

Meeting Minutes
Presidential Commission of the Supreme Court of the United States
Public Meeting #6 (Virtual)
December 7, 2021

Call to Order	3
Welcome and Opening Remarks	3
Overview of Draft Final Report	
Draft Report Preface, Introduction and Chapter One	3
Chapters Two and Three	4
Chapters Four and Five	6
Remaining Material in the Draft Final Report	6
Report Discussion Among the Commissioners	8
Commissioner David Levi	8
Commissioner Thomas Griffith	8
Commissioner Nancy Gertner	9
Commissioner Lawrence Tribe	9
Commissioner Adam White	10
Commissioner Walter Dellinger	11
Commissioner Sherrilyn Ifill	11
Commissioner William Baude	11
Commissioner Andrew Crespo	12
Commissioner Bert Huang	12
Voting on Submission of the Report	12
Closing Remarks and Adjournment	13
Co-Chair Bob Bauer	14
Co-Chair Cristina Rodriguez	14
Appendix A: Commissioners in Attendance	15

Call to Order

Dana Fowler, Commission Designated Federal Officer

Designated Federal Officer Dana Fowler called the meeting to order and welcomed everyone to the sixth and final meeting of the Presidential Commission on the Supreme Court of the United States. She indicated that the draft final report that will be the focus of today's meeting is available on our website at whitehouse.gov/pcscotus. She made several administrative reminders regarding the Commission and its compliance with the Federal Advisory Committee Act

Welcome and Opening Remarks

Commissioner Cristina M. Rodríguez, Co-Chair

Commissioner Rodriguez opened the meeting by laying out the agenda for the meeting, including discussing the draft report of the Commission and voting on whether to submit it to the President. This draft report reflects and incorporates the comments and perspectives raised during the deliberative meeting of November 19 as well as the previous deliberative meeting in October.

Commissioner Rodriguez started by indicating that the Commission has benefited from comments and expertise from various sources. The Commission heard from 44 expert witnesses and received additional written testimony from an additional 23 experts. In addition, the Commission has received over 5,000 germane unique comments from the general public. The comments were wide-ranging and addressed many of the proposals contained in the report. Commissioner Rodriguez expressed gratitude for the public's interest. Additional public comment can be submitted until December 15 via Regulations.gov. She reminded viewers that all of the comments received to date are also available for the public to view on Regulations.gov.

Commissioner Rodriguez summarized the agenda for the day:

- Review the draft final report
- Discuss the report for the last time
- Vote on whether the report meets the Commission's charge and to submit it to the President.

Draft Report Preface, Introduction and Chapter One

Commissioner Bob Bauer, Co-Chair

Report's Preface: The Preface lays out the basic approach that the Commission took to the development of the report. Commissioner Bauer emphasized that the report aims to provide a fair and constructive treatment of the complex and highly controversial issues the Commission was charged to examine.

Introduction: Commissioner Bauer next explained that the report's Introduction explains the genesis of today's Supreme Court reform debate and the events that gave rise to President Biden's establishment of the Commission. The Introduction emphasizes that the Court's composition and jurisprudence have long been subjects of public controversy and debate in the nation's civic life.

The Introduction lays out three common and interrelated ideas:

- The importance of protecting and enhancing the Supreme Court's legitimacy;
- The role of judicial independence in our system of government; and
- Democratic values and their relationship to the Supreme Court's decision making.

Chapter One: Commissioner Bauer also summarized Chapter One of the report. Chapter One gives a history of the efforts to reform the Supreme Court since the founding. It also highlights how lawmakers and the public have been engaged in debate about the Court's role. Commissioner Bauer noted that Chapter One points out that the reform debates have always involved partisan conflicts and struggle over substantive constitutional values and the power of the government to serve the people.

Chapters Two and Three

Commissioner Cristina M. Rodríguez, Co-Chair

Chapter Two: Commissioner Rodriguez summarized Chapters Two and Three of the report. Chapter Two examines proposals to expand or otherwise alter the structure of the Supreme Court. The Chapter provides a history of expansion efforts. Commissioner Rodriguez also said that the Chapter delves into the legality of expansion efforts and concludes that Congress has broad constitutional authority to modify the Court's size.

The Chapter goes on to present arguments made in public debate both for and against expansion. Proponents of expansion believe that expansion is necessary to address violation of norms during the confirmation process, which have exacerbated troubling developments in the Court's jurisprudence seen as undermining democracy.

Opponents of expansion say that expansion will significantly diminish the Court's independence and legitimacy and establish dangerous precedents for future intimidation of the Court. Commissioner Rodriguez emphasized that the Commission itself does not take a position on these arguments, while noting that individual commissioners hold strongly held views.

Finally, Commissioner Rodriguez indicated that the Chapter outlines other proposals for structural changes such as:

- The rotation of judges/justices between appellate courts and the Supreme Court;
- A panel system; and
- Proposals to ensure ideological balance on the Court.

Chapter Three: Commissioner Rodriguez went on to summarize Chapter Three of the report. The Chapter gives consideration to non-renewable term limits. Those in favor of term limits contend the benefits include:

- Ensuring that the Court is basically responsive over time to election outcomes;
- Having vacancies/appointments become more predictable and less arbitrary;
- Reducing the power of any single justice; and
- Enhancing the decision making of the court through the regular rotation of decision makers.
- Safeguarding independence by guaranteeing long terms (18 years) and lifetime salaries.

Commissioner Rodriguez then described arguments against term limits, including:

- Maintaining life tenure as a guarantor of the Court's independence and protection of its legitimacy;
- Avoiding politicization of the selection and confirmation process resulting from the occurrence of confirmations approximately every two years;
- Protecting against the perception that justices are partisan or political actors;
- Protecting against instability in Court doctrine.

Commissioner Rodriguez indicated that the Chapter lays out each set of arguments for and against term limits in extensive detail. She emphasized that while the Chapter does not take a position on the merits of term limits, it does consider design questions that would have to be addressed were term limits to be adopted. Such questions include: how long justices' terms should be; how many appointments a president should be able to make in each term; how the transition from a system of life tenure to a term-limited system would occur; and whether and what kind of constraints should be imposed on justices' post-tenure employment.

Chapters Four and Five

Commissioner Kate Andrias, Rapporteur

Chapter Four: Commissioner Andrias summarized Chapters Four and Five of the report. Chapter Four examines proposals to reduce the Court's power by curbing the Court's capacity to invalidate legislation. The goal of such proposals is to shift power to resolve major social, political, and cultural issues to the political branches. The Chapter examines four mechanisms for achieving this goal:

- Jurisdiction stripping;
- Supermajority voting requirements for invalidating Congressional or other Court actions;
- Rules requiring the Court to show greater deference to the political branches; and
- A constitutional amendment to allow for legislative overrides of Supreme Court decisions.

Commissioner Andrias indicated that the Chapter goes on to examine the extent to which such reforms would reduce the Court's power, the potential benefits and costs of the proposals, and whether simple legislation or a Constitutional amendment is needed to implement the proposals. The Chapter concludes that the efficacy of the reforms depends on the details, including whether they would affect lower court and state court decision making. In addition, the Chapter also concludes that the most effective proposals would require a constitutional amendment.

Chapter Five: Commissioner Andrias explained that Chapter Five of the report considers the Court conducts its work and explains its decisions. Chapter Five focuses on three sets of issues. First, the Court's use of emergency orders: These are orders issued without the briefings and oral arguments that merits cases receive, and often also without a written explanatory opinion. Yet some of these cases involve issues of national importance or great practical impact. Second, the Chapter reviews potential benefits and drawbacks of reforms that create a code of ethics or conduct for members of the Supreme Court. Finally, the Chapter discusses public access (transparency) to the Court's proceedings through the audio or video streaming of oral arguments and opinion announcements in real time.

Remaining Material in the Draft Final Report

Commissioner Bob Bauer, Co-Chair

Commissioner Bauer summarized the remaining material in the draft final report. The materials include:

- President Biden's Executive Order establishing the Commission;

- Information on the public meetings, testimony reviewed, and the public comments received;
- Excerpts from testimony received on issues in the confirmation process; and
- Excerpts from testimony about the sources of advocacy and information provided to the Court. The appendix provides information on:
 - Diversity of the Supreme Court bar;
 - Diversity of amici counsel;
 - Resources for the criminal defense bar to support Supreme Court litigation;
 - Additional resources to support the Court's decisions on which cases warrant review; and
 - The Court's treatment of facts included in amicus briefs.

Report Discussion Among the Commissioners

Commissioner David Levi

Commissioner Levi indicated that he will vote “yes” to submit the report to the President. However, he does not support most of the proposals in the report, proposals to expand the court or implement term limits in particular. Commissioner Levi believes that each of these proposals to a considerable degree reduces judicial independence and increases the likelihood that we will lose the freedom that judicial independence is and was designed to protect. Commissioner Levi went on to say that the Rule of Law depends on an independent judiciary— independent in its decision making as well as an independent branch of government (institutional independence). Commissioner Levi stated that autocrats attempt to achieve absolute power by destroying judicial independence and the Rule of Law by changing the size of their highest courts and by making judicial tenure shorter and less secure. Commissioner Levi expressed the view that we must approach with caution and skepticism any proposal that even has the potential to reduce judicial independence.

Commissioner Thomas Griffith

Commissioner Griffith stated that he would cast his vote to submit the report to the President as he believes that the Commission has met its charge under the Executive Order. However, he does not support proposals in the report: He is opposed to expanding the size of the Court, limiting the terms of the justices, and stripping the Court of any of its current jurisdiction. He approves submission of the report because the process that created the report was an extraordinary effort and deserves commendation. Commissioner Griffith joined the Commission skeptical that the views of the small handful of conservatives on the Commission would be fairly considered. Yet, Commissioners were respectful of his views and went to great lengths to have those views adequately reflected in the report.

Commissioner Griffith stated that this is not the report he would have written. He rejected any premise that the current Supreme Court represents a threat to our democracy. He celebrates the remarkable success that the Supreme Court has achieved in preserving the Rule of Law and worries that many of the proposed changes would undermine that vital role.

Commissioner Griffith remarked that the Constitution forces compromise and assumes respectful argument, and reasoned deliberation. He stated that historians have a name for this strand of our national DNA— civic charity. Commissioner Griffith lamented that it is in dangerously short supply today. However, Commissioner Griffith believed that the way the Commission has worked captures the essence of civic charity.

Commissioner Nancy Gertner

Commissioner Gertner stated that it is critical to have a discussion about the problems of the Supreme Court that we have had in this dispassionate setting. It is critical to have a discussion with participants whose opinions are as diverse as those on this Commission.

She said that some will be disappointed that the report doesn't contain recommendations or consensus, but that was not the Commission's charge. The charge was to outline arguments and review the pros and cons. The report ably does that and she will vote for it.

Commissioner Gertner said that, having served as a federal judge for 17 years, she appreciates the significance of judicial independence and the importance of sustaining the legitimacy of the Court. She is not concerned that the Commission's work comprises an implicit or explicit criticism of the court. She also does not believe that criticizing this Court risks undermining its legitimacy and independence. Commissioner Gertner stated that whatever short term perceived challenges to judicial independence arise from the implementation of some proposals, are more than offset by meaningful change in an institution that sorely needs it. Advocating for change in this situation does not disrespect the courts, but undergirds its legitimacy, and the Rule of Law. Commissioner Gertner emphasized that judicial independence can never mean judicial impunity or the illusion of neutrality. She continued by stating that identifying problems with the Court and the ways in which it has undermined its own legitimacy goes a long way to repairing these problems.

Commissioner Gertner indicated that her views have evolved from the beginning of her participation on this Commission, especially with respect to court expansion. After hearing public testimony, reading comments, hearing from fellow Commissioners, and watching and listening to this Supreme Court over the past several years, she declared that she is more convinced than ever that change is necessary and soon.

Commissioner Gertner stated her belief that this is a uniquely perilous moment that requires a unique response. She believes that the Court has been effectively packed by one party, and will remain packed for years to come with serious consequences to our democracy. She concluded by stating that she will vote for the report.

Commissioner Lawrence Tribe

Commissioner Tribe believed that the report is one all Commissioners can be proud of. There has never been so comprehensive and careful study of ways to reform the Supreme Court. It turns out that the least controversial reforms (like term limits) would be the most challenging to implement and that more controversial reforms like court expansion would be more straightforward to implement.

Commissioner Tribe stated that a sign of how fair and productive our deliberations was that some Commissioners who started out in favor of term limits and against court expansion, ended up doubtful about term limits and in favor of expansion.

Commissioner Tribe counted himself among that number. Furthermore, he indicated that in voting to submit the report to the President, he is not casting a vote of confidence in the Court's basic legitimacy. Commissioner Tribe indicated that he no longer has that confidence for three reasons:

- The dubious ways that some of the justices got there;
- What Justice Sotomayor called the stench of politics hovering over this Court's deliberations over the most contested matters; and
- The anti-democratic, anti-egalitarian direction of this Court's decisions on matters such as voting rights, gerrymandering, and the corrupting effects of dark money.

Commissioner Tribe stated that all is not well with this Court. He believes that it no longer deserves the nation's confidence and even though expanding it to combat what it has become would temporarily shake its authority, the risk is worth taking.

Commissioner Adam White

Commissioner White indicated that he intends to vote in favor of submitting the report to the President. He indicated that we have carried out our mandate although he would not have written the report in the same way. Commissioner White said that he has profound disagreements with proposals reviewed by the report, such as expanding the court and term limits. However, he expressed gratitude for his appointment to the Commission.

Commissioner White stated that he worries that arguments about the Court's legitimacy begin from a premise of expecting the Court to deliver certain outcomes on demand. Commissioner White expressed his view that a study of the Court should start with understanding the Court's unique constitutional nature and its unique judicial role. Consequently, Commissioner White believes that any reforms of the Court ought to focus on what would make the Court the best version of a court not only in terms of what it decides but also how it decides cases.

Commissioner White stated that the Federal judiciary is far from perfect. He indicated that during his time on the Commission, he has come to think a little more about aspects of the Supreme Court and lower court's work and how they might benefit from reforms such as discretionary choices of cases it will review and discretionary relief it grants. These are issues of self-reform. Commissioner White stated his view that we live in an era in which the most important constitutional reforms must be institutional self reforms.

Commissioner Walter Dellinger

Commissioner Dellinger noted that when any reading of the report will make clear that the Commission did not attempt to gloss over disagreements among commissioners. He believes that a healthy ventilation of disagreements was an important part of our charge from the President.

Commissioner Dellinger noted that Commissioners differed, for example, on the recent history that engendered this Commission. Commissioner Dellinger indicated he would vote to submit that report with the realization of the Commission is not writing the report for the next four months or even the next four years, for a long run.

Commissioner Sherrilyn Ifill

Commissioner Ifill stated that she would not say much about the report itself because she believes that it speaks for itself. Commissioner Ifill said that she joined the Commission because she was intrigued by the Commission's makeup of lawyers from across various areas of practice and across the political spectrum who would come together in this exercise, a scholarly effort, to present the arguments to the President and the American people. She assumed that Commissioners would work hard and push each other and that pride would compel the group to complete the project.

Commissioner Ifill stated that she also felt it important to create such a document because there is a need discussion of issues such as like court expansion, transparency, recusals and other matters directly related to how the Court is perceived by the public. She stated that she is proud that the report meet that need.

Commissioner Ifill stated that an examination of these issues and a review of the Court's practices does not reflect disrespect for the Court or the Rule of Law. She took it on faith that every member of the Commission was deeply concerned about the Rule of Law, the Court's legitimacy, justice in this country, and threats to American democracy. She also indicated that she wanted to join this Commission to see if it was possible for us across the spectrum to engage in this process. She expressed pleasure and gratitude that it was possible. Commissioner Ifill also stated that she believes, like Commissioner Dellinger, that this document is one that can form a platform, a scholarly platform, for a continued discussion of the many issues that are addressed in the report.

Commissioner William Baude

Commissioner Baude stated that as someone who made critical suggestions at several public meetings, he appreciates the work that's gone into getting the report to this point and to accommodate some of the disagreements and differences of opinion among the Commissioners. Commissioner Baude admitted that he was on the fence regarding

whether to submit the report to the President. But he indicated that he would vote for the report for two reasons:

- The report met the Commission's charge; and
- His worry that not voting for the report would send the wrong message.

Commissioner Andrew Crespo

Commissioner Crespo expressed serious misgivings about earlier drafts of the report. He said that seven weeks ago he could not have voted for the draft. But he expressed thanks and gratitude for the extensive revisions since then. He also said that it would be best to live in a time when serious debate on reform of the Supreme Court wasn't necessary. Commissioner Crespo said that this is not that time.

Commissioner Crespo stated that the Commission was convened because calls to reform the Supreme Court originated in deep concern over the current Court and the way in which its most recent seats have been filled. He believed that the task set before us was to capture that deep, live and consequential debate fully and fairly, without short changing either side. He also believes this report presents the arguments regarding potential reforms to the Court clearly, fairly, and powerfully. Finally, Commissioner Crespo stated that with gratitude to everyone on the Commission who worked hard to rewrite the early drafts to make this end point possible, he will be voting today to submit our report to President Biden.

Commissioner Bert Huang

Commissioner Huang started by saying that he hopes to be able to eventually thank everyone in person soon. He also thanked the members of the public who submitted comments in the thousands. They joined in this process of deliberation and he expressed his gratitude.

Voting on Submission of the Report

Commissioner Cristina M. Rodríguez, Co-Chair

After Commissioners had finished making comments and after a break, Commissioner Rodríguez indicated that it was time to vote. Commissioner Rodríguez summarized the Commission's charge:

- Give an account of contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functions of the constitutional process by which the president nominates (and by the advice/consent of the Senate) and appoints justices to the Supreme Court.
- Consider the historical background of other periods in the nation's history when the Supreme Court's role and the nominations and advice and consent process were subject to critical assessment and prompted proposals for reform.
- Develop a report that provides an analysis of the arguments for and against particular proposals to reform the Supreme Court including an appraisal of their legality and efficacy.

Commissioner Rodríguez then stated that the question before the Commission is whether it has met this charge and thus agrees to submit this report to the President. Commissioner Andrias moved that the Commission vote on that question. The Commission's Designated Federal Officer Dana Fowler then called the roll of the Commission to record the vote. She called on each commissioner in alphabetical order and directed them to vote for the submission of the draft report by saying yes, or yay, or against the report submission by saying nay, or no. All 34 Commissioners voted unanimously to submit the report to the President.

Closing Remarks and Adjournment

Co-Chair Bob Bauer

Commissioner Bauer emphasized that 34 Commissioners came together and in seven months made a meaningful contribution to an important national debate. He went on to thank the President, the GSA team, the Commissioners, Co-Chair Rodriguez and Rapporteur Andrias. Finally, Commissioner Bauer concluded that the Commission demonstrated that this kind of work is possible in a very polarized time.

Co-Chair Cristina Rodriguez

Commissioner Rodriguez thanked the President for appointing her to the Commission and for appointing this group. She also thanked Dana Fowler and the GSA staff. She expressed gratitude to all of the Commissioners for their willingness to have very difficult conversations. Commissioner Rodriguez expressed her belief that no single person would have written the analysis in the way that the report presents it, but she thinks that no single individual would have been able to produce the monumental report that we now submit.

Adjournment

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 11, 2022

Appendix A: Commissioners in Attendance

A quorum (simple majority) was maintained throughout the meeting with the following Commissioners present and voting unanimously to submit the report to the President.

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