carryover from  
17 the earlier discussion materials, and now seems a  
18 bit out of place given the restructuring.

19                  Because this language mirrors the  
20 preview of Chapter 5 a few pages earlier, my  
21 minor suggestion is just to fold it, or merge  
22 into that earlier discussion. Again, thank you.

1                   CHAIR RODRIGUEZ: Thank you,  
2 Commissioner Huang.

3                   We'll next hear from Commissioner  
4 Maggie Lemos.

5                   COMMISSIONER LEMOS: Thanks, and I'll  
6 be quick.

7                   Like Commissioner Huang, I just want  
8 to say thank you to the commissioners who've been  
9 working on this introduction.

10                  I offered some components at our last  
11 meeting about the conceptual framework set out in  
12 this chapter, and specifically about the  
13 discussion of judicial independence.

14                  And I think the current draft does a  
15 great job of clarifying that the concepts that  
16 are discussed here, and their relationship to  
17 court reform, can mean different things to  
18 different observers. And that the goal of the  
19 discussion here isn't to resolve those  
20 differences, but to sketch out and distinguish  
21 the various perspectives.

22                  And on judicial independence in



1 particular, I like the way the current draft  
2 flags various questions concerning the extent to  
3 which the federal judiciary as a whole, may be  
4 independent from, or dependent on, the political  
5 branches in ways that may be good or bad from the  
6 perspective of a system of checks and balances,  
7 and distinguishes those questions from concerns  
8 about whether individual judges might feel some  
9 pressure or incentive to decide particular cases  
10 in particular ways.

11 In my view, some of the reform  
12 proposals that the full report will discuss might  
13 trigger or might be inspired by the first set of  
14 concerns about institutional independence. And  
15 some of the analysis, I think, has much more to  
16 do with the second set of concerns about  
17 decisional independence.

18 And I'm grateful that the introduction  
19 now tees up both of those concepts and  
20 distinguishes them from one another. So, another  
21 thank you.

22 CHAIR RODRIGUEZ: Thank you,

1 Commissioner Lemos.

2 At this point, we can entertain  
3 further comment from commissioners who wish to  
4 weigh in about the introduction or the comments  
5 that have been made.

6 Commissioner Dellinger, it seems like  
7 you may want to raise your hand.

8 COMMISSIONER DELLINGER: I do --

9 CHAIR RODRIGUEZ: Go right ahead.

10 COMMISSIONER DELLINGER: Thank you.

11 I would like to, I second Judge Tom  
12 Griffith's remark. Though, unlike Commissioner  
13 Griffith, I don't believe that the report, fairly  
14 read, undercuts our sense of the importance of  
15 the role of the Supreme Court as an independent  
16 check, particularly on executive power. But I do  
17 understand the importance of that concept.

18 Judge Griffith, I taught Clinton  
19 against Jones, the case involving whether a suit  
20 against a president should be postponed until the  
21 end of his term in office. I taught that at  
22 Tsinghua University in Beijing.

1                   And the Supreme Court held  
2                   unanimously. I had argued for the United States,  
3                   the other way, in favor of postponement. But the  
4                   Supreme Court held unanimously in Clinton against  
5                   Jones, in favor of a clerk in state government,  
6                   against the President of the United States.

7                   And my students at Tsinghua University  
8                   in Beijing, were stunned and extraordinarily  
9                   appreciative of the fact that, first, that a mere  
10                  employee could bring the President of the United  
11                  into court. But more astounding, that she could  
12                  win.

13                  And though I had different views about  
14                  Clinton against Jones, as a decision, I saw the  
15                  power of the message that it sent to the world.  
16                  And what a wondrous thing it seemed to the  
17                  students in Beijing.

18                  CHAIR RODRIGUEZ: Thank you,  
19                  Commissioner Dellinger.

20                  Are any other commissioners interested  
21                  in joining the queue at this stage? Commissioner  
22                  Morrison.

1                   COMMISSIONER MORRISON: I should have  
2                   said at the beginning, and so just wanted to take  
3                   the opportunity here, to say how helpful the  
4                   comments we received, those of us working on  
5                   these part of the materials, the comments from  
6                   other members of the commission were. Since, at  
7                   our last meeting, and with the benefit of those  
8                   comments we were able to make a number of  
9                   adjustments.

10                   I want to thank in particular,  
11                   Commissioner Lemos, and Commissioner Fallon for  
12                   very helpful comments on the concepts of  
13                   legitimacy and judicial independence in  
14                   particular. They were very wise and I think made  
15                   the draft materials much better.

16                   I'll also say that I've great  
17                   appreciation for the concerns that Commissioner  
18                   Griffith has articulated today, and that have  
19                   been a part of our conversations as the  
20                   commission has worked on these materials.

21                   Like Commissioner Dellinger, I don't  
22                   read the introduction to embrace the proposition

1 that judges are mere politicians in robes. I  
2 think it tries to lay out a variety of  
3 understandings, and I hope the materials make  
4 clear that there is a very strong point of view,  
5 that when it comes to thinking about the Court's  
6 relationship to democracy, for example, it's not  
7 obvious what the relationship between the Court  
8 should be and the preferences of democratic  
9 majorities.

10 And there is a strong point of view  
11 that the job of judges is to do law and not to do  
12 politics. I think that that point of view is  
13 represented as one point of view held by a least  
14 some members of the commission, perhaps a great  
15 many members of the commission in the draft  
16 materials.

17 That having been said, I share  
18 Commissioner Griffith's perspective on the value  
19 of the federal judiciary, and of course great  
20 admiration for his service in that branch. And  
21 hope that the materials, in the introduction  
22 anyway, aren't broadly read in the way that he

1 worries they might be.

2 CHAIR RODRIGUEZ: Thank you,  
3 Commissioner Morrison.

4 Are there any other observations to be  
5 made at this point?

6 So, I quite agree with what has been  
7 said. That these materials very effectively take  
8 three concepts, whose meanings we might take for  
9 granted. But make clear that they have a variety  
10 of meanings. But those meanings all advance  
11 important values, and that they're values we have  
12 to take into consideration when thinking about  
13 reforming the Court.

14 And they're values that require  
15 balancing and trade-offs of different interests.  
16 And I think one of the things, both these  
17 materials and the rest of the discussion, is  
18 likely to underscore is that the Court plays a  
19 very complicated, multi-layered role in our  
20 system of government that can simultaneously do  
21 what Commissioner Griffith has underscored, but  
22 can also have significant impact on political

1 questions and the development of the political  
2 process.

3 So with that I think now it's time to  
4 turn to our discussion of Chapter 1, which as  
5 Commissioner Morrison said, was originally part  
6 of the introduction, but now forms its own  
7 chapter, as historical context for the Supreme  
8 Court reform debate.

9 And for an overview of that chapter,  
10 I'll turn to Commissioner Alison LaCroix.

11 COMMISSIONER LaCROIX: Thank you very  
12 much, Co-Chair Rodriguez.

13 I'd also like to thank the co-chairs  
14 for their leadership of this project. And also,  
15 to my fellow commissioners, and others who  
16 participated in these discussions. Because as  
17 you can already tell, I think we've had a lot of  
18 rich conversations.

19 I just want to spend a few minutes  
20 talking about, first, the main points of what is  
21 now Chapter 1. And then highlighting some of the  
22 main changes that have been made since the last

1 set of draft materials. Many of which came about  
2 because of public deliberation conversations that  
3 were had at our last public meeting.

4 So first, main points, what this  
5 chapter is doing. I think the main purpose of  
6 this chapter is to give the historical background  
7 and context in which this debate about potential  
8 Court reform, but really all debates about  
9 Supreme Court reform have taken place over the  
10 history of the republic.

11 The Supreme Court began operating in  
12 February of 1790. That's 231 years ago. And so,  
13 it's reasonable, I think, to begin a commission  
14 report of the scale by asking questions. Why  
15 does the Court look the way it does today? Which  
16 elements are constitutionally required, and which  
17 are the result of Congressional action,  
18 institutional change, political factors, and  
19 other elements?

20 So, this chapter is deliberately, I  
21 think, not presented as extra information or a  
22 timeline, or supplemental. I think, precisely



1 because the commission takes as its charge,  
2 providing a robust historical analysis, along  
3 with the rest of the analysis that we have been  
4 charged with providing to the President.

5 So, there are four main themes of this  
6 chapter. Those are largely the same as what we  
7 saw in the draft materials. Again, when this  
8 material was in a section of Chapter 1, in its  
9 previous incarnation.

10 First, the first theme is the  
11 persistence of reform debates. Debates over  
12 restructuring or reforming the Supreme Court have  
13 been with us since the Constitution was drafted  
14 in 1787. So, the moment of creation was also the  
15 first moment of criticism. And proposals for  
16 reform came at that same moment.

17 Debates over the proper role of the  
18 Court, this section lays out, are not a  
19 post-1960s phenomenon, or even a post-1937  
20 phenomenon, not even a post-civil war phenomenon.  
21 They indeed go all the way back to the first  
22 Congress and the Judiciary Act of 1789.

1                   And so, the chapter begins there to  
2 show Americans in and out of politics, struggling  
3 with issues about the Court's role in a federal  
4 republic, and in a democracy.

5                   But also, I think the chapter  
6 highlights changes. The fact that the nature and  
7 content of these debates has varied over time.  
8 And so, it would be a mistake to just look at the  
9 past for quote, unquote, lessons for today,  
10 without attending to this complex context.

11                   So, the second theme is the Court's  
12 dual role. This is a little bit subtle in some  
13 ways to capture. But the idea that the Supreme  
14 Court is both a branch of the federal government  
15 -- it plays a role in separation of powers  
16 analysis, checks and balances analysis -- but  
17 also, over time, it has come to see itself as, or  
18 has taken on the role for many, as the arbiter  
19 overseeing the entire system, determining the  
20 meaning of the Constitution. So, trying to keep  
21 a handle on those two different roles for the  
22 Court.

1                   The third theme, the connection  
2                   between the Court's role, and its organization.  
3                   And the variability in such things as number of  
4                   seats on the Court, which is not fixed by the  
5                   Constitution, the number of circuits, whether or  
6                   not the Supreme Court Justices ride circuit,  
7                   meaning hearing cases in the circuit courts,  
8                   regional representation, all these factors that  
9                   make up the Court's organization, and have  
10                  important consequences for its role in any given  
11                  moment.

12                  And then finally, the relationship  
13                  between the Court and politics. And here, we  
14                  mean politics, I think, in the broadest possible  
15                  sense. Not only partisanship, but a question  
16                  about how the Court is and is not interconnected  
17                  with political debates and broader political  
18                  discussions of its moment.

19                  So then, just a quick overview of some  
20                  of the newly added material in this draft, this  
21                  set of draft materials. And the newly added  
22                  material comes in three main areas.

1           First, criticisms of the Court, and  
2           calls for reform in the context of controversial  
3           nominations to the Court. Some of this material  
4           had been discussed, or is still referenced in  
5           other chapters, but it seemed useful to put it in  
6           this chapter.

7           So, here in particular, this chapter  
8           talks about the nomination of Justice Louis  
9           Brandeis in 1916 by President Woodrow Wilson.  
10          Brandeis has been famous for attacking corporate  
11          interests, pursuing progressive reforms, and was  
12          opposed by many legal and business elites.

13          Also, it must be said, bigotry and  
14          anti-Semitism played a role in the resistance to  
15          Brandeis. And this is important institutionally  
16          also, because Brandeis's nomination featured the  
17          first ever Senate Judiciary Committee hearing on  
18          a nomination to the Court.

19          So it's an important moment to  
20          understand, again, how we got where we are. But  
21          also, what might be different about those  
22          moments. And Brandeis was eventually confirmed

1 by the Senate.

2 Then we also talked about the  
3 nomination of John J. Parker in 1930. He was  
4 nominated by President Herbert Hoover, was  
5 strongly opposed by civil rights groups, led by  
6 the NAACP and labor organizations.

7 He was seen as anti-labor based on  
8 some of his decisions as a circuit judge. And  
9 also, widely criticized for many public speeches  
10 in which he engaged in outright racist and  
11 bigoted language, decrying African Americans'  
12 participation in politics.

13 The Senate rejected the nomination.  
14 So, the chapter talks about the context in which  
15 those events also happened. And how they were  
16 seen at the time.

17 The second additional discussion is a  
18 bit more detailed, about something the report had  
19 already discussed in draft form. Franklin  
20 Roosevelt's court-packing plan and its  
21 consequences. So, more political and historical  
22 context. The effect on FDR on the Democratic

1 Party, and on The New Deal, larger institutional  
2 consequences.

3 And really trying to demonstrate that  
4 there's still significant disagreement among  
5 historians and other scholars about what the  
6 consequences of the court-packing plan and its  
7 demise were. Again, in these various arenas, for  
8 FDR's political agenda, for the Democratic Party,  
9 and for the larger New Deal reforms.

10 Finally, some additional material at  
11 the end of the chapter, talking about the Warren  
12 Court as a subject of public debate, and a focus  
13 of criticism. In this period, in the late 1950s  
14 and through most of the 1960s, the Supreme Court  
15 was seen by some as too willing to confront  
16 social and political issues. And by others as  
17 engaging in long overdue protection of civil  
18 rights and civil liberties.

19 So there was a movement to impeach the  
20 Chief Justice, or a sort of widespread discussion  
21 about such a movement. But also, proposals to  
22 strip federal courts of jurisdiction over

1 reapportionment cases, and movements for  
2 constitutional amendments. So another flashpoint,  
3 historical moment of the Court coming in for  
4 significant criticism, and also praise for its  
5 role in popular and political life.

6           And so, on that, I'll just make one  
7 final point, which is, some of the commissioners  
8 mentioned at the last public meeting, well should  
9 this historical section continue past the Warren  
10 Court, or talk about events after 1969?

11           And I think the view that the draft as  
12 it currently stands represents is that, first of  
13 all, the historical account has been extended  
14 since the last draft to talk about some of these  
15 additional debates involving the Warren Court.

16           But also, other chapters of the  
17 report, do in fact discuss more recent debates,  
18 including the President Lyndon Johnson's move to  
19 elevate Associate Justice Fortas to the position  
20 of Chief Justice, which was filibustered by the  
21 Senate. Or the Senate vote to reject President  
22 Reagan's nomination of Judge Robert Bork in 1987.

1                   But, we can -- at some point of  
2                   course, history becomes current events. And so,  
3                   it's hard to evaluate as to these historical  
4                   events, when to sort of include them in history,  
5                   and when to talk about them as the current  
6                   moment. And also, those particular moments,  
7                   beginnings of the current moment are themselves  
8                   debated.

9                   So the sense was, much of the more  
10                  recent, say 1970 and onward discussion, comes  
11                  elsewhere in the report, in perhaps more subject  
12                  specific areas. And so, at some point, we put a  
13                  stop, or put a period at the history chapter, and  
14                  take up the more recent debates elsewhere in the  
15                  report. Thank you.

16                  CHAIR RODRIGUEZ: Thank you so much,  
17                  Commissioner LaCroix.

18                  So first we'll hear commentary from  
19                  Commissioner Laurence Tribe.

20                  COMMISSIONER TRIBE: Thank you,  
21                  Commissioner Rodriquez.

22                  I would like to begin where



1 Commissioner LaCroix took, the end of her  
2 remarks. Because I am one of the people who was  
3 concerned, and remain concerned, that the history  
4 chapter ends too soon.

5 I do want to say that I think, of the  
6 231-year history, that the chapter surveys from  
7 1790 to 2021. Seventy-five percent or so is  
8 covered brilliantly, that's Parts 1 through 8 of  
9 this chapter. But I kept looking for a Part 9.  
10 I do not think that it is enough to deal with the  
11 disputes surrounding, for example, Robert Bork or  
12 other nominees purely in a subject matter context  
13 later in the report.

14 So my strong view is that between now  
15 and when the report is completed, there be  
16 further consideration given to extending the  
17 historical treatment.

18 I do think the treatment of the first  
19 75 percent of the Court's history is, as I said,  
20 brilliant. It's elaborate, and an amazing amount  
21 of material is thoughtfully compressed, elegantly  
22 and compactly, into a relatively short number of

1 pages.

2           And it is true that in its current  
3 incarnation, the chapter does a good job of  
4 discussing the controversy surrounding the Warren  
5 Court's desegregation, reapportionment,  
6 establishment clause, criminal procedure, and due  
7 process decisions, and addressing the  
8 dramatically competing views of those decisions,  
9 whether they represented the high point in the  
10 Court's history or a low point.

11           But it seems to me that a history  
12 chapter of that kind is profoundly incomplete  
13 unless it addresses the controversy in  
14 particular, and this is simply one example,  
15 surrounding the Senate's rejection of Robert Bork  
16 and its subsequent confirmation of Anthony  
17 Kennedy, as part of the controversy about the  
18 Warren era.

19           It has become common for those who  
20 understandably think that Robert Bork was  
21 unfairly attacked, and who regard the history of  
22 his rejection by the Senate as an example of the

1 breakdown of the confirmation process. What is  
2 missing from this account, is a quite different  
3 view of that history. That it was ultimately,  
4 despite the overstatements of the some of the  
5 objections to Mr. Bork, and despite the unfair  
6 attacks on him personally, that it was the crown  
7 jewel in the history of confirmation.

8           Because unlike subsequent confirmation  
9 debates, which involved kabuki theater and  
10 ritualized incantations of meaningless  
11 platitudes, the Bork confirmation hearing  
12 involved a substantive national seminar on  
13 whether the Warren Era should in fact be deemed  
14 as the high point of the Court's contributions to  
15 human rights and democracy, or as a low point  
16 because of the Court's so-called activism.

17           In a sense, even though it took place  
18 in the late 1980s, the national consensus that  
19 emerged about the problems with Robert Bork's  
20 judicial philosophy, was the first, and in a  
21 sense, only, national referendum on the question  
22 of whether the Warren Court got it right.

1           For many people in that period, the  
2           emphatic rejection by the Senate of Robert Bork,  
3           which was not a function of the attacks on him  
4           personally, but a function of national revulsion  
5           at the view of the Constitution that he  
6           expressed.

7           A view that treated the Ninth  
8           Amendment as an inkblot. A view that treated  
9           decisions like *Shelley v. Kraemer*, involving  
10          racially restrictive covenants, as profoundly  
11          misguided. A view that said *Brown v. Board* was  
12          probably right, but its companion decision  
13          desegregating the schools of the District of  
14          Columbia was probably wrong. A view that said  
15          the Court should not have done what it did in the  
16          reapportionment cases.

17          The nation rejected those views  
18          substantively, which is why the overwhelming  
19          rejection of Robert Bork expressed something of a  
20          referendum.

21          Now, in my view, the historical  
22          chapter would be much better if it presented both

1 views. Not just the one I've just described, but  
2 its mirror image of the kinds of controversies  
3 that the Bork controversy represented.

4 It is true that at some point, history  
5 becomes the present. But I would draw the line  
6 somewhat differently and expand the coverage of  
7 this otherwise excellent chapter.

8 CHAIR RODRIGUEZ: Thank you,  
9 Commissioner Tribe.

10 We'll hear next from Commissioner Tara  
11 Grove.

12 COMMISSIONER GROVE: Thank you,  
13 Co-Chair Rodriquez.

14 So, the first thing I wanted to say,  
15 is the authors of these draft materials today,  
16 wonderful job, with a truly herculean task  
17 summarizing well over 200 years of judicial  
18 reform in 20 pages. And that is a truly  
19 remarkable achievement and I commend you for it.

20 It's very well written. It's clear  
21 and I think it nicely complements the other  
22 chapters. I was particularly impressed with the

1 coverage of the Judiciary Act of 1789, and the  
2 surrounding early reform efforts, which I think  
3 sets the stage for many of the arguments that you  
4 see later in the report. So, I thank you for  
5 that as well.

6 So, initially, I had a similar  
7 reaction to Commissioner Tribe, that the history  
8 needed to go further. And I do think it's a hard  
9 judgment as to whether, where one draws the line.  
10 I actually had a different part of the history  
11 that I wished had been covered, and that's Court  
12 reform debates that happened in the 1960s, '70s,  
13 and '80s over jurisdiction-stripping.

14 Eighties, '90s, and actually into the  
15 21st century as well, there were many, many  
16 efforts to take away federal jurisdiction in  
17 reaction to the Warren and Berger Court decisions  
18 over school prayer and abortion, and  
19 desegregation remedies.

20 But ultimately, I concluded that  
21 Chapter 4 very nicely covers these, this part of  
22 history. And I think Commissioner LaCroix has an

1 excellent point that one has to stop somewhere,  
2 and much of the history can be covered by other  
3 parts.

4 So, I think Chapter 4, at least for  
5 the parts that I felt were not adequately  
6 covered, in Chapter 1. Chapter 4 actually takes  
7 up where Chapter 1 leaves off, in a way that sets  
8 it up perfectly. So, overall, I just want to say  
9 the authors of this chapter did a wonderful job.  
10 And thank you so much for all the effort that  
11 this undoubtedly took.

12 CHAIR RODRIGUEZ: Thank you,  
13 Commissioner Grove.

14 At this time, I'll open it up to other  
15 commissioners who wish to speak to the history of  
16 Supreme Court reform. Commissioner Sherrilyn  
17 Ifill.

18 COMMISSIONER IFILL: Good morning. I  
19 too want to compliment the writers of this  
20 chapter. I thought it was incredibly well done.

21 I did however, also have some concerns  
22 about the incompleteness of the history. And my

1 concern really stems from the fact that I think  
2 it, that very often in the public debate, around  
3 what has caused kind of two camps to solidify  
4 their positions around the membership of the  
5 Supreme Court, that that has been laid at the  
6 feet of the Bork nomination.

7 And then the, you know, in subsequent  
8 chapters it's discussed, the nomination by  
9 President Obama of Judge Garland, that failed to  
10 be -- that was not taken up by Senate Majority  
11 Leader McConnell. And then, you know, Gorsuch,  
12 Kavanaugh, and Justice Amy Coney Barrett.

13 And what it leaves out, in my view, is  
14 that this is just been an ongoing process of  
15 concern and struggle, that I think very few  
16 Americans, and also very few people who comment  
17 in this area, acknowledge.

18 There has not been a period when this  
19 has not been an issue of tremendous controversy.  
20 And so, I think skipping over for example, I  
21 mean, there is a mention in later chapters about  
22 the confirmation of Justice Thurgood Marshall.



1           But, you know, the fact that he was  
2 confirmed, you know, in a vote that was 69 to 11,  
3 in that 20 Senators either abstained or voted  
4 present, is unprecedented, I think, in the  
5 confirmation votes of any justice.

6           And skipping over the withdrawn  
7 nominations of Carswell and Haynsworth, is also  
8 an important historical moment and point. And it  
9 may actually weave together with the points that  
10 Professor Tribe made, about a sense of the  
11 direction of the Court, and whether the goals of  
12 some, in terms of the personnel on the Court,  
13 felt frustrated by the time we even got to the  
14 nomination of Justice Bork.

15           So I think just hallowing out that  
16 period, disservices an understanding of how  
17 consistently this issue has been controversial,  
18 and has been debated, and has been wrestled with  
19 by people on multiple sides of the divide.

20           And certainly, to my mind, how often  
21 issues of racial discrimination, segregation, and  
22 civil rights decision-making by the Supreme

1 Court, has been at the center of the controversy  
2 over various justices, their confirmation, and  
3 the Court's power.

4 CHAIR RODRIGUEZ: Thank you,  
5 Commissioner Ifill. Are there any other  
6 commissioners who wish to address these  
7 materials, or what's been said thus far?  
8 Commissioner Ramsey.

9 COMMISSIONER RAMSEY: Yeah, thanks  
10 very much.

11 I'll just be real quick. I wanted to  
12 first say that, I really like the redress of the  
13 chapter. And I really appreciate the work that's  
14 been put into it. I had some comments on this  
15 section of the report at the first public  
16 meeting, and I appreciate the people who are  
17 working on this taking those into account. And I  
18 think, I want to echo Commissioner Grove in  
19 saying that this is really extraordinarily well  
20 done, and congratulations to you.

21 I'm not sure what I think about the  
22 suggestion that it go forward in history a little

1 bit more. I think that Commissioner Ifill makes  
2 some good points, about at least a little bit to  
3 be said about the continuing controversies over  
4 nominations.

5 But I'm concerned that taking up a  
6 substantial effort to extend this, at this point  
7 in our deliberations might raise more trouble  
8 than it would solve. Because I think that it may  
9 well be somewhat contentious as to how these  
10 descriptions would be done. It would have to be  
11 done with great care.

12 And to illustrate that, I wanted to  
13 just take a little bit of issue with some of the  
14 things that Commissioner Tribe said, regarding  
15 the Bork nomination.

16 I do absolutely agree with him, that  
17 the Bork nomination is incredibly instructive and  
18 important in the history of the Supreme Court, in  
19 the sense of their being very substantive,  
20 exactly as he said, in terms of illustrating the  
21 divide, between the ways people think about the  
22 role of the Supreme Court.

1           But what I wanted to express some  
2           doubt about, was that anything in the sense of a  
3           consensus, came out of that confirmation. That  
4           is simply not the way I see it at all. I think  
5           that the views were aired on both sides, and that  
6           it was a robust and informative debate that  
7           continues to influence us today.

8           But the suggestion that there was  
9           anything like a national consensus that came out  
10          of that debate, I think is not, not a fair  
11          description of what happened. And indeed, Judge  
12          Bork's nomination was rejected, but not  
13          overwhelmingly rejected. And indeed, rejected  
14          largely on party lines.

15          So I think we need to be careful, if  
16          we were to undertake a substantial extension to  
17          this chapter. I think the chapter is so well  
18          done at this point, that I would be hesitant  
19          adding too much to it at this late date, because  
20          it may be very difficult to agree how to describe  
21          things that have happened more recently, in which  
22          we are perhaps more immediately invested.

1 Thanks.

2 CHAIR RODRIGUEZ: Thank you,  
3 Commissioner Ramsey.

4 Commissioner Ifill, did you have  
5 another comment, or is that from before? Okay,  
6 thank you.

7 So, are there any further comments?  
8 Commissioner Boddie.

9 COMMISSIONER BODDIE: Yes, hi. I just  
10 wanted to say that I think Commissioners Ifill  
11 and Tribe make a very persuasive point about the  
12 historical narrative and not ending where it  
13 does.

14 I thoroughly appreciate the extremely  
15 hard work that was put into this chapter, and  
16 there was a lot of thoughtfulness and reflection  
17 that was sort of incorporated throughout this  
18 whole drafting process.

19 But I do think that because of the  
20 concerns that have been expressed, that by ending  
21 the chapter where it does that it influences the  
22 narrative and perhaps the public perception of

1 the trajectory of Supreme Court confirmations,  
2 that it actually -- it's more than just a  
3 historical data point.

4 That it actually does have a  
5 significant, or could have a significant effect  
6 on how people sort of read the controversies, the  
7 modern controversies about the Supreme Court.  
8 And so I just want to add my support for the  
9 comments that they both have made.

10 CHAIR RODRIGUEZ: Thank you,  
11 Commissioner Boddie. We do have time for a final  
12 comment if there are any more from the floor.  
13 Commissioner Waldman.

14 COMMISSIONER WALDMAN: I also want to  
15 thank those who worked on this, and would only  
16 note that if there is further revision to this  
17 chapter, bringing the story of controversial  
18 nominations closer to the present, that the part  
19 of the story, which is that those nomination  
20 fights have become increasingly partisan, and  
21 that nominations that are not even particularly  
22 controversial, nevertheless only pass on narrow

1 party line votes, shouldn't be undermined by the  
2 story of the Bork nomination, or any of the other  
3 nomination fights from the past, which, while  
4 ideological, were not the routine partisanship of  
5 today.

6 CHAIR RODRIGUEZ: Thank you,  
7 Commissioner Waldman. And thanks to everyone for  
8 your engagement in these first two sets of  
9 materials.

10 At this point, I will hand it over to  
11 Co-Chair Bob Bauer, to introduce the next set of  
12 discussion materials.

13 CHAIR BAUER: Thank you, Co-Chair  
14 Rodriguez. In this session, we're going to  
15 discuss materials and analysis of proposals  
16 relating to membership and size of the Court.  
17 Again, these materials were designed to be  
18 inclusive in their discussion of the competing  
19 arguments.

20 We will begin with an overview by  
21 Commissioner Grove. After which, I will  
22 recognize commissioners who've indicated an

1 interest in commenting on these topics. And of  
2 course, we'll also open it up to any other  
3 commissioners who would like to comment, either  
4 in response to those comments, or otherwise.

5 But let me begin, first by turning the  
6 overview over to Commissioner Grove.

7 Commissioner Grove, the floor is  
8 yours.

9 COMMISSIONER GROVE: Thank you so  
10 much, Co-Chair Bauer.

11 And I also want to echo the thanks to  
12 Co-Chair Bauer and Co-Chair Rodriguez, and  
13 Rapporteur Andrias, Commissioner Andrias for all  
14 the amazing work they have done leading this  
15 commission. That has been an herculean task as  
16 well, and I think we all do appreciate all of  
17 your efforts.

18 So, Chapter 2 is about changing the  
19 membership and structure of the Supreme Court.  
20 So there have been calls to expand the Supreme  
21 Court beyond its current size of nine members, by  
22 for example, adding four seats.



1           The draft materials here explore the  
2 scope of Congress's constitutional power to  
3 modify the size of the Court. And prudential  
4 arguments for and against Court expansion.

5           The draft materials also discuss  
6 several other proposals for restructuring the  
7 Supreme Court, which I will describe at the end  
8 of my remarks.

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

17           In 1789, the Court had six members.  
18 In subsequent decades, Congress changed the size  
19 of the Supreme Court seven times, setting the  
20 Court size at between five and ten members. The  
21 Supreme Court has considered of nine members,  
22 since 1869. But in 1937, there was a prominent

1 effort to reshape the Court, what came to be  
2 known, as President Franklin Roosevelt's effort  
3 to pack the Court with up to six additional  
4 members.

5 President Roosevelt initially claimed  
6 that he sought to expand the Court with more and  
7 younger personnel so that the justices could get  
8 their work done. But he soon acknowledged that  
9 his Court reform plan, was in fact, a response to  
10 Supreme Court decisions striking down his New  
11 Deal programs. There was some support in  
12 Congress for Roosevelt's efforts, but the 1937  
13 plan ultimately failed.

14 Two decades later, in the 1950s,  
15 Congress also rejected a proposed constitutional  
16 amendment that would have fixed the size of the  
17 Supreme Court at nine members.

18 Then there was starting around the  
19 mid-twentieth century a strong norm against  
20 modifying the size of the Supreme Court, but  
21 Congress continues to have considerable  
22 discretion to determine the Court's size.

1                   One question today is whether Congress  
2                   should exercise that power to add seats to the  
3                   Supreme Court. The draft materials here have  
4                   been revised considerably in response to comments  
5                   made at our public meeting on October 15th, and  
6                   to underscore both the complexity of the  
7                   arguments for and against Court expansion, and  
8                   the depth of disagreement over this issue. I'm  
9                   going to very briefly touch on some of the  
10                  arguments.

11                  Supporters of Court expansion argue,  
12                  in part, that the Supreme Court faces a  
13                  legitimacy crisis, because of what they see as a  
14                  break in the norms of the judicial confirmation  
15                  process. Supporters argue that Court expansion  
16                  could help restore balance to the Court, and help  
17                  address concerning jurisprudential trends made  
18                  possible by these events.

19                  Opponents of the reform, which  
20                  opponents refer to as court packing, argue that  
21                  it would significantly diminish the Court's  
22                  independence and legitimacy, and launch a cycle

1 of similar reform efforts in the future.  
2 Opponents argue that the long-standing norm  
3 against modifying the Supreme Court's size should  
4 be restored.

5 Court expansion is not the only  
6 structural reform that has been suggested. I'm  
7 going to briefly sketch out other proposals to  
8 restructure the Supreme Court, which are  
9 described in more detail in the draft materials.

10 One reform aims to ensure more  
11 partisan balance on the Court. A second proposal  
12 calls for a rotation system, that is a system by  
13 which judges would rotate between service on the  
14 Supreme Court and the lower federal courts. And  
15 a third would create a panel system, that is the  
16 justices would decide some cases in panels of,  
17 for example, three members.

18 One legal question is whether these  
19 rotation or panel systems comport with the  
20 constitutional requirement, that there be, to  
21 quote Article III, one Supreme Court. The draft  
22 materials explore the legal and policy questions

1 surrounding these alternative structural reforms.

2 And with that, I will turn the  
3 proceedings back to Co-Chair Bauer.

4 CHAIR BAUER: Thank you very much,  
5 Commissioner Grove. And I'm now going to  
6 recognize commissioners who would like to comment  
7 on aspects of this draft and I'd like to begin  
8 with Commissioner Fallon.

9 COMMISSIONER FALLON: Thank you very  
10 much, Commissioner Bauer and Commissioner  
11 Rodriguez, Commissioner Andrias. You have made  
12 service on this commission just absolutely a  
13 delight if anything that carries such a heavy  
14 workload could possibly be described as a  
15 delight.

16 I also want to thank Commissioner  
17 Grove and the people who are responsible for  
18 presenting the materials that we're talking about  
19 right now. I think that the draft chapter of the  
20 report does a really remarkable job of  
21 summarizing matters about which people disagree  
22 very deeply and then more than that conveys the

1 depth of feeling that underlies the disagreement.

2 So when I read this chapter, my  
3 overall reaction was one of absolute delight that  
4 you had done the splendid job that I think that  
5 you have.

6 Against that background, I have one  
7 relatively trifling suggestion that has  
8 everything to do with exposition and really  
9 nothing to do with substance.

10 When Commissioner Grove today  
11 described the various proposals that the report  
12 discusses she did so with great lucidity. I  
13 noted that as I read toward the end of the  
14 chapter, toward what was styled as subsection 4  
15 on, quote, other structural reforms, centrally  
16 including a discussion of what Commissioner Grove  
17 just described as rotation and panel systems.  
18 The report as currently drafted plunges directly  
19 into a discussion of the constitutionality of  
20 those proposed reforms without describing exactly  
21 what the proposed reforms are.

22 An attentive reader can undoubtedly

1 piece together for himself or herself what the  
2 proposed reforms are, but I think it would make  
3 for a more readable report if those responsible  
4 for preparing drafts of this chapter perhaps  
5 moved a few sentences or a paragraph of  
6 description in the report up ahead of their  
7 analysis of the constitutional permissibility of  
8 these proposals. Thank you.

9 CHAIR BAUER: Thank you, Commissioner  
10 Fallon. I would like to next recognize  
11 Commissioner Baude for comments.

12 COMMISSIONER BAUDE: Thank you, thank  
13 you very much. I know I was one of the people  
14 who had a lot of critical comments about the  
15 suggestion at our last public meeting, and I also  
16 want to echo the appreciation for the work people  
17 have done in trying to find some way to thread  
18 the needle between this often sort of  
19 incompatible criticisms this section has gotten.  
20 I know it's not an easy task and I can't think  
21 anybody could have done it any better.

22 I guess it has caused me to reflect

1 that it may be an impossible task, unfortunately.  
2 It occurs to me that there's a tension in the way  
3 we have decided to approach questions of Supreme  
4 Court reform, that it's just worth mentioning.  
5 There may be nothing at this point that we can do  
6 about it.

7 One way to think about Supreme Court  
8 reform is to think sort of independent of whether  
9 the Supreme Court decisions are correct or not  
10 correct, independent of that. Those are sort of  
11 jurisprudential disagreements. Is there  
12 something that people on both sides of the  
13 decisions agree would still help improve the  
14 function of the Court. And I think the approach  
15 in chapter 3 on term limits, the approach in  
16 chapter 5 on the shadow docket and other  
17 procedural questions still tries to take that  
18 approach, a sort of decision independent  
19 procedural approach, and there's a long tradition  
20 of that kind of procedural reform in the federal  
21 courts.

22 A different approach is to not take



1 that, ignore the decisions. To say no, the job  
2 of Supreme Court reform is to make the Supreme  
3 Court decisions better. And so if the Supreme  
4 Court decisions are bad, or destructive to  
5 democracy, or what have you, then part of the job  
6 of reform is to change the Court and cause it to  
7 do better things than it's been doing.

8 And it seems to me that approach marks  
9 a lot of the debates about court expansion or  
10 court packing. That's sort of one of the chief  
11 reasons for it really. And probably also, to  
12 some extent, the democratization proposals in  
13 chapter 4.

14 It just occurs to me that those are  
15 two very different ways of thinking about the  
16 project, and sometimes there's a lot of  
17 frustration and confusion that comes from  
18 blurring the two. It seems to me maybe we have  
19 to confront them both and we do confront them  
20 both, and maybe that's -- this is just the best  
21 we can do. But it seems to me that's part of the  
22 root cause.

1 I guess the last thing I'd add, which  
2 I hate to mention, is that it's not obvious you'd  
3 want the same sets of people giving you advice  
4 and decisions about those two kinds of reform.  
5 You might ask a very different set of experts  
6 with a very different, kind of bipartisan  
7 character if you want to really put aside the  
8 current influence of the Court's decisions.

9 On the other hand, if you really  
10 wanted to focus on changing the Supreme Court's  
11 decisions, those people may not be well  
12 positioned to give you as much useful  
13 information.

14 But given, sort of, all that and who  
15 we are, what our charge is, I appreciate how much  
16 has been done to try to resolve that. Thank you.

17 CHAIR BAUER: Thank you very much,  
18 Commissioner Baude. Commissioner Pildes.

19 COMMISSIONER PILDES: Thanks Co-Chair  
20 Bauer. I have a problem with a specific point  
21 that's made on page 10 of the draft materials.  
22 This is a section that's not about court

1 expansion in any immediate or short-term sense.  
2 In other words, it doesn't involve the debates in  
3 other parts of the chapter about what's called  
4 court packing by some people.

5 This is a section that addresses a  
6 different idea which is that over the long run  
7 there might be advantages to having a court  
8 composed of 11, or 13, or 15 justices, for  
9 example, with each President in a four-year term  
10 being able to add one justice until the Court  
11 reached some larger size, say 13 justices that  
12 some proponents might think is a more optimal  
13 size for the Court. So that's the section I'm  
14 talking about.

15 And the draft offers two main reasons  
16 that some people might support such a change, and  
17 it's the second of the reasons that I have a  
18 problem with.

19 The draft says there that it might be  
20 a benefit to the legal system if the Court were  
21 to resolve more cases than the 70 or so cases a  
22 year it now decides, and that a reason to

1 consider increasing the size of the Court to,  
2 say, 13 justices is to enable the Court to decide  
3 more cases.

4 But the reason the Court is not  
5 deciding more than 70 cases a year right now has  
6 nothing to do with the fact that the Court has  
7 nine justices. As we know and the report  
8 mentions in the mid nineteen eighties the Court  
9 was regularly deciding 180 cases a year or more,  
10 as much as 185 cases a year.

11 The Court has shown over many decades  
12 it can easily double the number of cases or more  
13 that it decides than it currently does. I  
14 actually think the draft could be misleading to  
15 readers to the extent that they read it as  
16 suggesting that the dramatic decline in the  
17 number of cases the Court currently decides has  
18 anything to do with the fact that the Court has  
19 nine justices.

20 And I say that as someone who believes  
21 it would benefit the legal system for the Court  
22 to decide more than 70 cases a year. In the

1 areas of law I know best, the Court sometimes  
2 gets involved on certain issues only  
3 episodically, perhaps once a decade or so. In  
4 the meantime the law in the lower courts can be  
5 unclear or confused for many years. Even if  
6 those issues don't produce the kind of direct,  
7 square conflict that the Court currently requires  
8 most of the time for getting involved in issues.  
9 So I do think the legal system would benefit from  
10 the Court providing greater clarity on important  
11 issues even sometimes in the absence of the  
12 direct conflict between the lower courts.

13 But there's no factual basis, in my  
14 view, for suggesting the Court needs to have 13  
15 justices to decide, say, 180 cases a year. Now  
16 that's only one point the draft makes in  
17 exploring this particular proposal that, perhaps  
18 in the long run, a larger court would be better.  
19 But I find that particular point really quite  
20 unpersuasive and I would encourage us to  
21 reconsider that particular point.

22 CHAIR BAUER: Thank you, Commissioner

1 Pildes. Commissioner Gertner.

2 COMMISSIONER GERTNER: Thank you. I  
3 wanted to add my voice to those who have, first  
4 of all, praised the overall effort of this. The  
5 significance of what we were doing, or at least  
6 that I thought what we were doing, and I think  
7 this is borne out, is that it was better to have  
8 these very fraught discussions in the context of  
9 a commission like this, a balanced commission,  
10 than as part of the political give and take, or  
11 on Twitter, or in a political campaign.

12 And our discussions have borne that  
13 out. In other words these have been very rich  
14 discussions and I, for one, have changed as a  
15 result of them. I came into this process  
16 convinced that while there were serious problems  
17 with the composition of the Court, how that  
18 composition happened, what the others have talked  
19 about as the legitimacy crisis with the  
20 appointment of Kavanaugh, Gorsuch, and Barrett.  
21 I believed at the outset that nothing could be  
22 done without substantial risk, that the risks

1 outweigh the benefits.

2 I have since changed and in my  
3 comments in the last public meeting I was  
4 concerned that the draft didn't reflect those who  
5 believed in expansion not because of legitimacy,  
6 not because even of diversity, but for a much  
7 more profound problem, a much more profound  
8 structural issue.

9 The draft reflects, at least my view  
10 and I think the views of other commissioners,  
11 that this really is a moment unlike any other,  
12 unlike any other in which this kind of reform has  
13 been debated.

14 The recommendation for expansion is  
15 not because of disagreement with particular  
16 positions on abortion, on civil rights, et  
17 cetera. It's not expand the Court so that the  
18 positions I believe in be respected. It's not a  
19 position on whether the Court has been correct or  
20 not in decisions over the past several years.

21 It is about a structural problem and  
22 that's reflected in the draft and a unique

1 moment. One can always assume that there will be  
2 changes in the composition of the Court in the  
3 future. Supreme Court membership will ebb and  
4 flow as Presidents change. It's not a one-to-one  
5 correlation because Supreme Court judges serve  
6 life tenure, but the Court still changes.

7 The draft reflects our concern that if  
8 -- at least some commissioners' concern that if  
9 current trends continue there will not be that  
10 kind of ebb and flow in the composition of the  
11 Court, that the Court will be entrenched in ways  
12 that have not happened before. That's why the  
13 draft reflects this is a moment unlike any other.

14 As to Judge Griffith's comment this is  
15 not -- you can call it partisan. I don't believe  
16 the draft suggests that judges are partisans in  
17 robes. Whether one agrees with these positions  
18 or not, it is that one judicial philosophy,  
19 whether you agree with it or not, is entrenched  
20 and will be entrenched even as elections come and  
21 go.

22 The draft I actually think could say



1 more about why that's the case, which is that  
2 legislation to restrict voting for young people,  
3 for people of color, gerrymandering to entrench  
4 one political party, legislation to put partisans  
5 in positions to monitor voting, have been  
6 effectively enabled by a series of Supreme Court  
7 decisions; the gist of which, again, is that the  
8 current membership, the current philosophy,  
9 whether you agree with it or not, will be  
10 entrenched in ways that it has never before been  
11 entrenched.

12 I do think that the draft now reflects  
13 what had been Commissioner Ifill's concern that  
14 expansion is also worth considering for a host of  
15 other reasons, to strengthen the Court as an  
16 institution, to reflect diversity, to reflect the  
17 changing country, and could enrich the Court's  
18 decision-making.

19 I continue to object, and maybe this  
20 is just words. The use of this -- taking this  
21 position and calling it court packing. Court  
22 packing was an epithet which was used in

1 Roosevelt's time.

2           We are really talking about -- while  
3 we're talking about expanding the Court as I said  
4 I think we're talking about something different  
5 than expand the Court because we don't like where  
6 it's going. We're talking about expanding the  
7 Court because of the Court's position on voting  
8 rights, and legislation restricting voting, and  
9 where that's likely to lead in the entrenchment  
10 of one philosophy over another.

11           I do want to emphasize I like the  
12 draft because it also talks that expansions need  
13 not happen all at once. That there are various  
14 proposals to increase one per presidential term,  
15 or two per presidential term. I think that's a  
16 discussion that we ought to have.

17           And finally, I think although the  
18 draft says this, I would actually like to flesh  
19 it out more. I understand the risks. The  
20 Commission has talked about the risks of  
21 proposing expansion. I think that we need to  
22 flesh out more about the way the need outweighs

1 those risks, that risks associated with expanding  
2 the Court really don't compare in severity to the  
3 risk associated with failing to take action.

4 Thank you.

5 CHAIR BAUER: Thank you, Commissioner  
6 Gertner. And now I'd like to recognize  
7 Commissioner White.

8 COMMISSIONER WHITE: Thank you. Thank  
9 you very much to the chairs and to all my  
10 colleagues here on the commission.

11 Those who read the new draft of  
12 chapter 2 will find that it differs significantly  
13 from the draft materials that were released weeks  
14 ago. They're very different. The new draft now  
15 sets apart the arguments in favor of court  
16 expansion and the arguments against court  
17 expansion.

18 The structure, I think, of this draft  
19 is understandable given the diversity of views on  
20 this commission, but I do think that when you  
21 read the two, sort of, separate sections of the  
22 pro and con arguments, they really are two ships

1 passing in the night. Each side is presenting  
2 its own affirmative arguments without really  
3 responding to the other side's arguments. And  
4 again, I think that's understandable, but I think  
5 that each side's criticisms of the other side are  
6 often left implicit rather than explicit.

7 Now, I can still support, I think,  
8 this draft because I do think it does accurately  
9 describe the arguments that the critics of court  
10 packing have put forward, and also the arguments  
11 for the proponents of court expansion, the  
12 arguments they have put forward. I think these  
13 are accurate representations of what both sides  
14 are saying and we're reporting it accurately to  
15 the President.

16 I do fundamentally disagree with the  
17 arguments made in favor of court expansion in  
18 practically every respect. I disagree with the  
19 advocates' view of history, the history of the  
20 Court and recent history of the Senate, and the  
21 suggestion that anything in recent history would  
22 justify breaking with the now longstanding norm

1       against tactical court expansion.

2                   I disagree with the advocates' view of  
3       the present, the present state of the Supreme  
4       Court, its approach to the rule of law, and the  
5       suggestion that that would justify tactical court  
6       expansion.

7                   Finally and maybe most emphatically I  
8       really do disagree with the advocates' view of  
9       the future, the suggestion that they can narrowly  
10      tailor an argument in favor of court expansion  
11      that wouldn't be used not just to pack the Court  
12      now, but by other advocates in the future. I  
13      just don't think we can gerrymander an argument  
14      for court expansion in that way, and I think it's  
15      dangerous to try.

16                   Just one last note. We, as a  
17      Commission, have now studied this issue for  
18      months, and many of us, surely all of us have  
19      been thinking about it for months and years  
20      before we joined this Commission.

21                   It's understandable that at the end of  
22      this process we will not make collective

1 recommendations one way or another. Again,  
2 that's not really our mandate and even if it were  
3 a commission with this diversity of views surely  
4 couldn't come to agreement on that. So  
5 collectively we won't offer recommendations.

6 Individually, I do think when this  
7 process ends each of us, all 34 of us really do  
8 owe it to ourselves, to one another, and to the  
9 public to be very clear and forthright in our  
10 views of the actual merits of court expansion in  
11 general and in this specific moment in time.

12 I hope that President Biden calls upon  
13 us individually to give our candid and honest  
14 views of the merits of these claims. I hope that  
15 Congress calls upon each of us to offer our  
16 views, and I hope the public calls upon each of  
17 us to offer our views.

18 We, as a Commission, have been  
19 entrusted with great resources and great  
20 responsibility to take these issues seriously,  
21 and I really do hope that the submission of a  
22 final report is not the end of a conversation but

1 the beginning of a conversation.

2 Commissioner Gertner, she and I,  
3 needless to say based on our last comments, we  
4 disagree profoundly with one another. We do  
5 respect one another and I'm grateful we've had  
6 the chance to serve on this together.

7 For all of our disagreements I do  
8 agree with something she just said where she said  
9 we're at a unique moment. I agree that it's a  
10 very unique moment. I think it's a uniquely  
11 dangerous moment, though, to expand the Court.  
12 And I'll end my comments there. Thank you.

13 CHAIR BAUER: Thank you very much,  
14 Commissioner White. And I would like, now, to  
15 open it up to any further comments either on  
16 these comments or on any other aspects of this  
17 draft that a Commissioner would like to address.  
18 Commissioner Grove.

19 COMMISSIONER GROVE: So thank you to  
20 everyone for these terrific comments. Always  
21 very helpful, as were the comments at our last  
22 public meeting.

1           Just a couple of things that I want to  
2 say. I think that as this discussion shows there  
3 is profound disagreement on the subject matter of  
4 this chapter. I think perhaps more profound than  
5 on any other part of the report, of the draft  
6 materials and what this Commission is trying to  
7 do.

8           But I also think it's extremely  
9 valuable that we've had this discussion. In our  
10 society today, many people who fundamentally  
11 disagree on issues simply do not discuss them,  
12 and not only have we discussed them and fought  
13 over them in some cases, strongly debated, but we  
14 have done so while maintaining respect for one  
15 another, and respect for the fact that we do  
16 fundamentally disagree.

17           And so while I think this is a  
18 challenging task, I don't think it's an  
19 impossible task. I think it's something that we  
20 can and have come together on even if we -- even  
21 if all of us have parts of this chapter and other  
22 parts of the draft materials that we would



1 actually prefer to change.

2 On the specific comments of  
3 Commissioners Fallon and Pildes, thank you very  
4 much Commissioner Pildes. I think we need to  
5 think about your suggestion. And Commissioner  
6 Fallon, that's absolutely right. We can clarify  
7 the discussion of the other structural forms.  
8 And I thank you for making that suggestion.

9 CHAIR BAUER: Thank you very much,  
10 Commissioner Grove. And I certainly want to  
11 associate myself with the view that this is a  
12 time when a commission like this with its diverse  
13 views and backgrounds can come together to have a  
14 meaningful conversation without in any way as  
15 Commissioner White pointed out overlooking the  
16 fact that there are significant individual  
17 agreements.

18 Any individual commissioner might well  
19 have written the report differently. But we had  
20 a charge to provide -- account, a fair account of  
21 the competing arguments and a critical appraisal  
22 of the reform proposals. And I think that this

1 commission has admirably joined collectively in  
2 the effort to do that. And I do think it's an  
3 important time to show that that can be done. So  
4 thank you, thank you for those comments and I'd  
5 like now to recognize Commissioner Rodriguez.

6 CHAIR RODRIGUEZ: I wanted to make a  
7 comment that in a sense follows from what  
8 Commissioner Baude said at the outset which is  
9 that I think one of the ways in which this  
10 chapter succeeds, and this is true of other parts  
11 of the report that we'll talk about later as  
12 well, is that it makes clear what the stakes of  
13 this debate are.

14 And we're not charged with making  
15 recommendations or coming down on one side or the  
16 other of this debate. But I think this does an  
17 effective job of laying out the world view that  
18 is behind the arguments in favor of expansion and  
19 the arguments against expansion. And those world  
20 views consist both of predictive judgments that  
21 may or may not be correct as well as of values,  
22 some of which are in common, but which people

1 think are affected differently by those empirical  
2 questions that are guiding their sense of whether  
3 to take the step of expanding the Court or not at  
4 this time.

5           And for that reason, it falls into the  
6 kind of category that Commissioner Baude  
7 described at the beginning, which is that these  
8 are debates about a set of political  
9 controversies, and maybe even legal controversies  
10 that we're having today, but are not about the  
11 institution of the Supreme Court writ large, per  
12 se, in the way some of the other chapters are.

13           And I hope that what this will do is  
14 both by rigorously describing the world views and  
15 the arguments made on both sides of the debate  
16 enable people, who have the power to either do  
17 something or not about the structure of the  
18 Supreme Court, to make good decisions and good  
19 decisions that are informed by a certain amount  
20 of epistemic humility, which I think this chapter  
21 ultimately by taking the approach that it does  
22 reflects even if that was not its ultimate

1 intention or its initial intention.

2 CHAIR BAUER: Thank you, Commissioner  
3 Rodriguez. Commissioner Ifill.

4 COMMISSIONER IFILL: Very brief point.  
5 First of all, I think the chapter does really an  
6 excellent job of laying out the different  
7 arguments. And I guess I have always been less  
8 ambitious than some about this process.

9 What I hoped would happen is that the  
10 arguments and the best arguments and the support  
11 for those arguments on all sides of this issue  
12 would be lifted and raised and available for  
13 people to educate themselves and to provide the  
14 underpinning for what is going to be an ongoing  
15 conversation. So I feel really rather satisfied.

16 I do, however, agree with Judge  
17 Gertner that something that stuck with me is the  
18 repeated use of the word court packing. And this  
19 is, in fact, I think, something of a drafting  
20 issue that and consistency issue that will have  
21 to be worked through.

22 In chapter 5 there was serious

1 pushback against the repeated use of the word  
2 shadow docket, and it was actually eliminated in  
3 many sections and now almost entirely reads as  
4 emergency orders. So if we're going to do that  
5 there I think you should reconsider the use of  
6 court packing, except when you're talking about  
7 how it was used in a historical period, in the  
8 Roosevelt period where court packing was the  
9 colloquial term.

10 But if we, as commissioners, are not  
11 going to use the colloquial terms for some of  
12 these changes then that should be consistent  
13 throughout the document and court expansion would  
14 be more appropriate in this chapter. It's in the  
15 headings, but in the text, court packing is used  
16 quite a bit.

17 CHAIR BAUER: Thank you, Commissioner  
18 Ifill. Commissioner Tribe.

19 COMMISSIONER TRIBE: Thank you, Co-  
20 Chair Bauer. I want to associate myself with  
21 Adam White, and with Sherrilyn Ifill and others  
22 who have said that the process itself has been

1 illuminating and educational, and at a moment in  
2 our history when people find it extraordinarily  
3 difficult to talk to one another (audio  
4 interference), let alone rationally, about  
5 matters on which they differ deeply in terms of  
6 values and about systemic differences and  
7 differences in prognostication.

8           It is, I think, a very good sign that  
9 we have been able to do what we've been able to  
10 do. But I want to add a word to that. If one  
11 were being, simply, hardheadedly political one I  
12 think would likely say that no matter how  
13 elegant, exposit, thoughtful, careful,  
14 informative this report is the likelihood of  
15 political movement in response to any of its  
16 appraisals, positive or negative, is not high.

17           The nation's agenda is filled with  
18 pressing matters and the likelihood that anyone  
19 will take up the cudgels in favor of any  
20 significant change in the Supreme Court, even if  
21 that group or individual is persuaded by the  
22 arguments in favor of change, that likelihood is

1 not great.

2 But that does not lead me to think  
3 that this extraordinarily time-consuming  
4 enterprise has been in any way wasted. As a  
5 teacher, as someone who has spent 50 years  
6 thinking and teaching about these matters I focus  
7 not only -- and I'm sure this is true of all of  
8 us, I focus not only on the likely short-term  
9 impact of what we produce and present to the  
10 President and to the public. But I focus on what  
11 things will look like when my grandchildren are  
12 in positions of influence and power, when my  
13 students have assumed positions of influence.

14 And for a moment I want to disagree a  
15 little bit with those who say that we are on a  
16 completely one-way ratchet and that the world  
17 will never change. With Commissioner Gertner, I  
18 fear that that may be the case, but I strongly  
19 hope that it is not, that those of us who think  
20 that we are at a moment in which if we don't do  
21 anything quite drastic we will go off the edge in  
22 terms of the American experiment.

1           I hope that those of us who fear that  
2           are wrong, that 20 years from now, 50 years from  
3           now debates about the role of the Court, its  
4           importance in preserving the rule of law, in  
5           preserving the values that Judge Griffith  
6           mentioned, its importance will still be with us.  
7           And the question of where its direction ought to  
8           go will remain. And that debates about  
9           structural reform will again arise. And when  
10          that happens I think it will be the case that  
11          nothing else out there, and I think we've all  
12          looked very hard, nothing else out there comes  
13          close to what this report will do in laying out  
14          calmly and thoughtfully the arguments for and  
15          against various changes, many of which on the  
16          surface seem a lot easier than it turns out they  
17          would be.

18                 So, looking into that more distant  
19          future I'm incredibly encouraged about what we  
20          have contributed. And I believe it has been  
21          worth the effort.

22                    CHAIR BAUER: Thank you very much for



1 that, Commissioner Tribe. Commissioner Griffith.

2 COMMISSIONER GRIFFITH: So I want to  
3 agree with Commissioner Gertner about the gravity  
4 of the moment that we find ourselves in. We  
5 probably think we're in a grave moment for  
6 different reasons, but I do think this is a grave  
7 moment in the nation.

8 For that reason, I'm perhaps more  
9 optimistic than she is. I'm certain I am, about  
10 the present state of the Supreme Court and the  
11 role that I hope it will play to get us through  
12 the difficult times we're in right now.

13 So, my statement at the outset was  
14 informed in part by my concern that if we aren't  
15 careful, and if we reduce the stature of the  
16 Court in the eyes of the American public that it  
17 may limit its ability to get us through the very  
18 difficult times we are facing and we yet face.

19 I associate myself completely with  
20 Commissioner White's comments. I wish I had said  
21 them as well as he had.

22 And finally, with Commissioner Baude

1 as well. But my biggest concern about this  
2 Commission, and I agree with the comments that  
3 have been made about what a wonderful exercise  
4 it's been in having thoughtful people with deeply  
5 held views speak with one another civilly and  
6 learn things from one another, and actually be  
7 willing to change views from one another. I  
8 think it's been a wonderful exercise in that way.

9 I do have a fundamental concern that  
10 the premise, a premise of many of the proposals  
11 for change is that change is necessary. And as a  
12 Burkean, I worry about change, right, and I worry  
13 about unintended consequences of change. So my  
14 concern about change is I think we have something  
15 really precious and good in the Supreme Court  
16 that's been created over the years with  
17 difficulty.

18 And I just worry about changes being  
19 made having unintended consequences that will  
20 limit its ability to play a critical role in the  
21 times that -- the difficult times that I fear are  
22 upon us and will continue for some while.

1                   CHAIR BAUER: Thank you very much,  
2 Commissioner Griffith. Do we have any additional  
3 comments from other commissioners at this time?  
4 Well, thank you very much. That was an excellent  
5 discussion. We will take a break now until 3  
6 p.m. at which time Commissioner Andrias will  
7 moderate a discussion on the length of service  
8 and turnover on the Court. And we look forward  
9 to seeing you there. At 3 p.m. we'll resume.  
10 Thank you very much.

11                   (Whereupon, the above-entitled matter  
12 went off the record at 2:36 p.m. and resumed at  
13 3:00 p.m.)

14                   COMMISSIONER ANDRIAS: Welcome back,  
15 everybody. In this session we will discuss the  
16 materials regarding the length of service and the  
17 turnover of justices on the Court, also known as  
18 term limits. As with the previous chapters these  
19 materials aim to be inclusive in their discussion  
20 of the arguments for and against reform.

21                   We will first hear a brief summary of  
22 the contents of this set of materials from

1 Commissioner Rick Pildes. I will then call on  
2 the commissioners who after reviewing the  
3 materials in advance of this meeting indicated an  
4 interest in speaking to the topics, and then  
5 we'll open up for any other commissioners who  
6 wish to speak.

7 So for now I will turn it over to  
8 Commissioner Pildes. Thank you.

9 COMMISSIONER PILDES: Thanks very  
10 much, Kate. And I want to start by thanking our  
11 co-chairs, Bob Bauer and Cristina Rodriguez. I  
12 know that sounds obligatory but they've really  
13 done a masterful job of steering the ship, and we  
14 will hopefully reach port safely soon.

15 And I want to acknowledge also the  
16 goodwill and the efforts of my fellow  
17 commissioners, particularly those I've worked  
18 most closely with over the course of our  
19 discussions.

20 I'll summarize the discussion  
21 regarding proposals that the country should  
22 consider changing the current system of life

1 tenure for Supreme Court justices to a system in  
2 which the justices would serve for a fixed term  
3 of a specific number of years. And the draft  
4 refers to this as a system of term limits for  
5 Supreme Court justices, and it's one of the  
6 proposals that's been central in discussion of  
7 possible Supreme Court reforms going back at  
8 least the last 20 years or so.

9           The main term limits proposal the  
10 materials address is one in which the justices  
11 would be appointed to terms of office that would  
12 last for 18 years. Under this proposal that  
13 would mean that each President in a four-year  
14 term would have the opportunity to nominate two  
15 justices to the Court.

16           Most proposals suggest that the  
17 President's first nomination should arise in year  
18 one of the new presidential term and the second  
19 in year three to avoid nominations arising during  
20 election years.

21           As we noted in our first public  
22 meeting term limits for the Court is a proposal

1 that has drawn considerable bipartisan support  
2 over the years. The commission heard testimony  
3 from a large group of experienced Supreme Court  
4 practitioners including former Solicitor Generals  
5 appointed by Presidents of both parties who  
6 concluded that the proposal warrants serious  
7 consideration, in their words.

8 Both originalist and non-originalist  
9 constitutional scholars have endorsed term limits  
10 for the Court over the years. And as Judge  
11 Griffith alluded to in his testimony or in his  
12 comments earlier today the single feature of the  
13 American Constitution that has been most widely  
14 adopted in other democracies is the idea of a  
15 written constitution and the system of judicial  
16 review.

17 Yet the materials also note the U.S.  
18 is the only major democracy in the world that has  
19 neither a retirement age nor a fixed term for its  
20 highest court judges.

21 To be sure, there's significant  
22 concerns that need to be confronted in

1 considering the proposal for term limits, and the  
2 major change in these materials from the prior  
3 public meeting in light of the comments made then  
4 and discussions since is to develop in much  
5 greater detail the reasons that those who oppose  
6 term limits believe they would be a bad idea.

7 Let me first quickly highlight some of  
8 the main justifications proponents of term limits  
9 offer.

10 First, term limits would regularize  
11 the appointments process and make appointments  
12 more predictable. The Constitution created the  
13 process of presidential nomination and Senate  
14 confirmation, but proponents of term limits note  
15 it's difficult to see the justification for the  
16 number of nominations any President has the  
17 opportunity to make to vary greatly based on  
18 random chance, such as when justices happen to  
19 leave the bench, whether through illness,  
20 retirement, or death.

21 Some Presidents end up with the  
22 opportunity to fill several seats on the Court

1 during a four-year term. Others end up with no  
2 vacancies during their four years as President.

3 In addition, the current system  
4 creates a risk, proponents point out, that some  
5 members of the public will perceive the justices  
6 to be retiring or failing to retire for what the  
7 materials call strategic reasons. That is, the  
8 justices choose when to retire based on whether  
9 they prefer a particular President to fill their  
10 seat.

11 And whether this occurs or not the  
12 perception that it occurs can undermine public  
13 confidence in the Court. By regularizing  
14 appointments, a system of term limits would make  
15 the process in the view of supporters of this  
16 proposal appear more fair, less arbitrary, and  
17 more predictable.

18 Since all justices would serve 18  
19 years and only 18 years term limits would also  
20 remove the incentive that currently exists for  
21 Presidents to consider only relatively young  
22 nominees who have the potential to serve for



1 many, many decades.

2 As I mentioned the draft gives much  
3 greater voice to the concerns that have been  
4 raised by those who are troubled by the prospect  
5 of term limits.

6 One concern that's been raised is  
7 whether a system of term limits would compromise  
8 the extremely important value of judicial  
9 independence.

10 Another major concern that's been  
11 raised is whether the prospect of each new  
12 President having two nominations for the Court  
13 would make the Court even more of an issue in  
14 electoral politics, and how that might affect  
15 public perceptions of the Court.

16 In our prior hearing some  
17 commissioners also raised concerns that giving  
18 Presidents two nominations every four years would  
19 give Presidents too much power to shape the  
20 Court, and the materials now give greater voice  
21 to that concern as well as others.

22 And I'm sure in the discussion we'll

1 hear more detail about those concerns along with  
2 greater elaboration of the reasons proponents  
3 believe a shift to 18-year terms for justices of  
4 the Court would be better for the Court and for  
5 the country. Thanks.

6 COMMISSIONER ANDRIAS: Thank you,  
7 Commissioner Pildes. So we will turn now to  
8 those who expressed an interest in participating  
9 in advance and then open up for additional  
10 comments. Commissioner Ramsey.

11 COMMISSIONER RAMSEY: Thank you very  
12 much, and first of all I want to congratulate the  
13 people who worked most directly on this new draft  
14 that we have because I think this is really an  
15 outstanding presentation of this difficult issue.  
16 I was one of the people who was somewhat critical  
17 of the earlier draft that we saw and I think this  
18 one is extraordinarily much improved, and it  
19 presents a very balanced discussion and very  
20 useful discussion of the issues that term limits  
21 bring up. So a great job, and it's just -- it's  
22 a pleasure to see the way that we've been able to

1 work together to produce this product.

2 I wanted to raise one fairly small  
3 thing actually, although it's an important thing  
4 to me but in the larger scheme of this chapter  
5 it's actually I think a fairly small one. I want  
6 to apologize for not having raised this before.  
7 It was actually something that was in the  
8 previous draft, but it didn't catch my eye the  
9 first time around because I think I was focused  
10 more on the front part of the draft instead of  
11 the back part.

12 So this is in the back part. It has  
13 to do with the first paragraph on page 26 which  
14 is in the section that is talking about  
15 difficulties of implementation of a term limits  
16 proposal, and in particular the question of  
17 whether something needed to be done in the  
18 confirmation process to make sure that the  
19 process doesn't break down by the obstruction of  
20 the Senate of particular nominees.

21 And so I think that discussion is a  
22 good one and an appropriate one. I just had

1 trouble with this one paragraph which is sort of  
2 at the end and it struck me as almost an  
3 afterthought that the draft says, and I quote, "A  
4 statute might provide that if the Senate fails to  
5 confirm one or both of the President's scheduled  
6 appointments the next President of a different  
7 party would lose a corresponding number of  
8 appointments."

9 The draft then goes on in the next  
10 sentence to say, "Without any analysis this  
11 proposal does seem constitutional, although it  
12 raises some practical concerns about the  
13 proposal."

14 I actually have grave doubts that such  
15 a proposal would be constitutional depending on  
16 how it was structured. The Constitution gives  
17 the President with the advice and consent of the  
18 Senate the power of nomination and appointment.

19 I'm not sure how a statute could  
20 purport to remove that power from the President  
21 and the Senate even if it's in the worthy goal of  
22 trying to deter a breakdown in the confirmation

1 process. At an absolute minimum it seems to me  
2 that substantial constitutional analysis would be  
3 needed in order to reach the conclusion that the  
4 proposal seems constitutional.

5 And I think that significant weight  
6 would need to be given to opposing views, at  
7 least unless I could be persuaded that it is in  
8 fact clearly constitutional. But I think that  
9 there could be a lot more to be said here, and a  
10 lot more needs to be said were we to reach the  
11 conclusion that such a proposal is  
12 constitutional.

13 But I actually have an easier solution  
14 which is I don't think we need to address this  
15 proposal. I don't believe that this is a  
16 proposal that was brought before us by any of our  
17 witnesses, and I'm not aware that it is a  
18 proposal that's been widely discussed or even not  
19 widely discussed in the public commentary about  
20 the -- about term limits.

21 Maybe I just missed it and I apologize  
22 if I did. But I don't think that we're obligated

1 to raise and consider in any and all proposals  
2 that might be out there.

3 And I think moreover that there are  
4 some serious, practical difficulties with this  
5 proposal which the draft currently notes. And it  
6 seems to me that for various political reasons  
7 it's likely to be in any event a non-starter.

8 So, because of the complex, as I see  
9 it constitutional issues involved with such a  
10 proposal that I think wouldn't be useful to get  
11 into I suggest that we simply delete this  
12 paragraph because I think it is a -- it's not  
13 really a proposal that stands much chance of  
14 being adopted, and it's not one that exists as a  
15 significant part of the public debate on term  
16 limits.

17 So I think it would be much simpler  
18 just to take the paragraph out rather than get  
19 into the significant constitutional analysis that  
20 we'd need to I think to support any kind of  
21 conclusion that such a statute taking away the  
22 President's power of appointment would be

1 constitutional. Thanks a lot. That's all I've  
2 got.

3 COMMISSIONER ANDRIAS: Thank you,  
4 Commissioner Ramsey. Commissioner Levi.

5 COMMISSIONER LEVI: Thank you very  
6 much, and I particularly thank Rick Pildes for  
7 his excellent work and for working with me on  
8 this chapter. I thank all of the other  
9 commissioners and our leadership.

10 The chapter does in my view a very  
11 good job of presenting the arguments for and  
12 against term limits. And in what may be its most  
13 significant contribution, exploring some of the  
14 considerable complexities of multiple difficult  
15 decisions that would arise if term limits were to  
16 be implemented.

17 Anyone who has not thought deeply  
18 about this subject will find the chapter  
19 illuminating and may find as in my case that  
20 having read the chapter and on further reflection  
21 they are opposed to term limit proposals.

22 I suggest very few places where modest

1 revisions may be in order, and I do so in the  
2 spirit of strengthening or clarifying the report,  
3 and with great respect for my colleagues on the  
4 commission.

5 First, I think it's important that the  
6 commission disclaim support for either side of  
7 this debate perhaps using language that is  
8 similar to the language used in chapter 2.

9 The impression is somehow given that  
10 this has widespread support and perhaps therefore  
11 widespread support within the commission. I  
12 don't know if that's true or not true, but since  
13 we are not making recommendations we ought to be  
14 clear that we are not taking sides on this  
15 debate, but presenting the debate.

16 Second, there's some places where the  
17 text seems to me to slip into what I would call  
18 the voice of the commission when discussing our  
19 arguments and points of controversy, and I think  
20 we should be permitted to do some further editing  
21 in those places.

22 Third, reliance on state supreme court



1 analogues, this needs clarification and  
2 qualification. There are no non-renewable term  
3 limits in the state system for supreme court  
4 justices. In the state systems justices hold  
5 renewable terms, generally I believe it's true  
6 without limit. That is, they can be renewed any  
7 number of times. And they involve some kind of  
8 election process on renewal, whether it's a  
9 partisan or retention election, or they go  
10 through a reappointment process in the political  
11 branches of the state government. So I don't  
12 think we can point to the state courts as a model  
13 of term limits that should be persuasive in this  
14 context. I look forward to further developing  
15 that point. Rick and I have had some discussion  
16 on this and I think we can do that.

17 Fourth, I'd like to give somewhat  
18 further very brief consideration in the  
19 opposition section to statements by proponents of  
20 term limits to the effect that justices become  
21 out of step with the times by virtue of their  
22 life tenure.

1 I realize that most of the people on  
2 this commission, most of the members of this  
3 commission are experts on life tenure because  
4 they have life tenure, and so perhaps they can  
5 enlighten me on this topic and the possible  
6 connection between tenure and what I'll call  
7 ossification. Perhaps it's okay to be amusing  
8 from time to time.

9 This is another point, addressing the  
10 12-year limit proposal which appears later in the  
11 chapter and is presented now as a plausible  
12 alternative to 18-year terms.

13 The central issue here is that a two-  
14 term President will have appointed a majority of  
15 the Court before concluding the second term. And  
16 I don't think the draft does enough to identify  
17 the obvious danger of presidential control,  
18 overreach, control of the Court under such a  
19 system. I'd like to see more on that, or perhaps  
20 the 12-year term could be eliminated in that  
21 discussion.

22 Sixth, there is a wrap-up or summary

1 at the end of the opposition section after three  
2 dots which in my view erroneously now  
3 characterizes the opposition to term limits as  
4 mostly based on a fear of unintended consequences  
5 from any reform of a significant part of Article  
6 III. That's a concern and should be said, but  
7 the consequences we are likely to experience are  
8 at least enough for this particular opponent, and  
9 this is easy to revise and does not introduce any  
10 new arguments.

11 Seventh, I think we should retain the  
12 ability to do some limited general editing  
13 designed to clarify existing points and remove  
14 repetition. I'd also suggest that just in the  
15 spirit of consistency with other sections that we  
16 remove some of the counter arguments from the  
17 opposition section since we don't present counter  
18 arguments during the presentation of the for  
19 arguments.

20 Eighth, there seems to be a suggestion  
21 that by providing for nomination and confirmation  
22 by the political branches the Constitution

1 implicitly provides for an equal number of  
2 appointments by the President and the President's  
3 party during each presidential term. I'd like to  
4 see this point challenged in the opposition  
5 section.

6 Ninth, I think we should give greater  
7 salience to some of the negatives in forbidding a  
8 justice from leaving the Court and taking other  
9 employment. This prohibition on further  
10 employment is a key part of the term limit  
11 proposal, but it could trap a justice in place  
12 who is unsuited to the job and there have been  
13 such justices, who dislikes the work or who is no  
14 longer up to it. That can't be good for the  
15 system.

16 There also may be justices who because  
17 of illness in their families or for other reasons  
18 need greater income and would find themselves  
19 forced to resign and yet be unable to do so and  
20 seek other work.

21 Tenth, as part of the opposition case  
22 I would like to consider the extent to which the

1 term limit proposals for the Supreme Court might  
2 open the door to extending the proposal at some  
3 later time to the entire federal Article III  
4 judiciary. I see this as a negative, but I  
5 suppose that others may see it differently.

6 Eleventh and finally, I wish to  
7 reserve the ability for myself and other  
8 commissioners to review this chapter and in fact  
9 the entire report before we vote on it, and to  
10 assure ourselves that the report does not give  
11 the impression to the American people that the  
12 commission as a whole views the Supreme Court or  
13 the Article III judiciary either as the spoils of  
14 political office or as participants in partisan  
15 politics.

16 Judges are not politicians in robes.  
17 They swear an oath to do equal justice and in my  
18 experience based on nearly 17 years as a federal  
19 judge, so not the full 18, but 17, that is  
20 exactly what they do and what they aspire to do  
21 sometimes in enormously difficult circumstances.

22 To the extent that there may be

1 language in any part of the report that may give  
2 a different impression on behalf of the  
3 commission I think we must retain the ability to  
4 correct it. Thank you very much. Appreciate it.

5 COMMISSIONER ANDRIAS: Thank you.

6 Commissioner Balkin.

7 COMMISSIONER BALKIN: Thank you very  
8 much. I welcome the comments by Commissioner  
9 Levi which are very sound. And I think it won't  
10 be difficult to accommodate them in the draft  
11 since they are I think rather minor.

12 But it did give me an idea. One of  
13 these criticisms gave me an idea because he was  
14 pointing out two things about tenure. One, he  
15 was pointing out about tenure about academics.  
16 And the second thing he was pointing out was what  
17 about life tenure for federal judges.

18 And as I thought about it -- so here  
19 I have to thank you, Commissioner Levi. It  
20 struck me that rotation matters more where there  
21 are a relatively small number of people who hold  
22 a position. So nine as opposed to many

1 thousands, and even larger if we think about  
2 tenured faculty.

3           Where you have a very, very large  
4 number of people who have life tenure just the  
5 flow of generations, people retiring, will in  
6 fact take care of many of the problems that give  
7 rise to the need for term limits.

8           That's why it's somewhat less urgent  
9 to have term limits for all Article III judges  
10 just because a huge number of them are appointed  
11 in each presidential term. And so what you get  
12 are many of the benefits of rotation that come  
13 that way.

14           On the other hand, if you decide as  
15 the United States does to have one Supreme Court,  
16 and that is the language, which consists only of  
17 nine people then in fact reliance simply upon  
18 generational turnover is less likely to give you  
19 the benefits of rotation.

20           And so in fact comparing the Supreme  
21 Court, nine people who hold their jobs for life  
22 and who have an enormous amount of power I should

1 say, to much larger populations actually suggests  
2 a very good reason to have term limits for that  
3 Court alone. And thank you very much,  
4 Commissioner Levi. I think we should include  
5 that point now in the draft.

6 COMMISSIONER ANDRIAS: Thank you.  
7 Commissioner Johnson.

8 COMMISSIONER JOHNSON: So, I just  
9 wanted to say a few things. One, I think that  
10 the chapter strikes a really nice balance of  
11 presenting the debate in all of its complexity,  
12 so much so that some could read this and think it  
13 leads to nothing. It sort of presents thoroughly  
14 arguments on what one might call both sides, and  
15 I think it does so exhaustively.

16 But I think in addition it really does  
17 spend a lot of time thinking about questions of  
18 design that are really difficult, not just the  
19 constitutional statutory line, but also the  
20 question of how whatever route you pursue could  
21 create some sort of unintended consequences.  
22 That took a lot of work and creativity and just



1 care. And I just want to thank all who had input  
2 in it and all the commissioners on that.

3 On the question of state courts I read  
4 this current draft to be careful about what it's  
5 saying about state courts, just to point out that  
6 they do have, most of them, renewable by election  
7 terms. Most of them also have mandatory  
8 retirement ages.

9 I didn't read the draft to really  
10 suggest that the federal courts could be compared  
11 to the state courts in all dimensions because of  
12 course they can't. State courts have all sorts  
13 of differences. Their constitutions are  
14 different, in a lot of cases much easier to  
15 amend.

16 And they are different in ways that I  
17 think matter for drawing comparisons, but I  
18 thought they were just a data point and a useful  
19 one in addition to the comparison perspective.

20 And then the last thing I want to say  
21 is I think we sometimes struggle, and maybe this  
22 goes to the last point about how do you create a

1 tone that both acknowledges that there are  
2 political stakes to appointments. That's why  
3 there has been so much wrangling over them. So  
4 some of the concerns that lead some people to  
5 term limits would exist even outside of and apart  
6 from a confirmation process that is fraught.

7 But the role of fighting over  
8 confirmation, aggressive political tactics,  
9 strategic retirements is pushing some people to  
10 the position of term limits.

11 And I think the report is really  
12 careful to talk about that real phenomenon  
13 without then falling into the trap of saying  
14 judges are all mere partisans. I think it holds  
15 both things in its framework.

16 And I think we have to be able to.  
17 The reason that there are stakes in all of this  
18 is because people think that there is a  
19 difference and an implication for the Court in  
20 who is appointed, and I don't think it would be  
21 good to be utterly naive about that and not  
22 mention that, but I don't read anything in the

1 report to suggest that means that ideology and  
2 partisanship are perfectly coextensive, or that  
3 judges are just driven by partisan motivations,  
4 and if it does I'd love to be -- to know where  
5 the language could change a little bit to satisfy  
6 those who have that concern.

7 COMMISSIONER ANDRIAS: Thank you,  
8 Commissioner Johnson. We have a little bit of  
9 time left if there are other commissioners who  
10 would like to address the issue. Commissioner  
11 Ross.

12 COMMISSIONER ROSS: Yes, thank you,  
13 Commissioner Andrias. I want to start by again  
14 thanking Bob and Cristina and Kate both for their  
15 awfully tremendous leadership. I also want to  
16 say what an honor it is to serve on such a  
17 distinguished commission. Especially on matters  
18 that are critically important to our republican  
19 form of government.

20 I want to thank Commissioner Pildes  
21 for presenting the part of -- this part of the  
22 report, and for the hard work that I know that he

1 has put into the work of this commission.

2 I think I want to kind of just engage  
3 the point that's been made about sort of this  
4 question about the politics of it all because I  
5 think in just -- I think it's important to  
6 reinforce points that are made by Commissioner  
7 Johnson and Commissioner Gertner.

8 I want to start by associating myself  
9 with Commissioner Gertner's point that judges  
10 have philosophies. Scholars, lawyers, members of  
11 the public label these philosophies conservative  
12 and liberal, but however you want to label them  
13 these different philosophies often lead to  
14 different views and decisions in cases involving  
15 democracy, individual rights, federalism,  
16 separation of powers, and other critically  
17 important matters to our republic and to the  
18 American people.

19 If judges did not have conservative or  
20 liberal philosophies I'm not sure there would be  
21 reasons for Presidents and senators to care so  
22 intensely, or as intensely as they do about who

1 gets nominated onto courts and particularly the  
2 Supreme Court.

3 Certainly Presidents and senators  
4 should care about putting persons on the Court  
5 who are impartial, knowledgeable, and have the  
6 right temperament to serve as judges.

7 But I think we would be blinking at  
8 reality if we thought it was merely the desire to  
9 secure impartial and capable judges that drove  
10 the tremendous amount of presidential attention  
11 devoted to Supreme Court nominees and the  
12 extraordinary intensity of confirmation battles.

13 Instead what seems absolutely clear to  
14 me is that Presidents nominate and senators seek  
15 to block or confirm judges on the basis of their  
16 judicial philosophies, and we are now in a unique  
17 moment in which the turnover of judges might be  
18 losing the randomness that I think is critical to  
19 our process as judicial appointments increasingly  
20 become the target of strategic manipulation.

21 Many think it is justices who are  
22 strategically retiring which may or may not be

1 true. But what seems clear is that the Senate  
2 through its decision regarding Judge Garland and  
3 Justice Coney Barrett have opened the door to  
4 strategic manipulation of Supreme Court turnover  
5 processes in the future that needs to be  
6 addressed now.

7 If the process for nominating and  
8 confirming judges loses randomness then there is  
9 a good chance that we will run into the problem  
10 that Commissioner Gertner described, the problem  
11 of an entrenched judicial philosophy on the  
12 Supreme Court.

13 And I fear that the combination of  
14 strategic manipulation of judicial turnover and  
15 an entrenched judicial philosophy on the Court  
16 poses a greater threat to the legitimacy and  
17 stature of the Court that Commissioner Griffith  
18 is so rightly concerned about than reform of the  
19 turnover process through term limits or the size  
20 of the Court through expansion.

21 And so I think that that moment is --  
22 I think it needs to be critically underlined and

1 emphasized as the moment that we're facing, and  
2 it's why I think that we need to at least  
3 acknowledge that judicial philosophies and the  
4 differences between them ultimately matter.

5 Thanks.

6 COMMISSIONER ANDRIAS: Thank you.  
7 Commissioner Boddie.

8 COMMISSIONER BODDIE: Yes, hi. Like  
9 others I want to take a point of personal  
10 privilege first to acknowledge the extremely hard  
11 work of our colleagues in putting together these  
12 respective chapters. Just extraordinarily  
13 grateful for them as well as for the direction  
14 and guidance of our Co-Chairs and our  
15 Rapporteurs. I just for the record wanted to  
16 express that while I had the chance.

17 I also want to preface what I'm about  
18 to say by saying that I recognize the importance  
19 of identifying the pros and cons of the reform  
20 proposals that have been floated. And so what  
21 I'm about to say is not intended to cast doubt on  
22 the usefulness of that exercise. I think if

1 anything it invites those of us who hold  
2 particular perspectives to voice them with  
3 greater clarity and precision.

4 And I also finally -- this is my last  
5 prefatory comment. I do think that a drawback as  
6 others have recognized with how the commission is  
7 structured is that it makes it very difficult for  
8 us to engage in a realtime back and forth  
9 conversation about proposals which might  
10 alleviate the need to include sort of the panoply  
11 of responses, pros and cons, in the drafts and  
12 that structure of course is not the fault of  
13 anyone on the commission but is a function of the  
14 federal statute that we're operating under.

15 Okay, so those are the prefatory comments.

16 My real comment is that I think given  
17 all that -- or in view of all that I've just  
18 said, I think we have to be very careful about  
19 the articulation of the pros and cons, and to  
20 take rigorous account of the other side's  
21 position. The example that I will point to is  
22 the language on page 5, the second paragraph



1 under objections to term limits. And the draft  
2 reads, "According to opponents it is decidedly  
3 not the role of a judge to decide cases according  
4 to the judge's estimation of the temper of the  
5 times except in the rare instance where the law  
6 requires consideration of contemporary mores in a  
7 particular context. Rather, say the opponents,  
8 it is the role of the judge to apply and develop  
9 the law using the tools of judging emblematic of  
10 the century's old common law tradition," et  
11 cetera.

12 Assuming that this description  
13 accurately reflects the opponents' critique, I  
14 don't believe that this critique takes account of  
15 what the proponents of term limits are actually  
16 saying.

17 So for example, the bottom of page 2  
18 in the draft states that proponents of term  
19 limits would, quote, "make individual members of  
20 the judiciary independent at any given point in  
21 time, but the composition of the judiciary as a  
22 whole responsive over time to the people as

1 expressed through its electoral decisions about  
2 who occupies the presidency and the Senate."

3 So I read this to say that proponents  
4 are not urging individual judges to evaluate the  
5 views of the body politic in making decisions.  
6 Rather, proponents of term limits are making the  
7 point that the composition of the judiciary as a  
8 body over time should take account of electoral  
9 outcomes as reflected in the roles specifically  
10 afforded in the Constitution to the President to  
11 nominate justices and the Senate to give advice  
12 and consent.

13 I'm concerned that leaving this  
14 language in the report would give what some have  
15 described as inattentive readers the chance to  
16 cherrypick language from the report that does not  
17 fairly reflect the views of the proponents, and I  
18 would recommend that it be removed. Thank you.

19 COMMISSIONER ANDRIAS: Thank you.  
20 Commissioner Morrison.

21 COMMISSIONER MORRISON: I just about  
22 lowered my hand because I think the point I was

1 about to make is very close to the one just made.  
2 I don't know if I agree with the suggestion to  
3 remove the particular language that Commissioner  
4 Boddie has just identified, but I think that the  
5 point she was making about the point of view of  
6 the proponents is I think what Commissioner  
7 Johnson was earlier saying as well, that one need  
8 not fall into the position of making the claim  
9 that Commissioner Griffith is concerned with,  
10 namely the suggestion that judges are nothing  
11 more than politicians in robes.

12 One need not end up there in order to  
13 observe the obvious which is judicial  
14 philosophies exist, ideologies exist, substantive  
15 value sets exist. And the question then is about  
16 how best to articulate that understanding in a  
17 way that's not misunderstood to suggest merely  
18 that judges are partisans, or politicians in  
19 robes.

20 My reading of the chapter is that it  
21 pulls this off quite well. I think it's a really  
22 admirable job that's been done in this draft.

1 But it may be that the language that Commissioner  
2 Boddie has just identified should be  
3 reconsidered.

4 But I think the goal here is clear,  
5 and it's to ensure that the argument on behalf of  
6 term limits isn't misunderstood as suggesting  
7 that a kind of regular vacancy process would  
8 achieve some goal of politicizing the judiciary  
9 in that way.

10 A responsiveness to democracy need not  
11 be converted into or understood merely as judges  
12 operating as politicians. As I say I don't think  
13 the draft on my reading mis-portrays the argument  
14 in favor of term limits in that way. But perhaps  
15 there's more that could be done to make the  
16 distinction between partisanship and ideology  
17 even clearer. And the fact that responsiveness  
18 to democracy in some way is not necessarily  
19 reducible simply to partisanship.

20 COMMISSIONER ANDRIAS: Thank you. Is  
21 there anyone else who would like to speak before  
22 we move on to the next set of materials?

1 Commissioner Griffith.

2 COMMISSIONER GRIFFITH: Yes, I just  
3 want to say I agree with what Commissioner  
4 Morrison just said. There's clearly a  
5 distinction between party affiliation and  
6 judicial philosophy. We need to recognize that  
7 and acknowledge that. I don't think that's a bug  
8 of the system, I think it's a feature of it.

9 The concerns that I've had and  
10 expressed are those used that suggest that what's  
11 going on now is actually a partisan issue, trying  
12 to exalt one political party's platform over  
13 another. I think we all agree that that's  
14 inappropriate. That's the distinction I'm trying  
15 to make, not that judges don't have judicial  
16 philosophies. I do and those are fair game to  
17 debate and to vote against someone if you think  
18 that their view of the role of the judge is --  
19 the system the constitution requires.

20 COMMISSIONER ANDRIAS: Thank you,  
21 Commissioner Griffith. Okay, with that I will  
22 turn things back over to Co-Chair Rodriguez and

1 we will turn to the next chapter.

2 CHAIR RODRIGUEZ: So in this next  
3 session we'll be talking about the draft chapter  
4 4, and we will discuss the materials that present  
5 an analysis of proposals that would in some way  
6 reduce the power of the Court in relation to the  
7 other branches of government.

8 And for an overview of chapter 4 I  
9 will turn to Commissioner Caroline Fredrickson.

10 COMMISSIONER FREDRICKSON: Hi and  
11 thank you. Before I get into the chapter I do  
12 want to thank the Co-Chairs from the bottom of my  
13 heart for all their hard work and their  
14 collegiality as well as the members of my working  
15 group who were really just a pleasure to work  
16 with.

17 So our chapter is as Co-Chair  
18 Rodriguez had mentioned is somewhat different  
19 from the earlier discussions because what we've  
20 talked about, what we're analyzing is the  
21 proposals that don't shape the Court in terms of  
22 size or personnel, but actually try and address

1 the power of the Court by reducing it, or the  
2 power of the judicial branch as a whole.

3 So, in this chapter we look at the  
4 proposals that would reduce the power of the  
5 Court. In part it's a way of shifting power to  
6 resolve the big questions of the day, social,  
7 political, and cultural away from the Court and  
8 to the political branches.

9 Those who support these ideas argue  
10 that the Supreme Court has played too large a  
11 role, has too much power in our system of  
12 constitutional governance because it's been  
13 interfering with or taking away control from the  
14 other branches that should actually resolve those  
15 questions.

16 Under this view the Court has emerged  
17 as an obstacle to the realization of important  
18 social goals and undermined the ability of  
19 Congress and other political actors to protect  
20 rights.

21 Without attempting to address all the  
22 mechanisms to reduce the Court's power this

1 chapter looks specifically at jurisdiction  
2 stripping, supermajority voting requirements to  
3 invalidate congressional or other government  
4 action, as well as the other rules that would  
5 require greater deference to the political  
6 branches, and lastly to legislative overrides by  
7 Congress of the Supreme Court or other courts'  
8 decisions.

9 And in looking at these proposals we  
10 analyzed how they might affect the Court, or the  
11 Court's role in relation to the other branches of  
12 government, potential benefits and costs of the  
13 proposals, and whether they could be achieved  
14 without a constitutional amendment.

15 So these proposals to disempower the  
16 Court generally rest on two related assumptions.  
17 First, a determination that a statute violates  
18 the Constitution requires exercising judgment  
19 about what the Constitution means. And that is  
20 something that as we all know many people can  
21 disagree about and the justices themselves  
22 disagree about.



1                   And in addition, the principles of  
2                   democracy require that Congress and the executive  
3                   branch have opportunities to check the decisions  
4                   of an unelected judiciary and to advance their  
5                   own views of the constitutionality of legislation  
6                   and executive action.

7                   For some this view rests on the belief  
8                   that the Court has stepped into political battles  
9                   better resolved by elected officials such as  
10                  abortion or voting rights. But in addition some  
11                  argue that Supreme Court justices are nearly  
12                  always drawn from the elite and so don't  
13                  represent the population as a whole.

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

1 Constitution is notoriously difficult to amend.

2 And with the justices' life tenure  
3 they can become, it is argued, increasingly  
4 unrepresentative over time.

5 So in these proposals some of them  
6 specifically target the Supreme Court, but others  
7 would also apply to lower courts. Some would  
8 insulate broad categories of legislation from  
9 judicial review. Others would limit judicial  
10 power only with respect to specifically  
11 identified issues.

12 So in this chapter we consider the  
13 extent to which such proposals would affect the  
14 Supreme Court's role, or that of the judiciary as  
15 a whole in relation to other branches of  
16 government to resolve important questions as well  
17 as the counter arguments.

18 Those who criticize these proposals  
19 worry that such reforms might undermine  
20 protections for individual rights and in  
21 particular minority rights, or that because of  
22 the possibility of competing interpretations of

1 the Constitution the law could become less  
2 settled, or reflect less well reasoned  
3 constitutional decision-making.

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

8 And of course there are some who  
9 simply contest the idea that the courts are  
10 operating in a way that is anti-democratic.

11 So in this chapter we engage in a  
12 discussion that's really much more analytical,  
13 don't purport to resolve fundamental questions of  
14 democratic and political theory that any  
15 substantial disempowering of the courts would  
16 raise.

17 Instead we analyze the extent to which  
18 the various proposals to disempower the courts  
19 reach the goals proponents hope to achieve and  
20 identify some of the potential costs, including  
21 from the perspective of those who emphasize the  
22 importance of the courts in protecting individual

1 rights, federalism, or other constitutional  
2 values and structures.

3 And finally we discuss the  
4 constitutional issues they pose and evaluate  
5 whether the proposals could be achieved without  
6 constitutional amendment.

7 So I did want to thank everybody in  
8 closing, the other members of the commission for  
9 the very helpful comments that we had. We did  
10 make some changes to the chapter that were  
11 reflective of those comments in order to tighten  
12 language and clarify issues where there was some  
13 ambiguity about how we had stated it in the  
14 initial draft.

15 So I do want to thank you and once  
16 again thank the Co-Chairs for their fearless  
17 leadership of all of us. Thank you.

18 CHAIR RODRIGUEZ: Thank you,  
19 Commissioner Fredrickson. So we did have one  
20 person who expressed an interest in commenting on  
21 these materials so I'll start with her and then  
22 open the floor to others who might have something

1 to say. Commissioner Grove.

2 COMMISSIONER GROVE: Thank you, Co-  
3 Chair Rodriguez. So, thank you so much to  
4 Commissioner Fredrickson for that great summary.  
5 I just want to commend those who worked on this  
6 chapter. I think they've done a great job.

7 I think throughout this public meeting  
8 we've been recognizing just how much work has  
9 gone into this. And I think we have all  
10 benefitted from the fact that some segment of our  
11 commission has worked very, very closely on a  
12 part of the draft.

13 And I will say I'm inclined to be  
14 somewhat deferential to the decisions made by  
15 people in particular groups because they have  
16 worked so closely on a particular issue and spent  
17 so much time and care on it.

18 And here it's just been fantastic work  
19 on chapter 4. There is a mountain of literature  
20 on Congress' power over federal jurisdiction, and  
21 this chapter manages to go through it pretty  
22 deftly and carefully, and cover a lot of ground

1 in a pretty short number of pages.

2 I also appreciate how chapter 4 picks  
3 up where chapter 1 left off in talking about some  
4 of the post-reapportionment attacks on the  
5 Supreme Court and the lower federal courts, and  
6 shows how there's been a lot of late 20th century  
7 and early 21st century debate over court reform  
8 over national security, desegregation remedies,  
9 school prayer, abortion, marriage equality. And  
10 I think that's a nice context for our report  
11 overall.

12 And I thought the analysis of  
13 supermajority requirements was very nuanced. And  
14 I appreciate the changes to the discussion of  
15 legislative overrides. So overall I think it's a  
16 fantastic chapter and I do so appreciate the work  
17 that went into it.

18 CHAIR RODRIGUEZ: Thank you,  
19 Commissioner Grove. Is there anyone else who  
20 would like to comment on chapter 4? Commissioner  
21 Andrias.

22 COMMISSIONER ANDRIAS: Thank you. I

1 wanted to also echo Commissioner Fredrickson in  
2 thanking those who made really constructive  
3 criticisms and comments at the last meeting which  
4 I think ultimately have led to a clearer and more  
5 useful chapter.

6 And for many people I think this  
7 chapter is not the most exciting. It might even  
8 be described as dull or overly technical, but I  
9 think it really deals with a topic that is  
10 extraordinarily important.

11 And it's worth underscoring that we  
12 really received quite a bit of testimony from a  
13 number of experts and organizations across the  
14 political spectrum expressing concern that the  
15 Supreme Court has exercised too much power over  
16 decisions that really ought to be made  
17 democratically, or put differently, that the  
18 Court has at times been insufficiently  
19 deferential to the judgments of Congress and as a  
20 result inappropriately struck down legislation.

21 But at the last meeting several people  
22 made really constructive comments about how and

1 where this chapter needed further clarification  
2 and elaboration. And I think those changes  
3 strengthened the draft. I just wanted to  
4 highlight two ways in which two additional  
5 changes that have been mentioned but I think are  
6 worth highlighting.

7 One is that the draft provides a lot  
8 more detail on legislative overrides and how they  
9 actually work, for example in Canada.

10 And the draft is also clear that most  
11 reformers have assumed and seem to agree that a  
12 formal system of legislative overrides would  
13 require in the United States, a constitutional  
14 amendment.

15 But the revisions also strengthen the  
16 draft in that they highlight the powers that  
17 Congress already has, or that many scholars think  
18 Congress already has to engage in the important  
19 task of constitutional interpretation and  
20 enforcement even without amendment or even  
21 without statutory reform.

22 And then finally to note that some



1 commissioners at the last meeting raised  
2 additional technical points that I think are  
3 really important and that the draft actually  
4 still doesn't grapple with.

5 Because adopting any of these reforms  
6 would be very complicated and difficult, and so  
7 the draft I think still leaves for future  
8 elaboration and discussion many issues in the  
9 interest of remaining at least somewhat readable.

10 So again, thanks to those who read so  
11 closely and made suggestions.

12 CHAIR RODRIGUEZ: Any other comments  
13 from commissioners on this chapter? I'll make  
14 one observation about the chapter which is as  
15 Commissioner Fredrickson mentioned at the outset  
16 it doesn't purport to take a position on the  
17 questions of democratic theory that are  
18 implicated. Those are questions that are  
19 perennial and long-standing in debates on  
20 constitutional theory and in political theory  
21 about the proper role of the Court, such a court  
22 that consists of life tenured judges and justices

1 in our constitutional system.

2 What I do think that it does in a way  
3 that is to its credit and I hope will be a long-  
4 lasting contribution of the report is think  
5 through how various forms of disempowerment might  
6 actually work and what the complexities  
7 associated with those reform proposals might be  
8 as Commissioner Andrias suggested.

9 And it does the work that we were  
10 charged to do which is to analyze whether various  
11 ways of reducing the Court's power within the  
12 system actually meet the objectives of the  
13 proponents of those reform proposals.

14 And in doing that especially with  
15 respect to its last part I think it opens up new  
16 conversation about how to think about ways to re-  
17 shape the Court's role in our system of  
18 democratic governance. And so it adds I think a  
19 depth to a long-standing debate that is sorely  
20 needed and in that sense makes a significant  
21 contribution. So I thank the people who labored  
22 over this intensely for so long.

1                   And if there's nothing else on chapter  
2                   4 we will move on to chapter 5 and I'll hand this  
3                   back over to Co-Chair Bauer.

4                   CHAIR BAUER: Thank you very much,  
5                   Commissioner Rodriguez. We're going to turn now  
6                   to the materials that present analysis and  
7                   competing views on proposals relating to the  
8                   Supreme Court's practices and procedures. We'll  
9                   follow the same model that we have up to this  
10                  point. Commissioner Huang will provide an  
11                  overview. I'll recognize him first. Thereafter  
12                  there will be commissioners who have comments to  
13                  offer, and we'll open it up to anybody else who  
14                  would like to speak to the issues. But first let  
15                  me recognize Commissioner Huang.

16                  COMMISSIONER HUANG: Thank you,  
17                  Commissioner Bauer. I mean really thank you and  
18                  thanks to Co-Chair Rodriguez and thanks to  
19                  Commissioner Andrias as well.

20                  So as we all know public discussion  
21                  about the Supreme Court has highlighted not only  
22                  the structural proposals analyzed in these

1 previous chapters but also the Court's internal  
2 procedures and practices.

3 The commission heard from expert  
4 witnesses on these topics over the course of the  
5 two sets of hearings this past summer. We've  
6 also examined commentary from lawyers, scholars,  
7 judges, and several of the justices in their  
8 recent opinions and public statements, as well as  
9 from hearings separately held by the House and  
10 the Senate this past year.

11 The draft of chapter 5 draws on this  
12 commentary and gratefully it also draws on the  
13 wide-ranging input of you, our fellow  
14 commissioners, during our last round of  
15 deliberations in October.

16 The chapter draft focuses on three  
17 sets of issues of especially high salience in  
18 public debates and commentary. First, emergency  
19 orders. Second, judicial ethics. Third,  
20 courtroom transparency.

21 In the first category, emergency  
22 orders, the draft covers current debates about

1 the Court's use of emergency rulings, including  
2 high profile, high impact orders that allow or  
3 don't allow a new law to take effect while legal  
4 challenges about that law continue forward in the  
5 courts.

6 Public debate has often focused on how  
7 emergency rulings differ from the way the Court  
8 usually decides cases. For example, how  
9 emergency rulings are informed by less briefing,  
10 don't involve oral argument by the lawyers, and  
11 often do not give much explanation of the Court's  
12 reasoning.

13 While acknowledging that emergency  
14 procedures are necessary commentators including  
15 commission witnesses have raised concerns about  
16 the Court's emergency rulings in recent years and  
17 they've suggested ways to address these concerns.

18 The first section of this chapter  
19 addresses these concerns and proposals as well as  
20 counter arguments.

21 The second section covers judicial  
22 ethics. The draft recognizes that there has been

1 much public discussion including bills in  
2 Congress about the fact that unlike other federal  
3 judges the justices of the Supreme Court are not  
4 formally bound by a code of conduct, although  
5 they may consult the code that applies to other  
6 federal judges.

7 Also, unlike other federal judges the  
8 justices are not subject to the federal statute  
9 that governs judicial discipline. The draft  
10 chapter examines commentary and proposals about  
11 these issues as well as about recusals of the  
12 justices.

13 The third section on courtroom  
14 transparency is about how to help the public  
15 observe the Supreme Court's proceedings in real  
16 time through live audio streaming or maybe  
17 someday even video.

18 In addition to these sections in the  
19 chapter a part of the appendix to the report will  
20 highlight witness testimony about advocacy and  
21 informational inputs to the Court, topics  
22 previously addressed in the discussion materials.

1           So now a hearty word of thanks is in  
2 order for everyone's input in our last round of  
3 full commission deliberations about that original  
4 set of discussion materials. Having taken into  
5 account your many insightful suggestions the  
6 draft chapter is now more tightly structured with  
7 a sharper focus on those issues which have been  
8 highly salient in current debates and are of  
9 great public concern.

10           It's also incorporated your  
11 suggestions about coverage, about matters of  
12 voice and style, terminology, and about how to  
13 understand the current debates. And like the  
14 rest of the report it's sought to find points of  
15 equilibrium among competing views in the  
16 commentary and among commissioners.

17           Finally of course it's been updated to  
18 reflect the latest developments including how the  
19 Court's practices have continued to evolve and  
20 how public debates have been evolving along with  
21 it.

22           So thank you again. A special thanks

1 to our friends on working group 5. You know who  
2 you are.

3 CHAIR BAUER: Thank you very much,  
4 Commissioner Huang. I'd like now to recognize  
5 commissioners who'd like to speak to any of the  
6 issues raised and discussed, analyzed in chapter  
7 5 and I'll begin with Commissioner Baude.

8 COMMISSIONER BAUDE: Thank you. And  
9 I want to again voice my real appreciation for  
10 the people who worked on this chapter. I think  
11 it's really dramatically improved from the  
12 chapter we saw at the last meeting and I know  
13 that took a lot to get there and I'm really glad  
14 that happened. Mostly I just wanted to say how  
15 much I like the chapter compared to where it was.

16 I will throw out one last concern I  
17 have is with the section on courtroom  
18 transparency which I worry is a little too one-  
19 sided in its assumption that transparency is  
20 always good for the functioning of government  
21 organizations, and that therefore the court  
22 should be sort of encouraged to move towards more



1 and more transparency.

2 I think the experience from other  
3 branches of government, the debates about the  
4 sort of effect on increased qualitization on  
5 Congress and other things should at least make us  
6 be less certain about how much transparency and  
7 how much realtime we really ought to have.

8 We note the experiments the Court is  
9 doing, but I think we probably ought to leave it  
10 to the Court without more information to decide  
11 whether this should be encouraged or not  
12 encouraged. They probably know more than we do  
13 about the effects that all the various  
14 transparencies have on them.

15 I mean I think we ourselves of course  
16 have been proceeding under a complicated set of  
17 rules about transparency which have created of  
18 course great public benefits, but sometimes great  
19 logistical difficulties. So I'd just sort of  
20 suggest we ought to be a little more cautious  
21 about assuming that there's a one-way March  
22 towards more transparency being good. Thanks.

1                   CHAIR BAUER: Thank you very much,  
2 Commissioner Baude. Any additional comments  
3 addressed to chapter 5? If that's the case --  
4 please feel free to interrupt with a raised hand  
5 but I will move now unless otherwise interrupted  
6 with someone who does want to make a comment to  
7 some closing remarks at the end of this session.

8                   Very briefly, first I know I speak --  
9 oh, Commissioner Morrison.

10                   COMMISSIONER MORRISON: I won't take  
11 long. Thank you. At a number of points  
12 throughout today various of us on the commission  
13 have thanked you, Co-Chair Bauer, and you, Co-  
14 Chair Rodriguez, and you, Rapporteur Andrias.  
15 But I thought maybe it would be just appropriate  
16 without purporting to speak on behalf of everyone  
17 to say that one more time.

18                   For the public that is joining us  
19 today there's just no way that you could  
20 appreciate the awesome task that these folks have  
21 undertaken in guiding us through this process.  
22 And I know that all of us on the commission, I

1 think I can speak for all in saying how  
2 appreciative we are. And I will on my own behalf  
3 say that I'm just stunned by the leadership that  
4 you've displayed here, each of you, and so we are  
5 deeply, deeply grateful for it. Thank you.

6 CHAIR BAUER: Thank you very much for  
7 that, Commissioner Morrison. I will just say for  
8 my own part and I doubt Commissioner Rodriguez,  
9 Commissioner Andrias disagree.

10 It all matters who you are trying to  
11 support here and our view was that we were  
12 supporting an extraordinary collection of  
13 individuals that the President asked to serve on  
14 this commission, and that certainly made the task  
15 for us far, far easier. It was always  
16 stimulating, it has continued, and I hope it will  
17 continue to be stimulating until we reach a  
18 conclusion.

19 But for our part we think the thanks  
20 -- I certainly would express it this way run the  
21 other direction to a really remarkable group who  
22 despite their disagreements are ever thoughtful

1 about how to meet this charge at a time when this  
2 sort of reasoned discussion is so terribly  
3 important.

4 And I'll pause there by the way in  
5 case there's something that Commissioner  
6 Rodriguez or Commissioner Andrias would like to  
7 add to that.

8 CHAIR RODRIGUEZ: I would only add  
9 that it's been almost entirely a pleasure. And  
10 we still have work to do. And I have learned  
11 humility from this experience about the views  
12 that I hold, and my ability to persuade others.  
13 But that experience of hearing the diversity of  
14 perspectives has been the one that I will take  
15 away, especially at this moment in our political  
16 life.

17 CHAIR BAUER: Thank you, Commissioner  
18 Rodriguez. Commissioner Fallon.

19 COMMISSIONER FALLON: Yes, I just  
20 wanted to echo what Commissioner Morrison and  
21 others have said, and add to that a thanks to the  
22 staff. Some of us have participated in this

1 process under the handicap of severe difficulties  
2 dealing with the technology that has been  
3 necessary to make this commission work. And  
4 staff in dealing with that issue among others  
5 really could not have been better.

6 CHAIR BAUER: Well, thank you,  
7 Commissioner Fallon. And you anticipated in my -  
8 - before I responded to Commissioner Morrison in  
9 my closing remarks one of the things I was going  
10 to say apart from thanking the commissioners and  
11 thanking members of the public who have joined  
12 these conversations is to tell you how much and  
13 to inform the public how much we have benefitted  
14 from the extraordinary support from the GSA team,  
15 Dana Fowler, Patrick McConnell and others who  
16 have been really indispensable on the technology  
17 issues, on a whole host of complicated issues  
18 that have to be resolved logistically for this to  
19 occur.

20 They have not only performed extremely  
21 well, but they have maintained what I would have  
22 to say an astonishing sense of humor and patience

1 that is an inspiration to us all. So we're very,  
2 very grateful to them and to all the members of  
3 their team.

4 Let me also say again that we will  
5 reconvene on December 7 to consider a draft final  
6 report and to vote on whether to submit it to the  
7 President.

8 We welcome as Commissioner Rodriguez  
9 said earlier comments from the public and we'll  
10 be receiving them throughout the life of the  
11 commission. We'll continue to accept those  
12 comments until December 15. However, we want to  
13 stress that the comments that are most helpful to  
14 us are ones that would be submitted by 5 p.m. on  
15 December 3, four days before the final public  
16 meeting.

17 Those comments as you know can be  
18 submitted to [regulations.gov](http://regulations.gov), and the comments  
19 received to date are also available for the  
20 public to review on that site at that address.

21 To find the comments you can go to the  
22 commission's website where the links are posted,

1 or you can go directly to regulations.gov and  
2 search for PCSCOTUS.

3 So with many thanks to my fellow  
4 commissioners, to Co-Chair Rodriguez, Rapporteur  
5 Andrias, and to the public for joining that  
6 concludes our session today. And thank you very,  
7 very much for participating. We hope to see you  
8 again in December. Good evening and have a good  
9 holiday weekend.

10 (Whereupon, the above-entitled matter  
11 went off the record at 4:02 p.m.)  
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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: 11-19-21

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

  
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Court Reporter

**NEAL R. GROSS**

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