Meeting Minutes

Presidential Commission of the Supreme Court of the United States
Public Meeting #4 (Virtual)
October 15, 2021

Call to Order

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

Welcome and Opening Remarks

Commissioner Cristina M. Rodríguez, Co-Chair
The fourth public meeting was the Commission's first opportunity to engage in deliberations. Any materials shared in advance were preparatory materials developed by five siloed working groups that researched different aspects of the reform debate. The Commission's co-chairs emphasized that the preparatory materials were not a draft of the report, had not been edited by the full Commission, and did not represent the views of the Commission as a whole nor those of any particular Commissioner.

On April 9th, 2021, President Joseph Biden issued Executive Order 14023, establishing the Presidential Commission on the Supreme Court of the United States. This Commission was tasked with producing a report that explores potential Supreme Court reform topics and will include:

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

The Commission's report will draw from a broad range of views and assess a broad spectrum of ideas. The Commission has not been charged with making specific recommendations, but rather with providing an appraisal of the arguments and proposals that animate Supreme Court reform debates today.

The Commission gathered testimony from 44 witnesses and consulted 23 additional experts over the course of two summer 2021 hearings, which can be viewed on the Commission's website. Public engagement has been encouraged throughout the process as well, resulting in over 6,500 unique comments from Congress and other

public officials, advocacy organizations, subject matter experts, and members of the general public. These comments support a variety of reform proposals, as well as retaining the status quo. Comments are reviewed by Commissioners and serve as valued input into the Commission's deliberations. The public was advised that while comments will be accepted until November 15th, 2021, they are most valuable as input into the report if provided before November 15th.

Commissioner Bob Bauer, Co-Chair
There will be five sessions today to discuss five sets of draft materials prepared by working groups within the Commission. The Commission was divided into five separate groups to research and prepare materials on different aspects of the reform debate, for the whole Commission's consideration as collectively prepare the report for the President. Today, for the first time, the Commission as a whole is meeting to exchange views and discuss these prominent reform issues and proposals as framed and discussed in these materials. The Commission has not edited the material and the material should not be understood to represent the Commission's views or those of any particular commissioner. As a Commission, we are committed to deliberating over these matters with respect for disagreement and for complexity. We hope that these deliberations will help us produce a report for the President that fairly represents the full scope of the reform debate and advances public discussion.

Commissioner Cristina M. Rodríguez, Co-Chair
What I want to do before we begin our first session is just explain a little bit about the mechanics of the day. We will take up each of the sets of draft materials one by one and then invite commissioners to speak to the issues explored in each of them. The subjects for discussion include first the materials that set the stage and provide an account of the origins of today's debates over the Court and outline the criteria for evaluating reform proposals and situate those proposals in today's debates in American history.

The second session will be devoted to a discussion of court expansion and other proposals for structural reforms to the Court. The third session will be devoted to whether and how to apply term limits to the Justices' tenures in office. The fourth session will involve proposals that would in some way reduce the power of the Court in relation to the role of the other branches, including proposals to impose different limits on the Court's jurisdiction, to change its voting rules or give Congress the power to override Supreme Court invalidations of laws.

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

Chapter 1: Setting the Stage: The Genesis of the Reform Debate and the Commission's Mission

Discussion materials

Opening Remarks

Commissioner Strauss: The draft materials for the first chapter were designed to provide background information on the work of the Commission. These materials are presented in three parts:

1 - An account of the events that led to the establishment of this Commission, such as the controversy around recent nominations to the Supreme Court and the Senate's treatment of those nominations.

2 - An outline of the categories of reform proposals that have been brought to the Commission's attention. These categories are: the size and composition of the Court; Justices' tenure; the power of the Court in our system; and the Court's internal operations. This section also identified four criteria for evaluating reform proposals: legitimacy, judicial independence, democracy as it pertains to the work of the Court, and concerns about efficacy and transparency. The section acknowledged that these criteria are complex and difficult to define.

3 - A comprehensive historical account of the controversies surrounding the Supreme Court, as well as proposed reforms. Debates about the Supreme Court's structure, powers, and relation to partisan politics have been a feature of the U.S.' constitutional system from the beginning, becoming particularly prominent at times of political conflict.

Deliberations

Commissioner Fallon: Commissioner Fallon addressed the criteria for evaluation, with a central focus on the criteria for evaluating proposals of legitimacy, judicial independence and democracy. He suggested a kind of ambiguity about the role that these organizing values of legitimacy, judicial independence and democracy play in our thinking and in the report. While the chapter 1 draft materials successfully established that those promoting or resisting reforms frame their arguments as matters of legitimacy, judicial independence, and democracy, Commissioner Fallon argued that the draft materials did not sufficiently account for the fact that different people are using these criteria in fundamentally different ways. Commissioner Fallon suggested that as the final report comes together, greater care be taken to be clear and coherent across chapters about the ways in which arguments are using the proposed criteria.

As a second point, Commissioner Fallon noted that by framing legitimacy, judicial independence, and democracy as evaluative criteria, these might seem to involve us,

from the very outset, in needing to make a choice that is partly substantive, but partly descriptive, about the most appropriate way to use these terms. The Commission is taking its own position on what these terms should mean, which presents a problem considering the fact that arguments under the Commission's consideration use the terms in inconsistent ways.

Commissioner Lemos: Commissioner Lemos noted that the discussion materials for each chapter had a recurring focus on how different kinds of reform proposals might affect, for example, the Court's ability to oversee and provide guidance for lower federal courts and state courts, as well as its ability to provide and promote uniformity in federal law. Commissioner Lemos suggested expanding in this respect the framework for chapter 1's evaluation of criteria to provide a more thorough foundation for subsequent chapters.

Commissioner Lemos also pointed out that chapter 1's discussion materials discussed judicial independence with a focus on the ability of judges to decide cases without fear or favor, which she labeled "decisional independence." Commissioner Lemos suggested that chapter 1 more fully preview and differentiate subsequent chapters' discussions of "institutional independence," which she described as the judiciary's role in the U.S.' constitutional system and its power in relation to the political branches.

Commissioner Ramsey: Commissioner Ramsey's comments focused on the historical account presented in chapter 1's discussion materials. First, Commissioner Ramsey was concerned that the history section, in its attempt to be brief and concise, may inadvertently and unnecessarily take positions on matters of historical controversy. As an example, Commissioner Ramsey noted that he, and likely other scholars, might not agree with the historical section's attempt to explain Alexander Hamilton's intentions in Federalist 78 (pages 13/14 of the draft). Commissioner Ramsey suggested the final report limit itself to listing the comments Hamilton made on the role of the judiciary and adding counter-points from the anti-federalist Brutus essays without trying to draw any deep conclusions. He recommended reviewing the draft with an eye to simplifying the analysis so that the Commission does not need to entangle itself in controversial issues of this sort.

Second, Commissioner Ramsey felt that the historical account's abrupt ending was premature and should have covered the revival of the Court's power starting with *Brown v Board of Education* and continuing into the Warren and Burger Courts.

Commissioner Driver: Commissioner Driver agreed that the historical account ended abruptly and should have included disputes over the Warren Court's legacy, among other aspects of this history.

Commissioner Driver also proposed adding the 1930 failed nomination of Judge John J. Parker to the historical section, as well as a fuller accounting of the events that led to the failed nomination of Robert Bork. Commissioner Driver argued that both failed nominations can be at least partly attributable to the nominees' negative views on black equality, which Commissioner Driver argued makes the failed nomination of Robert Bork seem less an example of violated confirmation process norms.

Commissioner Driver suggested reframing the historical section's account of Dred Scott and the Reconstruction Amendments, as he found the section to be overly sanitized in a way that overlooks the odious language on black-inferiority used by Justices at that time. Commissioner Driver proposed mentioning Frederick Douglas as an important constitutional voice of the 19th century that rejected the Dred Scott decision.

Commissioner White: Commissioner White stated that the Commission's directive was to study the commentary and debate about the role and operation of the Supreme Court, among other things. However, Commissioner White was concerned that the draft materials for chapter 1 frame things too heavily through the public's perception of the Court, particularly when discussing the stakes of the reform debate and the criteria used by the Commission to evaluate the Court's work. Commissioner White argued that this framing inadvertently reinforces the narrative that the Court is primarily a political body with political stakes. Instead, Commissioner White suggested anchoring the Commission's discussions in the fundamental duties and powers that the Constitution entrusts to the Supreme Court. Like Commissioner Fallon, Commissioner White felt that the draft materials painted an unclear picture of legitimacy, and he went further by arguing that the draft materials seem to take a disputable position on the Court's legitimacy.

Commissioner LaCroix: Commissioner LaCroix stated that due to the length constraints of the report, some topics of interest among Commissioners were not covered at great length, or even at all. Addressing suggestions that the historical section should go beyond *Brown v Board of Education*, Commissioner LaCroix noted that *Brown v Board of Education* itself was a Warren Court decision, which she argued serves as a logical starting point for current understandings of the Court's role and powers. Commissioner LaCroix agreed that the historical section's discussion of pre-1937 developments around the Supreme Court, such as Founder debates on the role of the Court, should be expanded. Responding to Commissioner Ramsey's suggestion that the report's historical account limit itself to describing events rather than interpreting them, Commissioner LaCroix pointed out that part of the Commission's charge was to provide an analysis of Supreme Court debates, which requires some degree of interpretation.

Commissioner Morrison: Commissioner Morrison stated the broad range of perspectives on the Commission make disagreement on issues inevitable. However,

Commissioner Morrison was confident that Commissioners would be able to collectively achieve the objectives President Joseph Biden laid out in Executive Order 14023. Commissioner Morrison agreed that the final report should provide more terminological and conceptual clarity when discussing the evaluative criteria. Commissioner Morrison suggested that one way of improving the discussion of evaluative criteria would be to better account for the ways in which the criteria are understood by participants in public debates around the Court, as well as to provide an account of how the Commission's understanding of the evaluative criteria may differ from the public's.

Chapter 2: Membership and Size of the Court

Discussion materials

Opening Remarks

Commissioner Grove: The draft materials prepared for chapter 2 explore the recent increase in calls for Supreme Court expansion, prudential arguments for and against Court expansion, and the scope of Congress' power to modify the size of the Supreme Court. The Constitution does not specify the number of Supreme Court Justices for the Supreme Court, and instead gives Congress considerable discretion to shape the Court. Congress exercised this power numerous times throughout the nation's first century for a mix of institutional and political reasons, with the number settling at 9 in 1869. While the Supreme Court's size has remained a subject of interest in the time since, with a prominent effort by President Franklin Delano Roosevelt to add up to six Justices in 1937 and a proposed amendment to fix the number of Justices at nine, Congress has consistently rejected these efforts. One of the prominent questions raised in current reform debates is whether Congress should once again consider exercising its power to add seats to the Supreme Court.

Advocates of court expansion argue in part that the Supreme Court faces a legitimacy crisis because of the controversy surrounding recent nominations to the Court. Another concern is the direction of the Supreme Court's jurisprudence on the issues, such as voting rights, affirmative action, reproductive justice and other areas. Opponents of court expansion respond in part that there is no legitimacy crisis from their perspective, but that court expansion could create one. Opponents also argue that court expansion today could launch a cycle of similar efforts going forward and more generally compromise the independence of the Court.

Other structural reform proposals that are addressed in chapter 2's discussion materials include ensuring a partisan balance of Court membership; a system under which Justices would rotate between the Supreme Court and lower federal courts; and a panel system.

Deliberations

Commissioner Driver: Commissioner Driver argued that the chapter 2 discussion materials read too strongly against the constitutionality of panel systems. While Commissioner Driver declined to take a position on the desirability of Supreme Court panels, he argued that Article 3's "one Supreme Court" requirement was ambiguous enough to make panels plausibly constitutional. Commissioner Driver pointed to the District of Columbia Circuit to support his argument, which routinely decides matters

through panels, yet is still considered to be one circuit court. While opponents to panel systems argue that several Justices throughout U.S. history have stated that a panel system would violate Article 3's "one Supreme Court" requirement. Commissioner Driver pointed out that these statements were made without briefing or argument and should not be understood to settle the matter. Commissioner Driver suggested that the final report further entertain the constitutionality of panel systems.

Commissioner Ramsey: Commissioner Ramsey agreed with Commissioner Driver in saying that the draft report would benefit from an enhanced analysis of Supreme Court panels.

Shifting to the discussion on Court expansion, Commissioner Ramsey argued that chapter 2's discussion materials do not sufficiently discuss the source of Congress' power to expand the size of the Court, which comes from Article 1's Necessary and Proper Clause. While Commissioner Ramsey agreed that the Constitution gives Congress the power to adjust the size of the Supreme Court, one issue raised by Professor Randy Barnett during the Commission's July 20th hearing was the question of whether Court adjustments that are made to achieve partisan results can be said to be necessary or proper. While Commissioner Ramsey did not endorse Professor Barnett's argument, he argued that it deserved more consideration in the report outside of an endnote, given that it was raised in the Commission's testimony and that if Court expansion were to be seriously considered by Congress, Professor Barnett's argument would undoubtedly be raised. Commissioner Ramsey specifically asked for expansion to section 3A.

Commissioner Baude: Commissioner Baude noted concern that the chapter 2 discussion materials were not careful enough to avoid leaning in a political direction and suggested that the final report make an effort to fully balance the presentation of arguments for and against Court expansion. Commissioner Baude agreed with Commissioner Ramsey in saying that Professor Barnett's argument against partisan Court expansion was plausible enough to be addressed more seriously in the Commission's report and argued that the norm that has developed against expansion reinforces arguments that there are some limits to Congress' ability to exercise its powers under the Necessary and Proper clause.

Commissioner Baude also noted concern over the materials' discussion of the prudence, efficacy, and consequences of changing the size of the Court. While the draft materials acknowledge many of the arguments against expanding the Supreme Court, Commissioner Baude felt that by omitting serious prudential arguments, the draft is dangerously open to the idea of substantive Court expansion. While Commissioners generally agree that Court expansion would be constitutional, Commissioner Baude argued that the report should clarify the overall leaning of the Commission on whether

Court expansion would be prudent. Commissioner Baude further stated that the current draft materials gloss over prudential arguments against Court expansion in a way that minimizes the destruction of important norms in American politics and gives too much credibility to arguments that the Supreme Court is at war with democracy.

Commissioner Ifill: Commissioner Ifill offer comments into two categories:

1 - Commissioner Ifill argued that despite not being warranted by the arguments laid out in the text, nor by collective decision of Commissioners, the discussion materials generally conveyed a Commission position against expansion by countering each proposal with a list of reasons as to why expansion would be unwise, problematic, or difficult. Commissioner Ifill suggested that the final report describe the different arguments for and against Court expansion without implying a Commission position.

2 - Commissioner Ifill noted concern that the discussion materials for chapter 2 too strongly framed Court reform as a matter of partisan politics and should have done more to include the perspective of those that are concerned with the Supreme Court, its impact on the public, its reputation and legitimacy, and ultimately the rule of law. Commissioner Ifill proposed expanding the discussion to include non-partisan reasons for expansion, such as diversity in professional background, race, and gender.

Commissioner Griffith: Commissioner Griffith agreed with Commissioner Baude in saying that the final report should be more careful in the framing and description of arguments.

Commissioner Griffith also noted agreement with Commissioner Ifill's concern that the discussion materials were framed too heavily around partisanship, particularly when seeming to give credence to arguments that Justices are seeking to advance the policy agendas of their nominating presidents and parties. As a former judge, Commissioner Griffith argued that judges do not rule with an eye toward policy agendas of the parties that supported their nominations and cautioned that any such suggestion is damaging to the Supreme Court, which he finds is largely successful in performing its constitutional role. Commissioner Griffith suggested that such arguments are often put forth by those that are dissatisfied with the outcome of particular cases who frame their arguments as matters of legitimacy in order to undermine confidence in the Court. Commissioner Griffith pointed out that Justices themselves have flatly rejected the idea that personal preferences or partisanship factor into judicial decisions; in reality, judges are guided by judicial philosophies grounded in judges' views of their role under the Constitution. Commissioner Griffith argued that at a time of extreme polarization the Commission should be working to build confidence in the Supreme Court, yet the discussion materials seem to do the opposite.

Commissioner Charles: First, Commissioner Charles agreed with Commissioners Ifill and Griffith in saying that the chapter 2 discussion materials were framed too strongly in terms of partisanship, and he suggested that the final report adopt an alternative framing.

Commissioner Charles acknowledged that it has been difficult for Commissioners to balance arguments that legitimating expansion can be dangerous against a desire to seriously consider concerns about the Court's substantive decisions and the role of the Court in the U.S. democratic system. However, Commissioner Charles argued that chapter 2's policy section did not come across as balanced between these arguments, instead coming across as overly speculative and unbalanced against Court expansion without providing sufficient reasoning. As an example, in response to arguments that expansion could lead to greater diversity, the report stated that there is no reason to believe that expansion would promote diversity absent a diversity requirement. Commissioner Charles did not feel that the discussion materials provided sufficient basis for that conclusion. Commissioner Charles suggested that the final report consider the policy implications of Court expansion in a more even-handed manner.

Commissioner Crespo: Commissioner Crespo agreed the current draft in its substance, in its structure, and in its tone communicates a clear position against expanding the Court. The arguments in favor of expansion are presented tentatively and at a distance, in the voice of unnamed others. And in every instance, they seem to be presented just to be knocked down by arguments against expansion, which receive more comprehensive treatment, and are stated in the Commission's own voice as its clearly favored position.

Commissioner Crespo argued that Commissioners agree that expansion is the structural intervention most clearly within Congress' power to enact, yet the discussion materials most strongly rejected expansion as a reform option. Commissioner Crespo felt that this rejection inadvertently dismissed the possibility of reform altogether and presented an underlying judgement about whether there actually are serious problems with the Court or its recent nominations. The overarching message sent to those who see deep problems with the current Court, and with how its most recent seats have been filled seems to be: "don't do the one thing you can do to address the problem, court expansion, but consider trying some things that probably won't work, like amending the Constitution, or passing statutes of questionable efficacy or constitutionality." Commissioner Crespo pointed out that there are Commissioners, elected leaders, scholars, and millions of citizens that believe urgent intervention is necessary in order to address deep concerns with the makeup and direction of the Court. Commissioner Crespo suggested restructuring chapter 2 in a way that presents expansion arguments in a more robust and balanced manner without conveying a Commission position.

Commissioner Gertner: Commissioner Gertner acknowledged that there are significant differences in opinion among Commissioners with respect to the nature of the problem with the Supreme Court, as well as the nature of the remedy. However, Commissioner Gertner agreed with other Commissioners' suggestion that the draft tilted too heavily against expansion and did not reflect her view that there are substantial problems with the Court that are unique to this moment in time. Commissioner Gertner argued that the problems with the Court are less about partisanship, and more about a pattern of government change and Supreme Court rulings that will impact the nation (?) for decades to come. In response to the materials' discussion of authoritarian governments setting out some witnesses' and scholars' concern that U.S. Court expansion would serve as a model for undermining democratic institutions, Commissioner Gertner argued that these autocratic agendas will move forward regardless of whether the U.S. pursues expansion. Commissioner Gertner added two points of concern with the discussion materials:

1 - The discussion materials distorted the account of how the U.S. reached this moment of crisis by suggesting that recent Court nominations were examples of ordinary politics. Comparisons were drawn between the failed nominations of Robert Bork and Merrick Garland to suggest that recent nominations were not anomalous, which Commissioner Gertner felt was misleading, given that Robert Bork received a confirmation hearing and Merrick Garland did not.

2 - The discussion materials did not address the argument that this moment is unique in U.S. democracy, where the Supreme Court is enabling one party's efforts to embed its power by changing voting laws and the electoral process as a means of insulating itself from demographic trends.

Commissioner Tribe: Commissioner Tribe reiterated other Commissioners' concern that some of the pro-expansion arguments were raised only to be knocked down by counter-arguments. Commissioner Tribe stated that he takes as a central theme the point that many people, and he includes himself in this group, believe that we are indeed at a "break glass" moment— a moment when the country cannot simply treat disagreements about particular trends of decisions as matters of more or less, but a moment at which, as Commissioner Gertner suggests. we may be on an irreversible path. This path might be seen as a kind of one-way ratchet involving series of decisions suppressing voting rights, denying judicial review of partisan gerrymandering, eliminating the preclearance provision of the Voting Rights Act, and gutting what is left of the Voting Rights Act. Commissioner Tribe argued that entire series of decisions are profoundly constrictive of democratic self-government.

Commissioner Tribe affirmed the views expressed by Commissioners Ifill, and Charles, and Crespo, and Gertner that the draft gives too little oxygen to the positive side of more radical court reform. For those who believe that the current course of the Court is

profoundly misguided, it is difficult to accept the argument that the only clearly constitutional path is blocked, which is tantamount to suggesting that there is no basis for continuing to worry about the Court. Commissioner Tribe expressed the view that that there's a big difference between reform based on disagreement with court rulings, and responses in a democratic way to an anti-democratic course of jurisprudence. The first compromises traditional independence. The second does not.

Commissioner Whittington: Commissioner Whittington indicated that by design and by necessity, the legal powers and duties of Government officials laid out by the text of the Constitution have been supplemented over time with a flexible and sometimes less durable, but critically important set of understandings, practices, norms, and conventions, what he would call constructions that form and guide the operation of the constitutional system. In many instances we have constructed a set of norms that have reduced the likelihood of abuse and hem in the range of choices that we think Government officials can responsibly make within the constant order. These norms might not be judicially enforceable. But they are nonetheless viable to preserving the proper functioning of the constitutional order, and in some cases of a constitutional democracy itself. Commissioner Whittington cautioned that the violation or alteration of these norms can have immediate and dire consequences and could put the U.S. on a dangerous new path with unpredictable and potentially grim results.

Commissioner Whittington suggested that the final report better explain the scope of Congress' power to expand the Court, do more to acknowledge how big a departure from deeply rooted constitutional norms Court expansion under present circumstances would be, and acknowledge the dangers of using legislative power to reshape the membership of the Supreme Court in order to alter the substance of the Court's jurisprudence.

Commissioner Grove: This discussion is kind of a microcosm of our broader society that the level of disagreement is not just what to do about some problem, but whether there's a problem at all. Commissioner Grove expressed the view that it's valuable that the Commission has been talking about these things, even as it involves brought people who do fundamentally disagree.

Commissioner Grove agreed with suggestions that chapter 2 of the final report expand the discussion on panel systems but noted that historical practice from 1789 to the present has taken the Supreme Court to be a single unit and shown a consistent rejection of panel system proposals.

Commissioner Grove indicated that she is very interested in the arguments that court expansion might be unconstitutional if it's done on partisan grounds, or because members of Congress are concerned about Supreme Court decisions. Virtually every

change to the size of the Supreme Court throughout U.S. history has been supported by one political party more than the other. It doesn't mean they're partisan. One can explain this in part on partisanship grounds, but it also reflects different perspectives on constitutional issues. It would be extremely hard in this context, and probably many others, to suggest that any particular legislation is unconstitutional because it is partisan.

Commissioner Baude: Commissioner Baude pointed out that Congress has more explicit power to control the jurisdiction of the federal courts than it does to expand the Supreme Court, yet there are strong scholarly debates about when jurisdiction stripping legislation might be improper because, for example, it is designed to control the Court's decisions.

Commissioner Baude noted that none of that sort of nuance, or complications, or complexity has yet been brought to the court-packing debate. Commissioner Baude stated that gerrymandering in particular is an area that has strong norms against partisan intent, and it's not clear why arguments against partisan behavior would apply to gerrymandering but not expansion.

Commissioner Baude indicated that in his view, the best arguments for court packing are something like a combination of what Commissioners Crespo and Tribe have suggested about a "break glass" moment. He stated said that if we just acknowledge that as the rationale for expansion, i.e., a set of extreme circumstances, then of course deadlock is a certainty, because there is no agreement that we have reached that point.

Commissioner Ross: Commissioner Ross noted that in chapter 2's discussion materials there's much discussion about the inevitability of a tit-for-tat following a sort of court expansion that would lead to a slippery slope regarding the number of Justices in the future. Commissioner Ross pointed out that the Court expanded and contracted multiple times in the 1860's without ultimately leading to a prolonged "tit-for-tat" cycle and a large Court. Commissioner Ross stated that it would be helpful to have a sense of what might have been different about that context that might lead one to believe that in our time, we might head down that slippery slope. Commissioner Ross also suggested consideration of whether proposals for a gradual expansion might be used as tools to resist any sort of tit-for-tat

Commissioner Fallon: Commissioner Fallon noted that one of the things he found it helpful to hear the diverse perspectives on this issue. He suggested that those Commissioners who have spoken so informatively and passionately write a few paragraphs casting in writing what they expressed orally.

Commissioner Boddie: Commissioner Boddie suggested that the final report be written in a more publicly digestible way, place more emphasis on the fact that expansion is a matter with significant public attention, and be more attentive to the ways that non-scholars are perceiving the court reform debates. Commissioner Boddie also proposed that the final report explore the argument put forth by Commissioner Crespo, which is that by refusing to act on the Merrick Garland nomination, the Senate has already disrupted the norm against adjusting the size of the Court.

Commissioner LaCroix: Commissioner LaCroix suggested that both this chapter and chapter 4 expand on the doctrinal and legal analysis of Court expansion, as well as make a distinction between political efforts and partisan efforts, which is not properly addressed in public debates. Commissioner LaCroix stated that the political branches (i.e., Congress and the presidency) have a constitutional role in the dynamic of checks and balances.

Commissioner LaCroix noted that the Commission itself, convened by the Executive, is a form of discourse between the political branches and the Court. On the role that partisanship plays in the constitutionality of reforms, Commissioner LaCroix argued that in the case of jurisdiction stripping, the Court has made it clear that motive is irrelevant.

Commissioner Rodríguez: Commissioner Rodríguez noted that a certain level of interpretation is required when reconstructing events, leading to divisive questions about whether and how norms have been violated, as well as arguments about the circumstances under which norms ought to give way to new understandings. Despite disagreement among Commissioners on the details of these events, they are relevant when trying to understand the Court today, as well as the possibilities of reforming it. Commissioner Rodríguez noted one proposal raised frequently in public commentary and by hundreds of members of Congress: a constitutional amendment that fixes the number of Justices at nine members. She suggested that the amendment reflects what Commissioner Driver said in the last session about the normative power of the actual. But the reason given by supporters of the amendment is that Congress should never be able to interfere with the size of the Court for partisan reasons, or reasons that favor one point of view, or one political party.

Commissioner Rodríguez suggested that the expansion proposal raises several central questions that offer perspective on the debate, namely: is it possible at this moment to pursue expansion without seeming partisan, or prompting retaliation? How does one determine whether the proposal is based on disapproval with the Court's jurisprudence, as opposed to the much more fundamental concerns raised by Commissioners? And lastly, when thinking about expansion proposals, where does the burden of persuasion lie?

Commissioner Adams: Commissioner Adams suggested that it would be difficult to get consensus on the Commission around Chapter 2. But she noted the Commission had managed something increasingly rare in our political consciousness: the ability to talk with one another, notwithstanding differences in perspectives and positions.

Commissioner Adams believe that it might be useful in framing the chapter to take up Commissioner Fallon's idea of having short written excerpts of some of the comments made at this meeting. Commissioner Adams indicated that even if we cannot reach some level of agreement or consensus on the chapter, there's a good faith ongoing desire to engage in the kind of discussion that are the hallmarks of a democratic republic.

Commissioner Charles: Commissioner Charles seconded the comments of Commissioner Adams and took the opportunity to associate himself with Commissioner Fallon by indicating that he thinks that there is a common ground in terms of surfacing the questions. Resolution is or may not be possible. But Commissioner Charles commented, just articulating and surfacing the various questions is important and beneficial both for us and the country.

Commissioner Levi: As a former judge, Commissioner Levi stated that members of the judiciary share frustration at Congress' unwillingness to confirm qualified nominees in the months leading up to an election. Whatever it is, this has become something of a tradition.

Commissioner Levi emphasized that he doesn't mean to suggest that it's a justified tradition. But Congress does not believe that it has changed, for example, the size of the D.C. Circuit when it refused to confirm or act on a nomination to the Circuit. Commissioner Levi stated that he suspects that at least one way to view the refusal to consider the nomination of such a qualified person as Merrick Garland is that Congress was simply waiting for the election, as it does for so many other judicial nominations. Commissioner Levi expressed his view that this was not good practice.

Commissioner Gertner: Commissioner Gertner emphasized it's important for the conversation to go forward even in the absence of a resolution. Speaking as a former federal judge, Commissioner Gertner stated that the concern that criticism of the Court somehow undermines judicial independence is just not true and tends to stop the conversation.

Chapter 3: Length of Service and Turnover of Justice on the Court

Discussion materials

Opening Remarks

Commissioner Pildes: Commissioner Pildes summarized the discussion materials regarding proposals that the country should consider changing the current system of life tenure for Supreme Court Justices to a system in which the Justices would serve for a fixed term of a specific number of years. The materials largely focus on a system in which Justices would be appointed to terms of office that would last for 18 years. Under 18-year term limits, each presidential term would provide an opportunity to appoint two Justices to the Supreme Court, with nominations made in years one and three of presidential terms to avoid election year nominations. The materials compare U.S. practices with those of state supreme courts and other major constitutional democracies. 49 of 50 U.S. states impose either mandatory retirement ages or term limits, and no other major constitutional democracy operates without either imposing mandatory retirement ages or term limits on the judges for their highest courts. In addition to covering the arguments put forth by proponents and opponents of term limits, Chapter 3's draft materials provide an appraisal of proposals to adopt term limits through constitutional amendment as well as those that advocate for Congress to impose term limits through legislation.

Deliberations

Commissioner Kang: Commissioner Kang stated that changing the term obviously changes the job to a degree. And you might expect Presidents to nominate a slightly different set of candidates. In addition, the job could become more or less attractive to certain types of candidates, as what was once a career position leading to retirement may now be followed by other employment opportunities. Commissioner Kang noted that a worry might be that a term limit shifts the candidate pool toward nominees who hope to leapfrog to other offices. So, that some may be more worried about what happens after their 18 years on the Supreme Court. Commissioner Kang suggested that the final report should expand this discussion, and could respond to these concerns by noting, among other things, that an 18-year term limit is sufficiently long to allow most appointees to reach retirement age based on his research on term limits for state supreme courts.

Commissioner Strauss: Commissioner Strauss raised two concerns with the chapter 3 discussion materials:

1 - There are arguments for term limits beyond those made in the draft. The materials largely focused on the political aspects of appointments, but there are other reasons to impose term-limits, such as assuring a mix of perspectives and providing generational diversity. Commissioner Strauss suggested exploring private sector reasons for term limits on senior positions and discussing those that would apply to the Supreme Court.
2 - Another concern he expressed had is the argument for term limits in maintaining a long-term political balance on the Court. Commissioner Strauss pointed out that the draft chapter says at one point the parties who win the White House should have the same or roughly equal chance to shape the Supreme Court through new nominations. Commissioner Strauss' concern is that it will normalize the idea that appointments are extensions of a party's agenda, that judicial appointments are the judicial wing of that party or the nominating president's administration. Commissioner Strauss expressed the opinion that while it is generally accepted that the Supreme Court should not be completely out-of-touch with public opinion for too long, the Supreme Court would have been envisioned as an elected body if there was a strong intent to align it with public opinion. Commissioner Strauss suggested that the final report surface this concern. He also suggested that the Report surface related concerns that have come to be part of the nomination process, such as the idea that winning elections entitles presidents to appointments and that presidents should focus on making appointments based on the expected positions that nominees will take on specific issues.

Commissioner White: Commissioner White stated that the document describes new processes for judicial appointments to help guarantee that every presidential election delivers not just two new Supreme Court vacancies but also two Justices. He also said that the document identifies some of the practical problems inherent in those proposals. Commissioner White thought that the new process for judicial appointments would further expand and entrench presidential power at a cost to the Court and its reputation; to the Senate; and to our Constitutional politics which are already very presidency-centric. Commissioner White argued that the U.S. constitutional system does not express notions of presidential entitlement to Court nominations or rapid Senate confirmation for good reason. Instead, the Constitution requires presidents to persuade the Senate to act on nominations in a way that creates incentives for both the president and the Senate. Commissioner White suggested that the Commission's final report discuss concerns that guaranteeing nominations and forcing confirmations would further disrupt the balance of power in favor of the presidency.

Commissioner White cautioned that there is real danger in treating Supreme Court seats as automatic spoils awarded to winning presidential candidates, as judicial vacancies were not envisioned in the Constitution as mapping onto the cycles of

presidential elections. Commissioner White argued that vacancies were meant to be distributed roughly across time to enhance judicial independence. Commissioner White acknowledged that vacancies are not always random due to strategic retirement but suggested that norms are the best answer to that problem.

Commission White stated that he came to the Commission with instincts in favor of term limits, recognizing some of the problems that have been identified in the report and believing that maybe the time had come for a change. However, the more the Commission studied term limits, and as he's thought through the draft document, he has been convinced strongly in the other direction.

Commissioner Griffith: Commissioner Griffith agreed with Commissioner White's comments and noted concern that the chapter 3 discussion materials seemed to strongly indicate a Commission recommendation in favor of term limits. Commissioner Griffith continued that the materials do not give points opposing term limits as much discussion as they should be given.

Commissioner Griffith indicated agreement with Commissioner Strauss that the discussion assumes that party control of the Court is a given and that it's not something to be resisted. He disagreed with the implication that the membership of the Court must keep changing to keep in step with election results. Commissioner Griffith stressed that he doesn't deny that Presidents and Congress view Supreme Court appointments as political spoils but believes that the Commission should do what it can to resist this perspective.

Commissioner Griffith also expressed uncertainty with the chapter 3 discussion materials' assumption that shorter term limits lead to a less contentious set of confirmation hearings. Commissioner Griffith indicated that it might make the appointment of Justices even more deeply embedded in the politics of the moment. He also said that he thinks shorter term limits will likely lead to less judicial independence.

Finally, Commissioner Griffith said that much that would be lost by limiting a Justice's service to 18 years. He listed several Justices who served more than 18 years: Chief Justice Marshall, Chief Justice Story, as well as Justices Holmes, Brandeis, Brennan, Scalia, and Ginsburg. He believes that most would agree that their service, as varied as their views were, were a great public service to the nation.

Commissioner Whittington: Commissioner Whittington stated that he is not enthusiastic about the current way in which vacancies in the judiciary are filled. However, he is not yet convinced that we've really grappled with all the difficulties of the alternatives either. Commissioner Whittington identified three considerations that he felt the materials did not acknowledge:

1 - Over time, the Supreme Court has evolved into a much more powerful and important institution within the U.S. Constitutional framework than it once was;
2 - More recently, deep partisan polarization has created a divide in understandings of constitutional adjudication and the substance of constitutional rules; and
3 - During periods of divided government unplanned vacancies could seriously undermine the proposed term-limit structure, and the draft materials need to more directly confront the challenges that would be presented.

Commissioner Whittington stated that there's a better alternative to what we have now but we'll need to do more to explore the difficulties of the alternative proposals

Commissioner Roosevelt: Commissioner Roosevelt agreed with Commissioners Strauss' and Griffith's view that the Commission should not endorse a view of judges as partisan actors or of appointments as a way of maximizing political power. However, Commissioner Roosevelt expressed his view that the Commission should acknowledge that it matters who judges are, as their different experiences and jurisprudential philosophies on constitutional interpretation guide the decisions that they make. He noted that everyone would agree, for instance, that the Warren Court, the Rehnquist Court and the Roberts Court are different. Commissioner Roosevelt stated that the question that term limits presents is what should determine which of those courts we have. Under the current system, the type of Court can depend on random chance, strategic timing of departures, or political "hard-ball." Commissioner Roosevelt argued that a more stable system would be to connect the Court's membership in a predictable way to the outcome of presidential elections through term limits, which he considered to be consistent with the intent of the Constitution as it already operates by making the judiciary responsive to the results of national elections.

And the framers did that for a reason, because they were creating a system that would make not individual judges but the institution of the judiciary ultimately responsive to the results of national elections. And the framers weren't thinking about partisanship, because they didn't foresee our party system, as Commissioner Whittington noted. But the framers did hold that elections should have consequences. Commissioner Roosevelt suggested that there are strong arguments (the emergence of the party system has made them stronger) that a term limits approach would help the system work better.

Commissioner Johnson: In response to concerns that term limits may compromise judicial independence, or that tying them to the political process could make Justices appear more partisan, Commissioner Johnson agreed that the Commission should avoid normalizing the perception that Justices pursue political agendas. However, Commissioner Johnson argued that 18-year terms are sufficiently long to balance

concerns of judicial independence with some degree of political responsiveness, in addition to many other benefits presented by term limits (e.g., reduced incentive to appoint younger, inexperienced Justices).

Commissioner Johnson was not convinced by the argument that imposing term limits would disrupt the separation of powers by expanding presidential power at the expense of Congressional and judicial power. She suggested that the final report could soften suggestions that the Supreme Court be politically responsive. Commissioner Johnson also thought that the Commission has to be careful about its use of terms such as politics, partisanship, and ideology. Commissioner Johnson indicated that no one should endorse the view that judges are mere partisans.

Finally, Commissioner Johnson said that with, even if we didn't have the problems around confirmation that we've had in recent years, and some of the conflicts discussed earlier, she believes that there would be strong arguments for considering term limits. In her view, some of the lessons from other jurisdictions suggest that term limits are worth taking seriously on that measure.

Commissioner Balkin: Commissioner Balkin stressed that term limits and many other Supreme Court reforms cannot be effectively implemented without changes to the Senate's confirmation procedures, as the root cause of the U.S.' broken appointment process is an institutionally dysfunctional Senate. Commissioner Balkin suggested that for term limits in particular, a speedy confirmation act would be needed to guarantee regular consideration and action on Supreme Court nominees. Commissioner Balkin acknowledged that the report is limited in its ability to suggest changes to the Senate, as the Commission is charged with exploring the Supreme Court. However, considering the central role that Senate behavior plays in the proper functioning of the Supreme Court appointments and nominations process, Commissioner Balkin argued that the report should more directly confront the need for Senate procedural reforms as well. Commissioner Balkin stated that the Constitution was not designed to accommodate the intense polarization and party competition that is prevalent in modern politics, the result of which is that the U.S. democratic system is under strain and at times failing.

Commissioner Gerken: Commissioner Gerken noted appreciation for Commissioners' attempts to provide solutions to the concern that they have identified throughout the deliberations. Commissioner Gerken encouraged Commissioners to think through reforms together and recognize the potential weaknesses of certain arguments while acknowledging the strengths of others, as well as to consider the potential for inadvertent and unanticipated consequences.

Commissioner Fredrickson: Commissioner Fredrickson was encouraged that Commissioners were not so much divided along party lines, but instead on the merits of the various proposals under consideration in a way that will resonate with the public.

Commissioner Ramsey: Commissioner Ramsey found that draft materials seemed to be an almost implicit endorsement of term limits. In particular, the section that discusses the pros of term limits is cast in the voice of the Commission rather than in the voice of proponents of term limits. The discussion materials also appear to imply a consensus among the Commissioners behind the idea of term limits.

Commissioner Ramsey encouraged the final draft not to imply this conclusion. First, he it's not the Commission's role to decide what we favor but rather, simply, to set out arguments and considerations on both sides. Second, to the extent there is any assumption of a consensus in favor of term limits among the Commission, Commissioner Ramsey disassociated himself from that consensus. Like Professor White, he has found that term limits seem less a good idea than he once supposed. Commissioner Ramsey stated that he finds term limits to be something in the nature of a solution in search of a problem.

Commissioner Levi: Commissioner Levi suggested that the report be more restrained when talking about parties taking over the Supreme Court. Commissioner Levi also suggested that the report explore whether arguments concerning the Supreme Court are equally applicable to the lower courts, and if not explain why.

Commissioner Levi agreed with Commissioner Strauss' concern that there are arguments for term limits that were not addressed in the discussion materials. Commissioner Levi sympathized with arguments that there should be limits on the extraordinary power wielded by Supreme Court Justices but disagreed with the discussion materials' suggestion that the most important argument for term limits is the need for representativeness.

Finally, Commissioner Levi suggested attention be given to what Commissioner Balkin comments about the confirmation process. In a system as rough as our current system, having regular confirmation hearings, and more of them, is a bold move. Commissioner Levi believed that more of what we have now is not going to be beneficial to the country.

Finally, Commissioner Levi cautioned against tying Supreme Court seats to the outcome of presidential elections, as the U.S. will end up with a system wherein presidents identify appointees as part of their campaign trail, creating a version of elected Justices.

Commissioner Waldman: Commissioner Waldman agreed with Commissioner Levi's argument that guaranteeing two Supreme Court nominations for every presidential election would become a central aspect of presidential campaigning; however, Commissioner Waldman suggested that recent presidential elections have already involved this behavior, with President Donald Trump having announced a list of nominees that he would consider if elected. Commissioner Waldman was not convinced that using term limits to tie nominations to presidential elections would increase the politicization of nominations, and he further argued that term limits would promote honest negotiation and bring partisan balance between the parties. Commissioner Waldman pointed out that voters have divided the presidency far more evenly among parties over the last half century than appointments to the Supreme Court have been, and he favored pulling the Court in a similarly balanced direction using regular turnover.

Commissioner Baude: Commissioner Baude noted that he shared the view that term limits for Justices may not necessarily be wise or prudent. While the draft materials did contend with concerns around what post-service employment could look like for retired Justices, Commissioner Baude found that that the report did not sufficiently explore the potential downsides of term limits and disagreed with the draft materials' assumption that term limits would be harmless. While post-employment restrictions could prevent retired Justices from running for political office, Commissioner Baude took issue with the draft's suggestion that law school lecturing would be an uncontroversial post-service career, as Justices may worry about ruling in ways that jeopardize their lectureship. Commissioner Baude acknowledged that term limits have managed to gain broader bipartisan support than many other reforms, but, agreeing with other commissioners that Senate confirmation changes would be required to make term limits effective, he stressed that there is very little bipartisan consensus on changing Senate procedures.

Commissioner Rodríguez: Commissioner Rodríguez raised two observations:

1 - The materials have forced Commissioners to grapple with the extent to which the Supreme Court ought to be either responsive to or reflective of the political process. Commissioner Rodríguez acknowledged that it is difficult to articulate what the value of responsiveness entails, as well as how the Court being responsive is different from its being partisan or representative of party views. Commissioner Rodríguez emphasized that there are differences between a Court that is motivated to advance the agenda of a particular party and a Court that is responsive to the people in some sense. Commissioner Rodríguez was confident that the Commission's final report would be able to explain that difference while acknowledging that the political appointment process was meant to inject a measure of accountability over the judiciary.

2 - The materials were particularly helpful in providing an initial blueprint for major constitutional reform, as well as demonstrating the kinds of questions that would

have to be answered if reform were to be pursued. Commissioner Rodríguez pointed out that these debates included discussion of whether reforms should be adopted by statute or constitutional amendment.

Commissioner Tribe: Despite his initial support for term limits, the Commission's deliberations convinced Commissioner Tribe that term limits may not address the concerns he had with the Court, as the root problems facing the Court are largely the result of a broken Senate. In consideration of the difficulties with implementation, dealing with Senate obstruction of nominations, and other unintended side-effects that would inevitably arise, Commissioner Tribe agreed that what once seemed like a clearly good idea may not be so. While the Commission's charge was to analyze and appraise reform proposals rather than provide recommendations, Commissioner Tribe felt that a fair appraisal would lead readers to come away from the report less enthusiastic about term limits than they began.

Commissioner Ross: Commissioner Ross stated that strategic behavior has become a predominant mode of turnover on the Supreme Court, which can contribute to the entrenchment of power of one particular political perspective over others. Commissioner Ross agreed with other Commissioners' suggestions that the final report could better differentiate those issues that are political from those that are partisan. Considering that the current system results in strategic turnover and the entrenchment of particular political perspectives, Commissioner Ross cautioned that abandoning term limits could undermine the legitimacy of the Court over time as Justices become increasingly at odds with the public. Commissioner Ross supported Commissioner White's optimism in favor of adopting norms to guard against strategic behavior but did not feel that norms would be enough to stop political "hardball" tactics that have become more endemic in the confirmation process.

Chapter 4: The Court's Role in the Constitutional System

Discussion materials

Opening Remarks

Commissioner Fredrickson: The draft materials for Chapter 4 examine proposals that would reduce the power of the Supreme Court or of the judicial branch as a whole. These proposals would curb the Justices capacity to invalidate legislation and shift power to resolve major social, political, and cultural issues from the Supreme Court to the political branches. The materials primarily focus on proposals that involve jurisdiction stripping, supermajority voting requirements, deference rules, and legislative override of Supreme Court decisions. The draft materials explore the potential impact that these proposals could have on the Supreme Court's role in relation to the other branches of government, the extent to which various proposals would achieve the goals sought by proponents, the potential benefits and costs, and whether they could be achieved without constitutional amendment. The efficacy of these proposals seems to depend on the details, including whether they would affect lower court and state court decision-making. Chapter 4's draft materials ultimately aim to help inform public debates on whether power reduction proposals would be worth pursuing, and how reforms might be designed consistent with broader constitutional principles.

Deliberations

Commissioner Grove: Commissioner Grover raised three comments:

1 - The chapter 3 discussion materials raised proposals to strip the courts of their jurisdiction to review the constitutionality of executive and legislative enactments. However, Commissioner Grove pointed out that the subsequent analysis mostly focused on legislative enactments, and largely skipped over executive enactments.

2 - The materials invoked James Bradley Thayer when discussing potential supermajority requirements for review of federal and state legislation. However, Commissioner Grove felt that the use of Thayer was out of context. Thayer argued in favor of strong deference toward Congress, but he expressly stated that there should not be strong deference toward states.

3 - Commissioner Grove agreed with other Commissioners in suggesting that the final report resolve the discussion materials' mixed use of terms like partisan, political, and ideological. The framing of Court-curbing debates from 1789 to the present have been seen by one side as matters of principle and the other matters of partisanship, showing the challenge the Commission faces in reaching consensus on issues.

Commissioner Pildes: Commissioner Pildes noted that some of the Commission's witnesses indicated that "judicial supremacy" refers to the Supreme Court's having the exclusive power to interpret the Constitution. An alternative that witnesses put forward is what is typically called departmentalism, which means other parts of the Government also have the power to interpret the Constitution. Under a departmentalist perspective, Congress may re-enact laws that have been stricken down by the Court. However, Commissioner Pildes was concerned that the discussion materials did not sufficiently acknowledge that under departmentalism, the rule of law requires compliance with the Court's decisions in specific cases. Commissioner Pildes suggested that the final report more clearly explain arguments against judicial supremacy, as well as the consequences of related proposals.

Commissioner Whittington: Commissioner Whittington posited that Article 5 of the Constitution, which creates high hurdles for amending the Constitution, seems to be the real source of the problem that legislative overrides are trying to address. Commissioner Whittington expressed the view that legislative overrides would be a messy solution, as they are too closely tied to the specific details of particular controversies and in some cases, it would not be clear exactly what Congress should be hoping to override.

Commissioner Boddie: Commissioner Boddie offered two comments on the chapter 4 discussion materials:

1 - The draft noted that skeptics of supermajority voting requirements argue that the courts play a valuable role in limiting the ability of political majorities to disadvantage individual rights. Commissioner Boddie suggested that the final report examine the empirical basis for the view that the Court is more suited to protecting the individual rights of people of color. According to some of the Commission's witnesses, the Court's overall record could be read to suggest hostility toward the rights of racial minorities.

2 - Commissioner Boddie argued that using the term "minorities" when referring to people of color does not capture instances where "minorities" are, in fact, the numerical majorities in the places that they vote, but are stripped of their power in the political process due to voter suppression. Commissioner Boddie suggested that the final report consider using the term "minoritized" to clarify that distinction.

Commissioner Baude: Agreeing with Commissioner Grove, Commissioner Baude was concerned that the jurisdiction stripping section oversimplified its discussion of legislative review of executive actions, and he suggested that the final report do a better job of conveying the scope of the proposal for the public's benefit.

Commissioner Ramsey: Commissioner Ramsey was not convinced that there should be special deference afforded to Congress that is not extended to states, as many of the more consequential intrusions of the Court into social, cultural, and political policy have

involved state laws. Commissioner Ramsey did, however, agree that the final report would benefit from addressing that point more directly, as well as clearly differentiating the arguments in favor of reducing the Court's power through acts of Congress as opposed to those that more broadly reduce the judiciary's power as a whole.

Commissioner Andrias: In light of the U.S.' history and the Reconstruction amendments, Commissioner Andrias found it reasonable to give greater deference to Congressional actions than state actions. Commissioner Andrias also agreed with Commissioner Pildes' suggestion that the final report should clarify the discussion of judicial supremacy and departmentalism and attributed the confusion to attempts at brevity. Commissioner Andrias also suggested the final draft make an effort to show which benefits legislative overrides have that an easier amendment process would not.

Commissioner Andrias emphasized that the topics analyzed in the chapter 4 discussion materials had received significantly less coverage in recent Court reform debates, and she was confident that chapter 4 would provide a helpful long-term framework for debates on the role of the Supreme Court and its relationship to the other branches. Commissioner Andrias agreed with other Commissioners who have suggested the final report fairly and completely analyze reform proposals without implying that any should be removed from consideration.

Commissioner Tribe: Commissioner Tribe stated that the discussion materials for chapter 4 are missing an important analytical point, which is that in the U.S.' system, the power of the Supreme Court to review the validity of legislation either under departmentalism or judicial supremacy arises from its authority to resolve cases and controversies. Commissioner Tribe pointed out that the distinction between facial invalidation as opposed to applied invalidation is prominent in constitutional scholarship, and he suggested that the final report more fully analyze that distinction.

Commissioner Tribe also suggested that the final report expand its discussion of constitutional avoidance, when the Supreme Court interprets a law in order to avoid a constitutional issue. Commissioner Tribe raised the question: when constitutional avoidance is used to reach a result, is the Court exercising its power to invalidate an act of Congress, or is it not?

Commissioner Rodríguez: Commissioner Rodríguez stated that enabling Congress to overcome constitutional decisions made by the Supreme Court was worth considering, and that international contexts show that design challenges can be overcome. For example, the Canadian system specifies rights that cannot be overridden, such as those that protect their democratic processes.

Chapter 5: Case Selection and Review: Docket, Rules, and Practices

Discussion materials

Opening Remarks

Commissioner Huang: Chapter 5's discussion materials focus on four categories of proposals related to the Supreme Court's procedures and practices:

1 - Emergency Orders - Public debates around emergency orders have intensified in recent years, with concerns centered on how emergency rulings differ from rulings decided on the merits docket. Emergency rulings have less briefing, usually do not involve oral arguments by lawyers, and often do not provide an explanation of the Court's reasoning. While it is acknowledged that emergency procedures are necessary and may need to differ from the Court's usual procedures, the materials discuss various proposals that would address these concerns.

2 - Case Selection - There have been concerns about the informational inputs received by the Court when it is deciding what cases to hear, also known as the certiorari stage. The materials address proposals to broaden or improve informational inputs by allowing more input from the public or by allowing more direct input from other federal judges.

3 - Judicial Ethics - The public has taken an interest in the fact that Justices of the Supreme Court are not formally bound by a code of conduct nor subject to the statute that governs judicial discipline, though they may informally consult the code that applies to other federal judges. The judicial ethics discussion materials also consider proposals related to the recusal of Justices from individual cases due to conflicts of interest.

4 - Courtroom Transparency - There has been long-standing interest in providing live audio and video of the Supreme Court's proceedings to the public. While live audio has been provided in response to the COVID-19 pandemic, the Court has not indicated a long-term position on the matter.

Deliberations

Commissioner Driver: Commissioner Drive indicated that he wanted to speak about the issue of financial recusals and Justices owning individual stocks. The discussion materials noted a consensus among observers that Justices, their spouses, and their dependent children should not own individual publicly traded securities. Rather than noting a consensus, Commissioner Driver suggested that the final report endorse that consensus, as the scope of the problem is significant. While the discussion materials noted proposals that Congress introduce a requirement that Justices must divest when

conflicts arise, Commissioner Driver favored a broader approach of prohibiting ownership of individual stock by Justices and their immediate family altogether. Under such an approach, Justices would still be able, for example, to invest in index funds.

Commissioner Adams: Commissioner Adams praised the discussion materials' thorough exploration of emergency orders but suggested that the final report make an effort to provide more context and history behind the Court's use of emergency orders and show the degree to which the Court's recent emergency order behavior deviates from its historical behavior. The emergency docket is an issue of increasing public interest, and Commissioner Adams felt that the Commission could provide a great public service by shedding light on this poorly understood topic.

The report indicates that the Court's use of the emergency docket has increased dramatically in recent years, while its use of the merits docket has declined. Commissioner Adams suggested that the final report include the percentage of the Court's overall docket that is comprised of merits vs emergency orders, and how those percentages have changed over time.

Commissioner Griffith: Commissioner Griffith agreed that the emergency docket is an important issue that is poorly understood, and that the final draft would benefit from providing greater context. Commissioner Griffith suggested that the report drop use of the term "Shadow Docket," as the term comes across as sinister and implies impropriety.

Commissioner White: Commissioner White raised two concerns:

1 - Commissioner White believed that the chapter 5 discussion materials downplayed the connection between the Supreme Court's emergency docket and lower court injunctions, singling the Supreme Court out from the bigger question of how courts ought to carry out their responsibilities in the U.S.' constitutional system. Commissioner White stated that both the Supreme Court and lower courts face constant requests for swift intervention, leaving judges with immense power to make decisions that produce unclear precedential effect.

Commissioner White also noted concern that the discussion materials treat capital cases as profoundly different from other emergency docket cases. Commissioner White acknowledged the view that death is different but pointed out that there are many differences between various kinds of cases that are taken up through the Court's emergency docket, and he suggested that it was a mistake for the Commission's report to pay special attention to capital cases.

2 - The discussion materials highlighted many problems inherent in the Court's discretionary power to decide which cases to hear, considering that this aspect of

the Court's work shapes the public's perception of the Justices, as well as Justices' own perception of their constitutional roles. Commissioner White suggested that the final report address what he finds to be the most obvious solution, which would be to reduce Justices' discretion by increasing their mandatory docket, rather than focusing the discussion on how to reallocate their discretion.

Commissioner Baude: Commissioner Baude disagreed with the approach that the chapter 5 discussion materials took to considering issues, as he felt they did not adequately disentangle arguments that are essentially matters of disagreement with the merits of the Court's decisions from those that raise actual non-partisan, non-political concerns. Commissioner Baude also disagreed with the materials' attempts to address or express apparent views on recent cases about which the Commissioners have different substantive.

Commissioner Baude also argued that the chapter 5 materials went beyond Executive Order 14023's charge to the Commission, which was to provide advice to the president and the public about potential reforms to the Court. Instead, the chapter 5 materials provided advice to Justices on behavioral changes and process improvements. Commissioner Baude stated that the Commission was not sufficiently informed to make such judgements, as it had not discussed reforms with the Court and did not have a clear grasp of their processes or procedures. Commissioner Baude also agreed with Commissioner White's concern that the chapter 5 materials gave capital cases separate structural treatment.

Commissioner Baude did not believe that the materials raised noteworthy concerns with the Supreme Court bar, the Court's case selection processes, or the Court's judicial ethics that would merit reform or discussion at all. Commissioner Baude concluded by recommending that the entirety of chapter 5 be removed from the final report.

Commissioner Boddie: Commissioner Boddie emphasized the importance of the Commission's report in helping the public understand reform debates and suggested that the final report would benefit from more explicitly acknowledging the complexity of capital cases and the consequences of rulings in those cases. Commissioner Boddie argued that capital cases should be treated differently from other emergency docket cases because they represent a highly specialized area of law that limits the pool of lawyers in lower courts who can expertly represent people on death row.

Commissioner Ifill: Commissioner Ifill responded to two comments raised in deliberations. Commissioner Ifill acknowledged that reform advocates are in part concerned about the merits of cases, as emergency orders have increasingly impacted people's rights in recent years. Commissioner Ifill noted that the truncated nature of the

emergency docket omits elements of adjudication that cause public concern when conclusively deciding high-profile substantive matters. These concerns are a matter of expecting the Court to take care to be consistent in the standards it uses, consistent in their explanation of decisions, and consistent in their position on whether or not emergency docket rulings and opinions have precedential effect.

Commissioner Lemos: Commissioner Lemos stated that it is appropriate and valuable for chapter 5 to consider reforms that the Supreme Court itself could implement voluntarily, particularly in light of the fact that the Court sets its own procedures. Commissioner Lemos argued that reforms relevant to chapter 5 that would be imposed upon the Supreme Court, such as mandatory jurisdiction, have not been a significant theme in current debates about the Court or in testimony provided by the Commission's witnesses.

Commissioner Lemos agreed with Commissioner Baude's suggestion that the final report be clearer about when and why debates on the emergency docket overlap with debates on the merits of the Court's decisions. Commissioner Lemos stated that the standards the Court is applying on the emergency docket include an inquiry into the merits, as well as unavoidably normative and contestable judgments such as an assessment of irreparable harm and the weight of public interests. Rather than disagreement on the merits, Commissioner Lemos suggested that the core concerns related to the emergency docket and precedential effect are matters of transparency and a desire for more explanation so that the public can understand what the Justices' views of the merits are, how Justices weigh competing interests, and the interaction of relevant standards.

Commissioner Crespo: Commissioner Crespo stated that the irreversibility of death makes capital cases different, and that the Court itself has repeatedly made the observation that death is, in fact, different. The Commission has received testimony arguing that capital cases are normatively different as well, Testimony provided by Professor Samuel Bray suggested that because death is different, the Supreme Court should be more willing to delay executions than accelerate them. While Commissioner Crespo would have supported discussion materials that embraced this normative view, he disagreed with Commissioner White's suggestion that the materials conveyed an endorsement.

Commissioner Crespo also noted that many of the proposals raised throughout the discussion materials could be voluntarily adopted by the Court, so he did not feel that chapter 5's proposals were out of place.

Commissioner Gertner: Commissioner Gertner asserted that a court that has no rules apparent to outsiders and no mechanisms to enforce ethics is a court that has

questionable legitimacy. Commissioner Gertner also found chapter 5's focus on Court-adopted reforms to be important and unique for their ability to be implemented in the immediate future.

Commissioner Gertner stated that when the district court issues an injunction it is required to write an opinion, and the court of appeals that affirms the injunction is likewise required to write an opinion. Commissioner Gertner pointed out that the Supreme Court is the only court that does not have to write opinions for emergency orders, which she argued is an important omission as it enables a different kind of decision-making that changes outcomes.

Commissioner Baude: Commissioner Baude did not find arguments that capital cases should be treated differently to be compelling. While death is indeed different, Commissioner Baude pointed out that there are significant elements that make every type of case that falls under the emergency docket different, including cases that could be argued as irreversible and involving the loss of life, such as abortion cases. Commissioner Baude felt that the materials were not consistent in their treatment of different types of emergency docket cases.

Commissioner Baude noted that the Court has made an increased effort to write opinions for emergency docket decisions, and he felt that there was no basis for the report's assertion that the Court has a transparency problem in its administration of the emergency docket. Baude cautioned that the chapter 5 discussion materials appeared to be overly attuned to the media's account of the Court in a way that comes across as uninformed and out-of-touch with the Court's activities.

Commissioner White: Commissioner White disagreed with statements that mandatory jurisdiction was not a reform area that the Commission should explore, noting that it was addressed in testimony provided by Michael Dreeben and the Committee of Supreme Court Practitioners.

Commissioner White did not believe that "death is different" was sufficient justification for affording capital cases separate treatment. Commissioner White reiterated that there are many differences between different kinds of cases on the emergency docket and matters of life and death are not unique to capital cases; questions of national security, abortion, COVID-19, and the criminal process all present issues that involve the loss of life.

Commissioner Ifill: Commissioner Ifill stated that the transparency argument raised in the discussion materials was focused on the fact that the Court picks-and-chooses cases in which it will write opinions. While the Court has shown a recent willingness to

provide opinions for emergency docket cases, Commissioner Ifill noted that the core problem is a matter of consistency. Commissioner Ifill also expressed her view that capital cases are different not only because death cannot be reversed, but also because the processes and procedures that capital cases go through are governed by a very particular body of law that the Supreme Court itself has criticized. Commissioner Ifill suggested that the final report provide empirical data and context to help readers understand the specific procedures that govern the disposition of capital cases operate in

Adjourn

Commissioner Bauer adjourned the meeting, with thanks to Commissioners and members of the public that submitted comments. Commissioner Bauer reiterated that the Commission's charge was not to make recommendations, but instead to provide the president with an informed and critical account of the current debates around the Supreme Court.

The next public meeting will occur on November 19th and will feature another round of deliberations on discussion materials that reflect the comments provided during the October 15th meeting. While the Commission accepts public comment until December 15th, 2021, comments are most useful if submitted prior to the November 19th deliberative meeting. Public comments and other information are posted to the Commission's website (https://www.whitehouse.gov/pcscotus/).

Tentative Timeline:
November 19th, 2021 - Public Meeting 5
December 7th, 2021 - Public Meeting 6
December 15th, 2021 - Release of Final Report

Certification of Co-chairs:
I hereby certify that, to the best of my knowledge, the foregoing minutes of the proceedings are accurate and complete.

Bob Bauer and Cristina M. Rodríguez
January 10, 2022

Appendix A: Commissioners in Attendance

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

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

Commissioners Absent:
None