PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES

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3RD PUBLIC MEETING

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TUESDAY
JULY 20, 2021

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The Commission met via Video Teleconference, at 8:30 a.m. EDT, Robert Bauer and Cristina Rodriguez, Co-Chairs, presiding.

PRESENT

ROBERT BAUER, New York University School of Law, Chair
CRISTINA RODRIGUEZ, Yale Law School, Chair
MICHELLE ADAMS, Cardozo School of Law
KATE ANDRIAS, University of Michigan (Rapporteur)
JACK M. BALKIN, Yale Law School
WILLIAM BAUDE, University of Chicago Law School
ELISE BODDIE, Rutgers University
GUY-URIEL E. CHARLES, Duke Law School
ANDREW MANUEL CRESPO, Harvard University
WALTER DELLINGER, Duke University
JUSTIN DRIVER, Yale Law School
RICHARD H. FALLON, JR., Harvard Law School
CAROLINE FREDRICKSON, Georgetown Law
HEATHER GERKEN, Yale Law School
NANCY GERTNER, Harvard Law School
JACK GOLDSMITH, Harvard Law School
THOMAS B. GRIFFITH, Hunton Andrews Kurth
TARA LEIGH GROVE, University of Alabama School of Law

BERT I. HUANG, Columbia University
SHERRILYNN IFILL, NAACP Legal Defense and Educational Fund, Inc.
OLATUNDE JOHNSON, Columbia Law School
MICHAEL S. KANG, Northwestern Pritzker School of Law
ALISON L. LaCROIX, University of Chicago Law School
MARGARET H. LEMOS, Duke Law School
DAVID F. LEVI, Duke Law School
TREVOR W. MORRISON, NYU School of Law
CALEB NELSON, University of Virginia School of Law
RICHARD H. PILDES, New York University School of Law
MICHAEL D. RAMSEY, University of San Diego School of Law
KERMIT ROOSEVELT, University of Pennsylvania Carey Law School
BERTRALL ROSS, University of California, Berkeley School of Law
DAVID A. STRAUSS, University of Chicago
LAURENCE H. TRIBE, Harvard University
MICHAEL WALDMAN, NYU School of Law
ADAM WHITE, George Mason University's Antonin Scalia Law School
KEITH E. WHITTINGTON, Princeton University

DANA FOWLER, Designated Federal Official

ALSO PRESENT:

PANEL 1
KENNETH GELLER, Mayer Brown
MAUREEN MAHONEY, Latham Watkins
WADE HENDERSON, Leadership Conference on Civil and Human Rights, and the Leadership Conference Education Fund
JEFF PECK, Tiber Creek Group
ILYA SHAPIRO, Cato Institute, and the Robert A. Levy Center for Constitutional Studies
BENJAMIN WITTES, The Brookings Institution

PANEL 2
NAN ARON, Alliance for Justice
CHRISTOPHER KANG, Demand Justice
JOHN MALCOLM, The Heritage Foundation
GABE ROTH, Fix the Court

PANEL 3
CRAIG BECKER, AFL-CIR
CURT LEVEY, Committee for Justice
SHARON McGOWAN, Lambda Legal
DENNIS PARKER, National Center for Law and Economic Justice

PANEL 4
AKHIL AMAR, Yale University
TOM GINSBURG, University of Chicago School of Law
VICKI JACKSON, Harvard Law School

PANEL 5
RANDY BARNETT, Georgetown University Law Center
DANIEL EPPS, Washington University in St. Louis
MICHAEL KLARMAN, Harvard Law School
MARIN LEVY, Duke Law School
NIEL SIEGEL, Duke Law School

PANEL 6
ROSALIE ABELLA, Supreme Court of Canada
JAMAL GREENE, Columbia Law School
LARRY KRAMER, William and Flora Hewitt Foundation
MARGARET MARSHALL, Choate, Hall & Stewart
STEPHEN SACHS, Harvard Law School

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

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

(8:32 a.m.)

MS. FOWLER: Welcome to the third meeting of the Presidential Commission on the Supreme Court of the United States.

My name is Dana Fowler and I am the designated federal officer for this advisory committee.

We would like to thank all of our invited speakers, our public attendees, and stakeholders for joining us today, including those who have provided public comment.

Before we begin hearing from our speakers, just a few administrative reminders.

This meeting is being recorded via video conference, and is also being livestreamed at our website, www.whitehouse.gov/pcscotus.

This commission is considered a federal advisory committee and is governed by the requirements under the Federal Advisory Committee Act, or FACA.

My role as the designated federal

officer is to manage the day-to-day administrative operations of the committee, attend all committee meetings, and ensure the committee operates in compliance with FACA.

All of the commissioners have received training regarding FACA requirements and their ethics obligations as special government employees.

In addition, each commissioner has completed a financial disclosure report that has been reviewed by ethics attorneys to identify any potential conflicts of interest.

Now, in order to begin, I will take a roll call.

Commissioners, if you could please turn on your cameras? I will call you all in alphabetical order.

Please unmute when you hear your name, and let us know if you're present by stating here or present. Michelle Adams?

COMMISSIONER ADAMS: Here.

MS. FOWLER: Kate Andrias?

COMMISSIONER ANDRIAS: Here.

MS. FOWLER: Jack Balkin?

COMMISSIONER BALKIN: Here.

MS. FOWLER: Bob Bauer?

CHAIR BAUER: Here.

MS. FOWLER: William Baude?

(No audible response.)

MS. FOWLER: Commissioner Baude was running a little late this morning. He'll be joining us shortly. Elise Boddie?

COMMISSIONER BODDIE: Here.

MS. FOWLER: Guy-Uriel Charles?

COMMISSIONER CHARLES: Here.

MS. FOWLER: Andrew Manuel Crespo?

COMMISSIONER CRESPO: Here.

MS. FOWLER: Walter Dellinger?

(No audible response.)

MS. FOWLER: Commissioner Dellinger?

(No audible response.)

MS. FOWLER: Okay, we'll mark Commissioner Dellinger as absent. Hopefully he's joining us later this morning. Justin Driver?

COMMISSIONER DRIVER: Here.

MS. FOWLER: Richard Fallon?

COMMISSIONER FALLON: Here.

MS. FOWLER: Caroline Fredrickson?

COMMISSIONER FREDRICKSON: Here.

MS. FOWLER: Heather Gerken?

COMMISSIONER GERKEN: Here.

MS. FOWLER: Nancy Gertner?

COMMISSIONER GERTNER: Here.

MS. FOWLER: Jack Goldsmith?

(No audible response.)

MS. FOWLER: Commissioner Goldsmith will not be joining us at the moment. We will mark him as absent. Thomas Griffith?

COMMISSIONER GRIFFITH: Here.

MS. FOWLER: Tara Leigh Grove?

COMMISSIONER GROVE: Here.

MS. FOWLER: Bert Huang?

COMMISSIONER HUANG: Here.

MS. FOWLER: Sherrilyn Ifill?

(No audible response.)

MS. FOWLER: Commissioner Ifill?

(No audible response.)

MS. FOWLER: Okay. We'll mark Sherrilyn absent for the moment. Thank you very much. Olatunde Johnson?

COMMISSIONER JOHNSON: Here.

MS. FOWLER: Michael Kang?

(No audible response.)

MS. FOWLER: Commissioner Kang?

(No audible response.)

MS. FOWLER: Okay. I will note Commissioner Kang is absent at the moment. Alison LaCroix?

COMMISSIONER LaCROIX: Here.

MS. FOWLER: Margaret Lemos?

COMMISSIONER LEMOS: Here.

MS. FOWLER: David Levi?

(No audible response.)

MS. FOWLER: Commissioner Levi's joining us I think a little bit later this morning. Trevor Morrison?

COMMISSIONER MORRISON: Here.

MS. FOWLER: Caleb Nelson?

COMMISSIONER NELSON: Here.

MS. FOWLER: Richard Pildes?

COMMISSIONER PILDES: Here.

MS. FOWLER: Michael Ramsey?

COMMISSIONER RAMSEY: Here.

MS. FOWLER: Cristina Rodriguez?

CHAIR RODRIGUEZ: Here.

MS. FOWLER: Kermit Roosevelt?

COMMISSIONER ROOSEVELT: Here.

MS. FOWLER: Bertrall Ross?

(No audible response.)

MS. FOWLER: Commissioner Ross will not be joining us at the moment, hopefully later today. Thank you. David Strauss?

COMMISSIONER STRAUSS: Here.

MS. FOWLER: Laurence Tribe?

COMMISSIONER TRIBE: Here.

MS. FOWLER: Michael Waldman?

COMMISSIONER WALDMAN: Here.

MS. FOWLER: Adam White?

COMMISSIONER WHITE: Here.

MS. FOWLER: Keith Whittington?

COMMISSIONER WHITTINGTON: Here.

MS. FOWLER: Thank you, commissioners. You may now all turn off your cameras.

COMMISSIONER DELLINGER: Walter Dellinger is here.

MS. FOWLER: Oh. Good morning, Walter. Thank you.

COMMISSIONER DELLINGER: I was here, my audio wasn't working. Thank you.

MS. FOWLER: Thank you, commissioners. You may now turn off your cameras.

I now have the pleasure of introducing Commissioner Rodriguez, co-chair, for opening remarks.

CHAIR RODRIGUEZ: Thank you so much, Ms. Fowler. Good morning everybody.

Welcome to our second of two days of public hearings for the Presidential Commission on the Supreme Court of the United States.

My co-chair, Bob Bauer, and I are delighted to be gathered with the members of the commission again to hear from a broad range of

distinguished witnesses who will speak to the matters under our consideration.

As many of you know, the commission was formed via executive order on April 9, 2021 by President Biden, and the order tasks the commission with providing him an account of the contemporary public debate over the rule of the Supreme Court in our Constitutional system.

We're charged with providing an analysis of the principal arguments for and against reform and in our considerations, we were thinking through the legality, the efficacy, and the potential consequences for our system of government of various reform` proposals that are part of the contemporary discussion, many of which we'll hear people discuss throughout the day.

We've been asked to draw from a broad range of views and to assess a broad spectrum of ideas, and we're not charged with making specific recommendations, but rather with providing a rigorous appraisal of the arguments and proposals

that animate the debate today.

Before we begin our very long day of testimony, I would again like to acknowledge the many comments from the public that we have received, including scores that have come in since our last public meeting on June 30.

Since we were formed in April, we've received hundreds of unique comments from members of Congress and public officials, from advocacy organizations, from subject matter experts, and from members of the general public.

The comments support a variety of reform proposals, as well as retaining the status quo.

Those that advocate for reform emphasize the importance of counteracting what they identify as the politicization of the Court, and the reforms emphasize by commentators who believe the Supreme Court is in need of some form of reform, include legislation that would expand the size of the Supreme Court and elimination of life tenure for Supreme Court justices, including

by setting term limits between ten and 22 years.

Many of the comments, however, support the status quo, or don't believe that Court reform is necessary, and caution against reforming the Court.

Many of these comments advocate legislation that would propose to amend the Constitution to fix the number of justices at nine.

We welcome further comments from the public throughout the life of the commission. We will continue to accept comments until November 10.

However, comments are most valuable to the commission if they're submitted before the deliberative meetings that are scheduled for October and November, and preferably no later than November 1.

Public comments may be submitted to the commission via regulations.gov, and all of the comments received to date are also available for the public to view on regulations.gov.

To find these comments, you may go to the commission's website, where the link is posted, or you can log on to regulations.gov and search for PCSCOTUS.

In addition to the public comments, a number of other scholars and experts will be submitting written testimony in the coming months to the commission, and that will be posted on our website when it is received.

So, with that, I am delighted to turn to the business of the day.

We are incredibly grateful to have the participation of so many witnesses on six different panels today, and we also appreciate the written testimony that they have submitted, which is available for public review on the commission's website.

So we have a great deal of ground to cover today, and my co-chair and I will do our very best to manage the time allocated for opening comments by the witnesses, and then for the question time that's allocated to individual

commissioners, so that we can be sure to stay as close to schedule as possible, while also covering the many of the topics of the day officially and thoroughly.

So our first panel of the day will address perspectives from Supreme Court practitioners and views on the confirmation process, and I would now ask the witnesses on this panel to please turn on their cameras.

Each of our witnesses on this panel have three to five minutes to provide opening statements, after which we will turn to a panel of three commissioners for questioning.

I will call on the witnesses in alphabetical order, and their complete biographies are on the commission website, as is their written testimony.

So, our first witness is actually a pair of witnesses, Kenneth Geller, a partner at Mayer Brown LLP, and Maureen Mahoney, a partner at Latham and Watkins, both of whom also served in the Solicitor General's Office.

They will be presenting the views of a group of attorneys who practice regularly before the Supreme Court, and I will call on each of them in turn to provide opening remarks.

Mr. Geller, I'd like to begin with you, and you now have the floor. Thank you for being here.

MR. GELLER: Thank you, Chair Rodriguez, and good morning, commissioners.

My name is Kenneth Geller, and along with Maureen Mahoney, I'm the co-chair of a committee of experienced Supreme Court practitioners.

Our committee was formed at the suggestion of the co-chairs of this commission to advise the commission on the wisdom and practicality of a number of suggested proposals for Supreme Court reform from the perspective of lawyers with extensive experience of appearing before the Court.

In addition to Maureen and myself, the committee consists of the following members.

Beth Brinkmann, David Burman, Kelsi Brown Corkran, Michael Dreeben, Miguel A. Estrada, Jeffrey Fisher, Gregory G. Garre, Deepak Gupta, Caitlin Halligan, Peter Keisler, Joshua Matz, Michael McConnell, Virginia Seitz, and Donald Verrilli.

This distinguished and diverse group is made up of Supreme Court and appellate lawyers from across the political spectrum.

It includes two former solicitors general who served under the presidents of both parties, a former principal deputy solicitor general, three former deputy solicitors general, and six former assistants to the solicitor general, as well as the former state solicitor general.

We have both prosecuted and defended criminal cases, and one of us is a former federal appellate judge.

We've collectively argued more than 400 cases before the Supreme Court, dating from the 1970s to the most recent term, and we filed

thousands of merits briefs and certiorari petitions.

More than a dozen of us have served as law clerks at the Court, and one of us has served as co-author of the principal of the last five editions of the standard treatise covering practice before the Court.

Now, unlike others who have been testifying or will be testifying before the commission, we have not asked to appear here to advocate for or against any changes to the structure or internal operations of the Court.

Instead, as I noted a moment ago, we are here as a resource for the commission and at its invitation to give you our collective views on a set of reform proposals that the commission itself has identified and asked us to consider.

To complete that task, members of our committee met on six occasions over the past two months and spent at least ten hours debating the issues presented.

It was a lively exchange of views and

all things considered, a surprising amount of agreement on core principles.

Indeed on most of the proposals, the committee's views were supported unanimously or by a large majority.

Several of the proposals gave rise to disagreements among members, but those differences were generally differences of degree or emphasis.

In sum, no member of the committee subscribes to every aspect of our report, but all members agree that the report accurately captures the consensus views of the committee.

Now, as I remarked a moment ago, our committee is composed of practitioners from across the political spectrum who have all had the privilege to observe the Court's operations up close over a long period of time.

I think it's fair to say that this common experience is what led our committee to unanimously oppose all but two of the numerous proposals that we were invited to address.

The committee concluded that many of these proposals would cause serious harm to the Court and to our ability as practitioners to seek redress for Constitutional violations.

We also concluded that most of these proposals had not been shown to be necessary, and that the Court is in the best position to determine how and when to change its internal processes.

And we concluded as well that most of these proposals would be subject to serious Constitutional challenge, and that Congress should continue its historic practice of respecting the Court's authority to control its own proceedings.

The committee did however make some recommendations for change that the Court itself may wish to consider, and also concluded that two of the proposals forwarded to us for Congressional action warrant serious consideration.

My co-chair, Maureen Mahoney, will now

give you a more detailed overview of our committee's conclusions, after which we would be happy to respond to any questions. Thank you.

CHAIR RODRIGUEZ: Thank you very much, Mr. Geller. Ms. Mahoney, the floor is yours now.

MS. MAHONEY: Thank you for the opportunity to speak with you today. The proposals our committee examine generally fall in to three categories.

Changes in the Court's composition, jurisdiction, or internal procedures.

Turning first to the Court's composition, our committee unanimously opposes proposals to enlarge the Court.

While there are legitimate concerns surrounding the political polarization of the nomination and confirmation process, increasing the number of justices represents an escalation of the problem, not a solution, and a larger bench could make arguments less productive, deliberations more difficult, and yield even more opinions with less clarity in the law.

The committee also unanimously opposes proposals to impose term limits by statute. Such a statute would face serious Constitutional challenges and create unacceptable instability because it could be changed by a subsequent Congress.

A majority of the committee nonetheless believes that a Constitutional amendment imposing 18 year terms, with each president getting to fill two seats per four year term, warrants serious consideration.

The majority of the committee recognized that a variety of difficult issues would have to be resolved to effectuate such a change and did not embrace any particular proposal.

Turning to the jurisdictional proposals, the committee unanimously opposes statutes that would strip the Court of jurisdiction to strike down unconstitutional legislation, authorize Congress to supersede the Court's holdings, or require a supermajority to

strike down legislation.

Such statues would spark serious constitutional challenges and would fundamentally subvert the Court's power of judicial review, which is essential to all of us.

Our committee also unanimously opposes proposals to regulate the Supreme Court's certiorari jurisdiction.

Over time and through experience, Congress has given the Court near-plenary control over its docket, which has allowed it to focus its resources on identifying and resolving the legal questions that are most important to our nation.

Congress got it right, it shouldn't change it.

The committee also unanimously opposes proposals to give the Supreme Court mandatory appellate jurisdiction over death penalty appeals because they would overwhelm the Court's docket and force it to decide fact-intensive issues best resolved in the lower courts.

A majority of the committee, however, concludes that Congress should give serious consideration to heightening the standard of review for evaluating stays of execution entered in the federal courts based on the profound consequence of any error.

With respect to the final group of proposals, the committee unanimously opposes the adoption of legislative rules governing the Court's internal procedures, but recommends that the Court itself might wish to consider some changes in practice, starting with the Court's emergency docket.

The committee unanimously opposes Congressional rules mandating oral arguments or written opinions.

Congress has allowed the Court to make its own rules since 1789. Any intervention now is Constitutionally suspect.

Due to the exigent nature of the emergency docket, the Court needs to design its own procedures to be fast and to be flexible, but

the committee encourages the Court to consider holding telephonic arguments on some occasions, and issuing more opinions when feasible, especially when entering injunctions.

The committee also unanimously opposes any legislative changes to the Court's recusal and ethics policies.

This also implicates significant Constitutional concerns, and we see no evidence of a problem with the Court's current practices.

The committee also unanimously opposes Congressional mandates to televise oral arguments.

Legislative efforts to strip the Court of its historic authority to control procedures in its own chambers would precipitate an unnecessary Constitutional confrontation.

The Court's in the best position to determine whether cameras would impair its own deliberative processes.

A substantial majority of the committee is also unwilling to recommend to the

Court that it change its policy of prohibiting televised arguments.

We nevertheless believe that live audio broadcasts of oral argument, a COVID-19 innovation, have been beneficial to the public, and we favor their continuation and possible expansion to opinion announcements.

Finally, the committee unanimously opposes proposals for public standards to govern amicus appointments, and for the creation of an Office of the Defender General.

The committee does, however, believe the Court should continue to expand the pool from which it draws appointed amici, and believes that disparities in resources between defenders and prosecutors in criminal cases would be more effectively addressed by increasing federal funding for the development of Supreme Court expertise in public defenders' offices.

In conclusion, like all institutions, the Court is not perfect, but its greatest strength by far is its independence.

Subversion of that independence would irreparably damage the Court, and with it, our Constitutional order.

We evaluated the proposals with an eye toward that independence, while also recognizing certain respects in which such reforms warrant serious consideration.

We welcome your questions. Thank you.

CHAIR RODRIGUEZ: Thank you, Ms. Mahoney, and thank you very much to the group as a whole for your serious thought and deliberation on these many matters.

Our next witness is Wade Henderson, who's the interim president of the Leadership Conference on Civil and Human Rights, and the Leadership Conference Education Fund, which he also chaired for two decades.

Mr. Henderson, the floor is yours.

MR. HENDERSON: Thank you. Good morning, Commissioner Rodriguez, and members of the commission.

Thank you for the opportunity to

testify today.

The late Congressman John Lewis called on each of us to remember that every generation must do its part to help build the beloved community.

As you consider a path forward for our nation's highest Court, I urge you to help realize the promise of our democracy.

The Supreme Court has sweeping power over every aspect of our lives.

Throughout our nation's history, the Court has recognized our civil and human rights in decisions like Brown v. the Board of Education, which ended legal apartheid in our schools.

But the Court has also done tremendous harm.

In both Plessy v. Ferguson and Korematsu v. the United States, the Court chose to subjugate Black and Asian Americans under the guise of promoting the rule of law.

More recently, in Shelby County v.

Holder and Brnovich v. the DNC, a majority of justices eviscerated key provisions of the Voting Rights Act, the landmark civil rights law that prohibits racial discrimination in voting.

The Court's decisions have devastating consequences for people of color, and other communities who, for too long, have been excluded from decision-making and the ranks of power.

Now, to understand the Senate's advice and consent role, it is important to ground the discussion in both why and how the judicial confirmation process has changed.

In recent years, Senate Republicans have rigged the process as part of a broader strategy to redraw the composition of the Federal Judiciary and short-circuit other Democratic methods of change.

Their efforts are largely in response to the progress made by the Civil Rights Movement, and to maintain a system of power that benefits a privileged few.

We saw the mark shift in the Senate's

advice and consent role during President Obama's second term.

Then, Senate Majority Leader Mitch McConnell and Senate Republicans doubled down on obstruction, which reached a disgraceful peak in 2016 when Senator McConnell refused to consider President Obama's Supreme Court nominee, then-Judge Merrick Garland.

He took the unprecedented position that no president should have their nominee considered during a presidential election year.

This raw power grab escalated across the next four years.

In 2017, President Trump selected Justice Neil Gorsuch from a curated and ultraconservative shortlist to fill that seat.

Senator McConnell confirmed him by changing the rules to alter the filibuster.

In 2018, the Senate majority once again discarded norms to confirm Justice Brett Kavanaugh.

The Senate Judiciary Committee

obscured documents and thwarted a full FBI investigation into allegations of sexual assault.

And last year, after the passing of Ruth Bader Ginsburg, Senate Republicans proceeded with speed unmatched in recent history to confirm Justice Amy Coney Barrett, while millions were already voting in a presidential election.

Now, the evidence is clear. Republicans dramatically hollowed out the process to stack the Court.

The new Court's decisions will shape the direction of the law, and whether people's rights will be recognized for generations.

The discussion about the future of the Supreme Court and all of our federal courts is not an academic one. It is about humanity and dignity.

We are now at an inflection point. As the commission continues its critically important work, all options for how the Court functions must be considered.

We urge you to engage and center

historically marginalized people who are most impacted by the Supreme Court and to focus on strengthening our democracy.

Our nation needs judges and justices who will deliver equal justice and protect the rights of everyone, no matter their race or background.

That is why the Leadership Conference and our Fair Courts Task Force are working to advance two priorities.

First, it is vital that the Federal Judiciary to be made up of fair minded judges and justices who are committed to the civil and human rights of all people, and who possess diverse backgrounds and experiences that will inform their role on the bench.

Furthermore, we urge Congress to pass legislation to modernize our Federal Judiciary by shoring up ethics and transparency.

We must also undertake structural change of the judiciary and the Supreme Court, including the expansion of our lower courts.

The commission is presented with a big task, one that will help set the course for what comes next.

For the Court to work for all of us, we must act and we must act in the interest of everyone, not just the powerful few.

Our communities and our democracy depend on it. Thank you.

CHAIR RODRIGUEZ: Thank you very much, Mr. Henderson.

Next we'll hear from Jeff Peck, the former chairman of the Tiber Creek Group, and former general counsel to the Senate Judiciary Committee. Mr. Peck?

MR. PECK: Good morning. Thank you for the opportunity to testify.

For today's purposes, I will summarize the research and recommendations set forth in my written statement.

I conducted 25 interviews, 13 Republicans and 12 Democrats.

I sought out individuals spanning a

broad range of nominations to secure bipartisan perspectives from multiple political eras.

Interviewees worked on the 17 nominations between O'Connor in 1981, and Barrett in 2020.

I also took into account my own experience on the Bork, Kennedy, Souter, and Thomas nominations.

Senate rules and the rules adopted by the judiciary committee provide a general framework, but they are only the beginning, not the end.

With guides to Senate as an institution are norms of behavior, the foremost two of which are, in the words of Steven Levitsky and Daniel Ziblatt, mutual toleration and mutual forbearance.

For that reason, and based on my own experience in the Senate, I began with the general reluctance to propose more formality and the belief that the Senate can basically work this out.

The Senate, however, is in institutional crisis.

Norms are broken with regularity. Mutual tolerance and forbearance are often the exception, not the imperatives they once were.

Accordingly, I recommend flexible but essential rules to standardize certain processes while maintaining sufficient flexibility for exigent circumstances.

The objective is to reduce the level of partisanship and political tribalism by introducing greater regularity, clarity, and accountability.

First, I propose new rules for the Senate Judiciary Committee.

Hearings should start no sooner than 30 days, and no later than 50 days after the Senate receives the president's nomination.

A nomination made during a Senate recess that is longer than three days should extend the minimum and maximum periods by the length of the recess.

The nominees' complete written record should be delivered no later than ten days before the hearings begin.

Delays in production should extend the minimum and maximum periods by the length of the delay.

The committee should vote no sooner than ten days and no later than 21 days after the hearings conclude.

Senate consideration should begin no sooner than ten days and no later than 21 days after the committee files its report.

These timeframes could be shortened or lengthened for cause by joint agreement of the chair and ranking member, and the timeframes I'm proposing should apply under all circumstances, including nominations in a presidential election year, up to August 1 of that year. More on that in a minute.

These new rules and my judgment could be altered only by unanimous consent in order to eliminate the ability of the majority party to

jettison the new policies for political expediency by simple majority vote.

I've also proposed that these new timeframes not go into effect until 2025, so if adopted now, neither Republicans or Democrats know whether the particular rules might favor them in the future or disfavor them.

If thoughtful people take issue with the number of days I've proposed here, no doubt they will, and I'm sure good modifications will emerge. This is art, not science.

My focus is on the principle. Should there be timeframes set by rules? If we can agree on that, then we can debate and decide the precise numbers.

Second, regarding the proper scope of questioning of Supreme Court nominees, I don't think a rule is feasible here.

Rather, the appropriate norm, a standard of responsiveness, if you will, ought to be philosophical particularity.

Time this morning does not permit me

to get into this topic into detail, but it's discussed extensively in my written statement.

Third, a new memorandum of understanding should clarify the FBI's role by, number one, memorializing the bureau's independence, second, by creating communication protocols governing the FBI's dialogue with the White House and the judiciary committee, and third, by spelling out more specifically the parameters for the FBI's investigation, including requiring a more fulsome investigation and process at the outset, so that matters that have historically come to light later in the process are more likely to be uncovered on the front-end.

Fourth, when it comes to the full Senate, I have the following proposals.

First, the current simple majority vote requirement should be maintained.

Senate rule should explicitly require all nominees receive a judiciary committee hearing, a committee vote, and an up or down vote on the merits in the Senate.

Let me repeat that.

Senate rules should explicitly require all nominees receive a Senate Judiciary Committee hearing, a committee vote, and an up or down vote on the merits in the Senate.

The Senate Majority Leader, whoever he or she may be, should not be able to decide which nominations get considered and which get to be declared null and void.

The Senate should consider all nominations in a presidential election year, except for those made after August 1.

Given my proposed judiciary committee timeframes, nominations after August 1 are not likely to be considered thoroughly and fairly before the American people select the next president, and an August 1 cutoff date also takes into account the early voting that many states now allow.

Thank you, and I look forward to answering your questions.

CHAIR RODRIGUEZ: Thank you, Mr. Peck.

We appreciate it.

Our next witness is Ilya Shapiro, who is the vice president of the Cato Institute and director of the Robert A. Levy Center for Constitutional Studies.

Mr. Shapiro, the floor is yours.

MR. SHAPIRO: Thank you, Co-Chair Rodriguez and Co-Chair Bauer, who I know is in the background.

Thanks for this opportunity to testify about the role the confirmation process plays in Supreme Court debates.

My testimony is based on my recent book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court, a copy of which I'd be happy to provide to any commissioner who would like one.

Now, I have seven lessons from our long history of confirmation battles.

First, politics has always been part of the process.

From the early republic, presidents

have sought people in line with their own political thinking.

There's never been a golden age when merit as an objective measure was the sole consideration, and Senate control is most of the ball game.

Historically, fewer than 60 percent of nominees are confirmed under divided government, and about 90 percent under united, and that disparity is even more stark in presidential election years.

Twenty percent under divided, 90 percent under united, and the Garland blockade therefore was hardball politics, but by no means unprecedented.

Second, confirmation fights are now driven by judicial philosophy.

This is a relatively new phenomenon because fights transcend any particular nominee, and it's no longer accepted that a president gets to have his choice as long as he meets certain neutral criteria.

With the parties adopting incompatible judicial philosophies, it's impossible for a president to find an uncontroversial nominee.

Third, modern confirmations are different because the political culture is different.

The inflection point for our legal culture, as for our social and political culture, was 1968, which ended a 70 year near perfect run of nominations.

Until that point, most justices were confirmed by voice vote.

Since then, there hasn't been a single voice vote, and the inability to obtain the qualifications has led to manufactured outrage and scandal mongering.

Fourth, hearings have become Kabuki theatre.

Public hearings have only been around for a century, and they weren't regular practice until the 1950s when Dixiecrats used them to rail against Brown v. Board.

These days, senators try to get nominees to admit that controversial cases are settled law, whether Roe from a Democrat or Heller from a Republican, and that's before we get to gotcha questions or last minute accusations of sexual impropriety.

Fifth, every nomination can have a big impact. The confirmation process has little to do with being a judge.

As Don McGahn put it, it's a Hollywood audition to join a monastery. Regardless, as Justice White was fond of saying, every justice creates a new Court.

That's why every vacancy is important, even if it wouldn't necessarily flip a five to four or six to three result.

Sixth, the hardest confirmations come when there's a potential for a big shift.

Think of it this way. Regardless of which party controlled the Senate, would there have been as big a political firestorm last fall if President Trump were replacing Justice Thomas

rather than Justice Ginsburg?

Seventh, the Court rules on so many controversies that political battles are unavoidable.

Under the Framers' Constitution, the Court hardly ever had to block a federal law, but as the Court let the government grow, so has its own power to police the programs its own jurisprudence enable.

In that light, modern confirmation battles are all a logical response to political incentives.

The ever expanding size and scope of federal government has increased the number and complexity of issues brought under Washington's control, while the collection of those new federal powers into the administrative state has transferred ultimate decision-making authority to the Courts.

The imbalance between the Executive Branch and Congress has made the Supreme Court the decider both of controversial social issues

and complex policy disputes.

And this at a time when we have a culmination of several trends where divergent interpretive theories map onto partisan preference at a time when the parties are more ideologically sorted and polarized than at least the Civil War.

So, should we reform the confirmation process?

I've come to the conclusion that we should get rid of hearings altogether, that they've served their purpose but now inflict greater cost than any informational benefit.

With instantly searchable records that nominees now have, is there any need to subject them and the country to an inquisition? Or maybe senators could hold the hearings in closed session.

There's a reason why the intelligence committee hearings that are closed are much more effective, and senators can actually discuss and negotiate than the public-facing Kabuki theatre,

as I've called it.

In the end, all the reform discussion, I'm happy to talk about term limits or Court packing or anything else, but all the reform discussion boils down to rearranging the deck chairs on the Titanic.

And this Titanic is not the appointment process, but the ship of state. The fundamental problem is the politicization not of the process, but of the product.

The judicial debates we've seen in the last few decades were never really about the nominees themselves, they're about the Court's direction.

The reason we have these heated battles is that the federal government is making too many decisions for such a large, diverse, pluralistic country.

Let Congress decide truly national issues like defense or actually inter-state, actual commerce, but let states and localities make most of the decisions that affect our daily

lives.

Let Texas be Texas and let California be California.

That's the only way we're going to diffuse tensions in Washington, whether in the halls of Congress or in the marble palace of the highest Court in the land.

Thanks very much, and I look forward to your questions.

CHAIR RODRIGUEZ: Thank you very much, Mr. Shapiro.

And our final witness before we proceed to questioning is Benjamin Wittes, who's a senior fellow in governance studies at the Brookings Institution. Mr. Wittes?

MR. WITTES: Co-Chairs Rodriguez and Bauer and members of the commission, thank you for your invitation to testify today.

I am a senior fellow in governance studies at the Brookings Institution and the editor of Lawfare, a web resource devoted to national security legal matters.

By background, I am not a lawyer, or much less, a law professor or an appellate practitioner, I'm a legal journalist.

In that capacity, however, I did write about judicial confirmations for a number of years on behalf of The Washington Post's editorial page during both the Bill Clinton administration and the George W. Bush administration, and I thus had a unique kind of 360 view of the confirmation process.

I spoke regularly with White House officials responsible for nominations with the Senate staffers who were handling them, with the activist groups who were supporting and opposing them, and critically, and I think very unusually, I also spoke regularly with the nominees themselves -- a dirty little secret -- nominees do not in fact maintain quite the silence that they are often believed to -- I saw very directly the modalities, and frankly the brutalities of the confirmation process, and how it created cycles of retribution among political actors.

I ultimately wrote my reflections on the process in the 2006 book, Confirmation Wars: Preserving Independent Courts in Angry Times.

Having spent many years advocating reforms and changes to the confirmation process, after writing that book I ceased actually to believe that constructive change is likely on the subject, and have as a result largely stopped writing and working in this space.

You've asked me to address the subject of the United States Senate's processes for advising and consenting on the president's nominations to the Supreme Court and the role that the confirmation process plays in debates over whether and how to reform the Supreme Court.

This framing of the question necessarily focuses on the Supreme Court itself, which I understand to be the mandate of the commission, but it is essential to take a slightly broader view of the question.

The confirmation process for Supreme Court justice is not in fact a different process

from the one for lower court judges, it is rather a particularly high stakes and high profile iteration of a game played dozens of times a year by the same repeat players.

The White House, the Senate majority, the Senate Minority, and a single novitiate who often has no idea what he or she is in for.

I want to make five broad points. First, the decay of the confirmation process is intimately connected with calls for Court reform, enlargement and related schemes.

The decay of the process is in fact the but-for cause of the current agitation.

Second, the decay of the confirmation process has been a bipartisan affair in which neither Democrats nor Republicans have refrained from escalations, and which both sides perceive themselves as playing defense, and routinely take offensive measures believing they are engaged in preemptive self defense.

At the risk of being accused of both-sidesism, I highlight some of the abuses and

escalations of both sides in my written statement.

Third, in the escalatory cycle that has developed, Court enlargement or related changes are the logical next step. I think they are all but inevitable, frankly.

They're likely to happen exactly as soon as one political party or the other controls the levers of power sufficiently to make them happen because both sides believe, probably correctly, that the other side would take these steps.

If given the chance, both are likely to take them themselves as a preemptive measure as soon as the chance presents itself.

Fourth, the best way to head off a tit for tat cycle of Court enlargements and related manipulations is to do reform in a negotiated, deliberative fashion, with an eye toward de-escalating matters and lowering the stakes.

The alternative to waiting until one side or the other has the power to act

unilaterally is to design the system of nominations and confirmations in a fashion that is both durable and reduces the incentives to gamesmanship.

Finally, to this end, I propose a simple test of whether a given Court altering proposal represents a constructive de-escalatory intervention, or merely invites a retributive response when power alignments shift.

When confronted with any reform proposal, I urge the commission to ask the following question.

What response will this proposal, if enacted, engender when the House and Senate and presidency are in different hands?

Thank you. I am happy to take your questions.

CHAIR RODRIGUEZ: Thank you very much, Mr. Wittes, and thank you again to all of the witnesses. There's a great detail to discuss.

So, with that in mind, I'll ask the commissioners who will be asking questions to

turn on their cameras.

We will begin with Commissioner Caroline Fredrickson, distinguished visiting professor from practice at Georgetown Law Center and a senior fellow at the Brennan Center for Justice at the NYU School of Law.

Commissioner Fredrickson?

COMMISSIONER FREDRICKSON: All right, well thank you very much, Commissioner Rodriguez, and thank you to all of the witnesses for extremely helpful statements that you gave today, as well as the testimony that you've provided to the commission in advance. It's enormously, enormously helpful.

I have the very, very difficult role of engaging with three of you in now what is less than ten minutes.

So, I want to get right to my questions.

I'd like to start with Mr. Geller and Ms. Mahoney, and I know you were dividing up in some way the very expansive set of issues that

you took on, and first, thank you for that.

I think that your report was enormously helpful on so many different issues, and such an illustrious group of people who contributed.

And I was very interested in your discussions of jurisdiction-stripping in particular -- and I ask whichever of you wants to respond to this -- to talk a little bit further about what you think the limits are in Congress's power, because clearly the Constitution leaves to Congress the ability to shape the Court's jurisdiction in many ways, and yet, you don't seem to acknowledge a great role there.

Is it that you think that through the norms and practices that have arisen since the adoption of the Constitution, the Court's own rulings have kind of eliminated the ability for Congress in any further way to shape the Court's jurisdiction, or what do you think the contours are for the Court or for Congress in the future to shape the Supreme Court's jurisdiction?

And again, acknowledging that your report was extremely concerned by these proposals and suggested great Constitutional problems would surround any Congressional approach to jurisdiction stripping. Thank you.

MR. GELLER: Thank you, Commissioner. As you suggested, Congress has a tremendous amount of power under the Constitution to control the appellate jurisdiction of the Supreme Court.

The proposal, as it was submitted to our committee, was to strip the Supreme Court of the power to consider the Constitutionality of particular legislation, and that is what we addressed and what we unanimously thought was a problem, both from a Constitutional standpoint and a prudential standpoint.

It would allow Congress to immunize its own enactments from Constitutional scrutiny, and the proposal also, as we understood it, would've been limited to the Supreme Court so that lower federal courts would still have been allowed to consider the Constitutionality of

state and federal legislation with the upshot that there would be many, many lower court decisions, presumably going different ways on a Constitutionality of particular legislation that the Supreme Court would not be able to resolve because its jurisdiction to consider Constitutionality had been removed.

So, we think there are Constitutional problems in immunizing the Courts from determining the Constitutionality of legislation, and we also see great problems in allowing the lower courts to consider Constitutional issues without those issues being reviewable by the Supreme Court.

COMMISSIONER FREDRICKSON: Thank you very much, I appreciate that answer.

There are other proposals for jurisdiction stripping that address quite a number of other issues.

I take it that your committee did not look at those sort of subject matter specific jurisdiction-stripping proposals?

MR. GELLER: Right, that was not within the purview of what we were asked to consider.

COMMISSIONER FREDRICKSON: Okay. Thank you very much.

I'll turn now to Mr. Henderson, and then hopefully if I have time, I'll come back to Ms. Mahoney.

Mr. Henderson, again thank you for your testimony that you provided the commission. Again, enormously helpful.

I'd like to talk to hear from you about your suggested reforms to address some of the concerns you raised, in particular around diversity of the judiciary.

And you mention that one of the reforms that you think Congress should undertake going forward is to expand the lower courts.

Generally our commission is focused on the Supreme Court, but because the lower courts provide the bench for elevation, I think it's a very important question.

Are there certain reforms around lower court expansion that you see, in particular, beyond just adding seats, that would address some of your concerns around the diversity of the judiciary?

MR. HENDERSON: Well, thank you, Commissioner Fredrickson, for your question.

As I had noted in my formal testimony, the Courts rely on public trust for legitimacy, and diversity among judges contributes to that perspective and helps to balance decision-making by the Court.

As I'm sure this commission noted, in the last presidency, 234 judges were confirmed to the federal seats, lifetime federal seats.

Of that number, 85 percent of them were white, and 65 percent of that number were white male.

Certainly from our perspective, it is important that the Court reflect the diversity of the country as a whole.

There has been so much change, such

dramatic change over the past 50 years that the failure to provide that kind of perspective, including perspectives on the background of individuals who are appointed to the bench, we believe it is necessary to provide all manner of diversity.

Not just racial and ethnic diversity, but gender, sexual orientation, and other forms, and we think it's important that a demonstrated commitment to civil and human rights be taken into account on behalf of the individuals who would be affected by decisions of the Court.

We think it's especially important that background experiences be reflected.

Judges who are public defenders, judges who have served in various public interest capacities who have previously been excluded from the bench should be considered.

So, we think without adopting a particular proposal to achieve that result, we think the Senate Judiciary Committee, and the Senate as a whole -- which has the only advice

and consent role aside from the president and selecting nominees -- I take those matters into account as they reflect on the judiciary as a whole.

COMMISSIONER FREDRICKSON: Thank you very much, Mr. Henderson, and I'll pose one more question in the remaining minute that I have, and perhaps we can come back to it if we have more time. This may be for Ms. Mahoney.

One of the areas where you do suggest there could be a reform is around the death penalty document and the stays of execution.

You don't necessarily suggest specific standards.

Do you recommend adopting the heightened standards of AEDPA adopted to this particular situation, or do you have a different set of standards that you would recommend that the Court adopt?

MS. MAHONEY: There was a division in the committee on this issue.

The minority didn't think that there

was a need to change the standard, but the majority believed that there should be a heightened standard because of the consequences of error, but I think they want serious consideration of a higher standard.

They certainly were considering AEDPA as a possible way of looking at it, saying that, you know, that there would have to be a finding that the decision was unreasonable, but they didn't conclude that AEDPA was a perfect fit, and instead just said it should be seriously considered by Congress.

I think that's the way it was left.

COMMISSIONER FREDRICKSON: Thank you very much, and done very well within the timeframe, so thank you.

CHAIR RODRIGUEZ: Well done. Thank you, Commissioner Fredrickson.

We'll next turn to Commissioner David Strauss, who is professor at the University of Chicago School of Law. Mr. Strauss?

COMMISSIONER STRAUSS: Thank you very

much, Co-Chair Rodriguez.

Let me add my thanks to all of the witnesses for their really enormously valuable contributions today.

I'd like to start with Mr. Shapiro, and here's my question.

Your testimony paints a pretty bleak picture, which may be entirely justified, but if I read you correctly, there are hints in what you say, that at least in certain times in our history, norms of compromise and consultation develop that mitigated some of what would otherwise be partisan division and acrimony.

So I'd just like to ask whether it would be a good thing to try to develop such norms today?

It may be impossible, it may be impossible to get from here to there, but just indulging the assumption that we could, would it be a good thing?

And I have two things in particular in mind.

One would be a norm that when the president's party controls the Senate, the president should nonetheless try to nominate people who can command a supermajority in bipartisan support rather than going for broke and nominating the people who are the most favorable to his party's positions that he can get through his caucus, and should that be a norm?

And then the alternative scenario, when the other party controls the Senate, should it be a norm that the Senate should never take the position that it will simply not confirm a nominee by president of the other party, that a conscientious senator should never say that?

That just -- this presence of a different party, I will simply not consider the nomination.

Would you think that those would both be good norms to establish?

MR. SHAPIRO: Thanks for that question, Professor Strauss, my former professor.

Although any errors are my alone, I won't attribute that to him.

You know, there never really was an era of good feelings.

You know, generally, you know, we think of the, you know, the immediate post-founding period as an era of good feelings when there was only one party.

The Federalists kind of faded away, but there are a lot of battles within the Democratic-Republicans, and you see similar things going on in the grand sweep of nominations and confirmation.

So, even if some confirmations were easier than others, there was a whole lot of politicking before the actual vote as presidents tried to placate regional interests, intraparty factions, certainly, all sorts of considerations.

You know, religion became one. All these different things.

The particular seat was geographically allocated, so all of these different

considerations, not just judicial philosophy, and not just after the nominee is formally announced.

And even then, you still had sometimes close votes, sometimes rejections.

You know, Stanley Matthews was confirmed by one vote in the 1880s. George Washington had a nominee rejected.

I mean, going back to the beginning, this has been a contentious process, so I don't think we can point to any halcyon age where, you know, there wasn't contentiousness.

Politics played differently, absolutely, and the issues at stake certainly were different, but I don't think it's simply a matter of, oh yeah, let's go back to how they did things in the 1820s or the 1940s, or anything like that.

Each period had its challenges, and as I said, when there's united government, it's generally easier.

The larger a majority in the Senate, the president's party has -- you know, FDR, for

example -- the easier things became.

As far as norm restoration or creation, I mean, again, you know, the story I'm painting is that the political hardball and the Senate breakdown of norms or what have you, the tit for tat escalations is a symptom of this underlying trends where you have incompatible judicial theories that map onto political parties. It wasn't always the case, certainly.

You know, yes, it'd be great to snap our fingers and go back to some period where, you know, everybody was engaged and, you know, had negotiations and things like that, but that was also a period where you had conservative Democrats and liberal Republicans, and regional dynamics were completely different.

So, you know --

COMMISSIONER STRAUSS: So, if I can interrupt? I get that.

MR. SHAPIRO: Sure.

COMMISSIONER STRAUSS: I'm actually thinking of the line in your testimony where you

say there was a 53 year period when pre-nomination vetting and Senate consultation obviated the most problematic fix, and that was recently, the recent 53 year period.

So just assuming -- I grant you it might be very difficult to get there, would it be a good thing if a president came to you and said, you know, should I try to get the person that will most serve my constituency, or should I go for a more consensus pick?

If a senator came to you and said, should I just block anyone from the other party, what would you say to that?

MR. SHAPIRO: The second is a purely political question. What did your constituents elect you to do?

If it was to confirm people of your Constitutional vision and oppose those of a different Constitutional vision, then the answer might be different.

If they don't care about that as much, you know, I guess the senator can make up his or

her own mind.

You know, my view as a constitutionalist is to have, you know, an original meaning, interpretation of the Constitution, restore balance of federalism and separation of powers, these sorts of things, so I would want nominees in that line confirmed and not in that line not confirmed.

So, I mean, it's a political dance. There's no deus ex machina to enforce or create these other outside norms, and it's just part of the give and take of the political process.

COMMISSIONER STRAUSS: Of course. I get that. Thank you. Then I want to ask a question of Mr. Peck.

Mr. Peck, your research that you did for us was very impressive and very helpful in its comprehensiveness and specificity.

My first question is oblique to that project, and if I have time I'll ask you once more directly connected to that project, but this is a question that really draws on your

familiarity with the confirmation process over the years and having sort of a close view of that.

It's occurred to me that one of the problematic things about the way the process and how it works, in particular about the hearings, is the relationship that develops between the nominee and people in the Executive Branch.

That the nominee before the hearings is closeted with people in the Executive Branch and the White House, or sometimes the Justice Department, and those people of course are political people, and often partisan people, and they become the nominee's team.

They're the people who are going to see the nominee through this incredibly stressful period for the nominee and try to get the nominee to satisfy what could be a lifetime's ambition.

And the natural effect of that is that the nominee begins to think of those people, as I said, as his or her team, and were still to begin to think of the other party as adversaries.

And of course the hearing sometimes take an adversarial tenor anyway, but it can't help matters if the nominee goes in there thinking those people on the other side are out to get me, and the people on my side are here to protect me.

So that's one way in which I think there's an unhealthy relationship that develops, and my question to you would be, do you agree that's a problem? Is there anything to be done?

Let me also sort of flag possibly a second unhealthy thing, which is after the confirmation, there has been recently kind of a celebration, a kind of pep rally type celebration at the White House, often with a distinctively partisan flavor.

And that sort of further reinforces the sense that the now-justice is on a team.

Now that, unlike the first, could actually -- sort of as Mr. Shapiro was just saying, getting from here to there is a problem, but we could simply say, look, once you're

confirmed you're a justice, then you should cut off contacts with the White House just as you were if you were a sitting justice, the first seems to be more difficult to manage.

So really, a two part question.

Am I right in thinking this is a problem, or these are complementary problems? Is there a way out?

MR. PECK: Sure. Good to see you, Professor Strauss.

COMMISSIONER STRAUSS: Thank you, Jeff.

MR. PECK: No question, I think these are both problems. I'll take the second question first because that's easy.

Those celebratory moments with only one party sitting in the Roosevelt Room, or wherever they happen to have the celebration, if it's outside in the Rose Garden, those are unseemly I think.

You know, yes, the administration that nominated this particular person has won, so to

speak, and their nominee's been confirmed, but that -- if I were -- not that I would ever be a Supreme Court nominee and then confirmed, I would elect, if the president invited me, not to participate in that process for exactly the reason that you identified.

It certainly reinforces the perception that that nominee is on one team and not part of the other team.

Now, when, you know, there's consensus nominations, as there were, you know, for a period of time when nominees were getting 80 or 90 votes, and you had members of both parties there, it mitigates that perception to some degree, but I think doing away with it is certainly an easy fix.

The harder question is the first one you posed in terms of the kind of preparation and the fact that the nominee essentially becomes a client of the White House.

At least that's the perception. The murder boards are conducted by the White House.

You know, the White House picks a navigator, if you will, to shepherd that person through the process, and I think, you know, we're not going to eliminate that entirely.

There is preparation that the nominee needs to do, but it has gotten to a point where it certainly is at the extreme.

You know, if you think of the Kavanaugh nomination, obviously a lot of controversial issues surrounding that, but certainly the perspective was, you know, the nominee was in the White House Counsel's office all the time.

There was a very team-like approach between the Justice Department and the White House Counsel.

That, and, you know, I think and Kavanaugh enveloped even the FBI, and it does reinforce a very, very partisan, team-like, you know, perception.

There's the shirts and there's skins, and the two will never agree. What to do about

it?

I think, you know, like all of these things, is a challenging question.

You certainly could have a situation where the nominee is supported as they are in part today by former clerks or former colleagues.

You know, the administration has nominated them.

There is some preparation when it comes to the questionnaire and the financial disclosure statement and that sort of thing that is required, but I think putting some norms, putting some guardrails around that so it doesn't create this perception that the nominee is the White House's client, and the lawyers at the White House are doing everything to make sure this nominee gets confirmed under any circumstance, that is a troubling perception, and if we could develop some norms limiting that, I think it would be a good idea.

I honestly didn't give a whole lot of thought to that in my research, and I would want

to give it a little more thought, but I think you've hit on something that certainly creates a very negative perception, and reinforces the perception of the public, that these are not independent nominees, you know, they're political tools for a particular administration.

COMMISSIONER STRAUSS: Thank you, Mr. Peck.

CHAIR RODRIGUEZ: Thank you, Commissioner Strauss, and I will now call on my illustrious Co-Chair, Bob Bauer, to ask his ten minutes' worth of questions.

CHAIR BAUER: Thank you very much, Commissioner Rodriguez.

I'm going to turn to you, first, Mr. Wittes, and I'm going to get straight to it to squeeze as much as I can to this 20 minutes -- or ten minutes, I just doubled it, hopefully, but not successfully.

You wrote in your written submission, and I'm going to quote, put simply, there would be no significant debate about Court reform and

enlargement today, except the certain academic circles, but for the confirmation process.

There was no grave problem with the Courts that require reform. So I wanted to ask you first, how far does this go?

There have been questions about the Court's operations and procedures having to do with codes of judicial conduct, transparency, the management of its docket.

And the question is, do you think those are legitimate reform issues, or do you think that if we, you know, set that aside -- that we basically ought to set that aside, focus on whether there's reform on the grand scale that has been part of the public debate here?

Or, do you think we should consider those kinds of reform issues as potentially lowering the temperature and creating space for a more bipartisan look at how the institution is functioning in a democracy?

MR. WITTES: Yeah, so to be clear, when I wrote that I was referring to things like

the existence of this commission in the first place, right?

And the issue of Court reform and enlargement did not become part of the political campaign in 2020.

It was not something that candidate, now president, Biden had to address because of docket management issues or institutional concerns about the way the Courts are functioning.

Though those issues may be very important in their own right, the political impetus for this discussion is almost entirely a function of the confirmation process and the perceived -- and I believe correctly perceived imbalance that that has produced.

And so, I think these other issues are important. I would urge the commission to take them seriously.

My point is that the but-for cause of the salience of this issue in our current political discussion is really solely a function

of the output of the confirmation process over time.

CHAIR BAUER: So let me stay with that for a second and ask a sort of related follow-up.

There have been witnesses who think there's just a much wider ongoing problem with the role and operation of the Court in our democracy, so they definitely believe it has been ignited to different levels by, you know, recent political conflict, but they would focus us on these wider concerns, and let me sort of now pivot, although I want to connect it to my last question to what Mr. Peck has proposed in the way of refashioning Senate rules, potentially on a basis in which both parties can't quite predict how it's going to work out.

The rules are set to change, say, in 2025.

Given some of what he proposes, hearings have to be held, votes have to be conducted, the FBI has seen some more impartial role as some would have it.

There are specific requirements under the rules for entertaining nominations submitted in an election year, provided that they're submitted before August 1.

Do you think that focusing on those kinds of rule changes, and focusing on some of these internal judicial operating procedures could play a useful role in putting the Court reform debate on a sort of less dramatically partisan polarized footing?

MR. WITTES: So, yes and no.

I spent probably ten years advocating reforms like that and devising what I thought were very clever schemes to ensure the veil of ignorance, and that we wouldn't know who would be helped by which reform, and there was never an appetite on frankly either side for enacting such reforms because both parties are generally convinced that they're going to win the next election and they're going to have power to themselves, or that they have it now.

And so, I can't tell you how many

editorials I've written or columns I've written advocating just such stuff, and look, I am a fan of what Mr. Peck proposes, and if he wants me to sign a document saying I endorse these ideas, I do.

Do I think there's any realistic chance of a negotiated framework of implementing them?

I no longer believe that, and what I do believe is that instead of what we're going to get if we focus on reforms like that is an endless back and forth that's not fruitful until one side actually has the power to do something, and then the thing that they will do is not enact those common sense norms-based order kind of reforms, they'll just up the ante once more to their own benefit.

And that is I'm sufficiently afraid of that, that my main concern is interrupting that prisoner's dilemma mentality that both sides are operating under, and I don't think we're going to do that through that kind of technical reforms of

rules.

That said, if we can, I think it would be a wonderful thing.

CHAIR BAUER: So if I may, just to conclude the question, I'm going to turn to Mr. Henderson here for a second.

You think these kinds of steps are by their nature -- the ones that you and I have been talking about, the Senate confirmation rules and some rules that bear on the Court's internal operating procedures and so forth, they're not by nature the kind that would necessarily ignite sort of an escalatory tit for tat, but you believe that neither side has any incentive to turn in that direction, and therefore, they would just basically be shoved to the side?

MR. HENDERSON: Correct.

I think the risk is that you have a protracted period of negotiation over those rules that don't provide an agreement, that don't provide, you know, a stable set of rules, then one side wins an election.

They sweep aside what the assumptions that were leading, that were guiding those conversations, and they immediately impose their own preferences, which the other side then has to respond to.

And that incorporates both the confirmation process and, frankly, the Court enlargement regime.

CHAIR BAUER: Thank you very much, I really appreciate that.

Mr. Henderson, I'd like to bring you into this specific line of discussion, somebody who's deeply experienced in the confirmation process over the years.

When you hear the proposals that Jeff Peck has made and that reflect conversations he's had with both Democrats and Republicans, is it your view that they in a world in which reasonable conversations could be had would have some promise, or do they sort of miss the large picture in your judgment, and we ought to be turning our attention in another direction?

MR. HENDERSON: Well, thank you, Commissioner Bauer for your question.

I believe that the proposals Mr. Peck has put forth certainly deserve consideration and should be discussed.

I do think, however, that the partisan nature of this process, which I think Mr. Wittes has described accurately, as has Mr. Shapiro, to me, make the possibility of achieving a consensus on those positions more difficult.

I do like the idea that Professor Strauss has advanced of establishing norms of behavior, perhaps between Supreme Court nominations that might in fact govern how the Senate chooses to exercise its advice and consent role.

For example, the notion that a senator should never take a position that he or she would oppose a nominee from the opposing party simply because it is from the opposing party, in my view, is simply, you know, not appropriate, and it's unseemly and should be taken off the table.

The idea that we are trying to find a way of advancing a more cooperative process that we think could serve the interest of the country better is an approach that makes sense.

But I think Mr. Peck's proposals, as good as they may be, will have some real difficulty in actually being accomplished.

CHAIR BAUER: Very good, and did you have -- by the way, just thought I'd ask, was there anything in the report -- it's very comprehensive and an important report from Mr. Geller and Ms. Mahoney that got your attention that you want to comment on before I try to squeeze in?

Which I may not be able to do one last question.

MR. HENDERSON: Well, I certainly appreciate the views of practitioners, and I think they have concluded, of course, that the process should essentially, if I'm interpreting it correctly, remain essentially the same.

I do think however that all proposals

that are being discussed should be on the table, and I know like the commission you are weighing and analyzing these initiatives that have been put forth by your witnesses.

My only request is that you center the impact of these proposals on people and interests who are most adversely affected.

Civil and human rights of American citizens, and others covered by the Constitution voting rights, those issues are so fundamental to our democracy that I would hope that proposals to reshape the Court or the structure of the confirmation process be reflected, or rather refracted through those considerations.

I think that would be helpful. And so, I encourage the commission to consider all proposals, but to center them on the impact that they would have on interests, or people, rather, who are most adversely affected.

CHAIR BAUER: Thank you very much, Mr. Henderson.

MR. HENDERSON: Thank you.

CHAIR RODRIGUEZ: Thank you, Commissioner Bauer.

We now have 13 minutes left and that means each of the commissioners has just over four minutes, perhaps time for one exchange, with the witness of your choice, and I'll return to Commissioner Fredrickson to begin.

COMMISSIONER FREDRICKSON: Okay, thank you, and thanks again to all of the witnesses for a very illuminating discussion.

I wanted to come back to Mr. Peck because I feel like we've talked a lot about Mr. Peck's proposals, and with some skepticism, if I can say, about the possibility of them being implemented in any lasting way.

And I too spent, not quite as many years as you, but quite a number of years in the Senate as a Senate chief of staff and a deputy chief of staff to the Senate Democratic leader, so I've had some experience with Senate rules and with some of the complications of making changes and some of the increasing partisanship and

polarization that has come about in the last many years.

So Mr. Peck, based on your experience in the Senate and in this wonderful report you put together with the interviews that you did, do you have an answer to what has been suggested from some of the other witnesses that perhaps these ideas, well-intentioned, are not really achievable?

MR. PECK: Sure. Thanks for that, and thanks for the opportunity to address that.

Look, I think it's hard not to look at the Senate and our politics today and be anything short of pretty skeptical about any proposal, whether it has to do with the Court, whether it has to do with the filibuster, whether it has to do with the specific areas that I discussed in my report.

I think we have two options.

We can kind of throw up our hands and kind of give up and say nothing is ever going to change, and certainly in the 30 plus years I've

been in politics, I'm as close to that position today as I have been, given the tribal nature of what's happened to our politics today.

But we have a second option, and that is to try to think of some alternatives to improve the process, and I wouldn't go so far as to call it a fail-safe, but one way I thought to deal with the skepticism is to try to have this discussion and debate about changing the rules outside the context of their immediate effect, or outside the context of a particular nomination.

That's why I proposed implementing them in 2025. We don't know who will take the oath of office on January 20, 2025.

We don't know who's going to control the Congress, particularly the Senate, who will chair the Senate Judiciary Committee, who will be the majority leader or the minority leader.

So, I am hopeful through that sort of mechanism -- which by the way is not to say that I don't think these rules are necessary now, I think they are, particularly in the ways the full

Senate deals with the nomination -- but I try to take it out of, you know, the immediate skepticism and immediate sort of hot debate that our politics provide.

You know, in the end, I think a lot of this, particularly in the areas I focused on, depends on who's in the Senate, and one could make the case that we may see, I hope, some more statesman-like members of the Senate emerge, men and women, going forward, and that they are willing to take a more sort of bipartisan thoughtful approach, and look at norms and look at rules that might make more sense.

Is what I've proposed a heavy lift? No question it's a heavy lift, and I think if I was proposing that the Senate take it up over the course of the next six months, they'd be dead on arrival in terms of their adoption.

But by postponing the effective date, by trying to pull together perhaps a group of senators who would like to work on a bipartisan basis, there might be some foundation there to

adopt new rules that improve the process.

Again, it's a difficult lift, but I don't think it's impossible, and I think the alternative of just to kind of throw up our hands -- I respect Mr. Shapiro's views, and it's tempting to say we shouldn't have any hearings at all because they are Kabuki theatre.

That term came up in countless of my interviews.

I just think to kind of give up on the process is not the best answer at this point, despite, you know, some evidence as he points out that certainly the process is not working as it should.

CHAIR RODRIGUEZ: Commissioner Strauss?

COMMISSIONER STRAUSS: Thank you. I have a question for Mr. Geller and Ms. Mahoney.

It is about the so-called shadow docket, the Court's emergency applications and some are dispositions.

You make the point in your report that

your committee believes that legislative intervention in that area would be inappropriate and the matter should be left to the Court.

Taking that very well made point, do you think there is reason for the Court to reflect on its own practices and possibly change them?

One criticism that we've heard -- there are actually two criticisms that come to mind that we've heard.

One is that the Court has increasingly been resolving substantive merits questions in emergency applications, and that's not a good thing.

And the other is that the Court has, without fully acknowledging it, changed its definition of irreparable injury so that any inability of the government to carry out its programs counts as irreparable injury, and then has inconsistently applied that standard.

So either the views of the committee, if you're comfortable expressing that, or your

own views, if you're comfortable expressing those.

Do you think those are areas in which the Court should give some serious thought to going in a different direction?

MR. GELLER: Thank you, Commissioner Strauss, and it's good to see you.

COMMISSIONER STRAUSS: Nice to see you, Ken.

MR. GELLER: I think that many of us on the committee, if not most of us, felt that the criticisms of the Court's so-called shadow docket are a bit overstated.

Even the name shadow docket it seems unfairly to suggest some impropriety.

In fact, the Supreme Court, like every Court, is required on a regular basis to act quickly without full briefing and oral argument on applications for stays and injunctions pending appeal.

I don't think the Court's procedures on stays have changed much over the years,

although in recent years perhaps because of the flurry of flurry of immigration and COVID crises, cases, among other reasons, there have been more high visibility applications and those getting more publicity.

I think that what's happening during the stay process may be somewhat misunderstood. As you suggest, the Court is not making merits decisions.

Perhaps some of the things that it writes when it decides these stay applications.

Given this impression, it's obviously applying a four-part test, balancing equities and moving very, very quickly.

In other words, if disappointment with the way some of these decisions have come out does not suggest that we need to change the processes, but our committee did think there were a couple of things that the Court itself might consider.

One is not to have, as the proposal suggested, an oral argument in every case in

which a stay application was filed, but there may be cases on occasion where difficult issues of law are raised, or the facts may be somewhat unclear where it would be, we think, advisable for the Court to at least consider the possibility of having oral argument.

The fact that the Court has over the last year, because of the pandemic, had oral arguments telephonically and it seems to have worked very well, suggests that the Court could consider doing that on stay applications from time to time.

And we also think that the Court might well be somewhat clearer in some of the things it writes in deciding stay or injunction applications, particularly when it's reaching a decision that's different from the lower courts, when it's granting a stay, when one's been denied, or issuing an injunction when one's been denied.

It would probably be helpful both for transparency purposes and for other purposes

development of the law for the Court to be a little bit more specific in why it's ruled the way it has, but we don't think that any set of widescale revision of the way the Court deals with stays and applications is appropriate or has been suggested by any empirical evidence.

COMMISSIONER STRAUSS: Okay, thank you.

CHAIR RODRIGUEZ: Commissioner Bauer, you have three minutes and 40 seconds.

CHAIR BAUER: Very good. Let me ask again of Mr. Geller and Ms. Mahoney one question, and thank you again for this really, extensive and comprehensive piece of work and all the effort and thought that went into it.

Let me ask a question about the position that you take on any restrictions that would be put on justices owning individual stock.

You oppose any restrictions or expanded reporting requirements and the like, and you write in your report that there are tax consequences, and you also write that given

there's no problem that you see, that if there were issues that had been raised on an isolated basis, no evidence of bad faith, that the justices would be deprived of an investment vehicle -- I'm quoting, that is generally available to the public.

Of course, Executive Branch officials also frequently face being deprived of investment vehicles that are generally available to the public, and they oftentimes set up blind trusts, and have to go through a complete review of their financial holdings with the Office of Government Ethics, and the like.

What about apart from there being a specific problem that's developed -- and I grant you, it's hard to see what that would be in the immediate past that has to be addressed.

A lot of ethics regulation of this kind is premised on just avoiding appearances, avoiding questions being raised.

How does your committee weight that?

Apparently not that strongly in coming

out against any restrictions. Can you talk about that for a minute, please?

MR. GELLER: Yeah, sure. We just did not see anything that suggested that the current process was broken in a way that required any sort of significant revisions.

The justices comply with the ethics restrictions by and large that apply to other federal judges.

In addition, they file annual disclosures of outside income, gifts, reimbursements, investments under the Ethics in Government Act of 1978.

So therefore we didn't think that there was a situation present today that required what would be the unusual situation of Congress stepping in and imposing rules on the head of a coordinate branch of government.

And we also took into account the fact that the chief justice has announced that the Court itself is currently looking at revising the rules under which it operates in terms of ethics

and disclosure.

So at a minimum, we thought we ought to wait to see what the Court itself does before we bring out the heavy artillery of Congressional legislation.

CHAIR BAUER: Thank you. Do I have an -- I'm sorry. Commissioner, you mentioned --

CHAIR RODRIGUEZ: Your time is up.

CHAIR BAUER: You said --

CHAIR RODRIGUEZ: I'm sorry.

CHAIR BAUER: Coming in under the wire, but we're down to 50 seconds, so I don't know.

CHAIR RODRIGUEZ: If you could do it in 50 seconds, go ahead.

CHAIR BAUER: Yeah, just to follow up on that.

That's very, very helpful, and I suppose I just want to ask the question about Congress' role in potentially imposing a requirement like that.

Of course, Congress imposes financial disclosure requirements and regulates financial

interests of senior Executive Branch officials, and that's also a coordinate branch.

Do you see this as essentially opening the door to an assault on judicial independence?

What is the risk here that you're concerned about in this direction that does not operate in the other direction toward the Executive Branch?

MR. GELLER: Well, I think the analogy to the Executive Branch would be the lower federal courts. I think the analogy here would be to the president itself.

I'm not aware that Congress has imposed significant, unique restrictions on the president himself from an ethics standpoint, and the analogy would be to the Supreme Court as the head of a coordinate branch of government.

CHAIR BAUER: Thank you.

CHAIR RODRIGUEZ: Thank you so much to all of the witnesses.

I know the time here reflects an enormous amount of work and thought, and we're

very grateful for that.

All of the witnesses are invited to submit further statements in writing if they so wish, though it is by no means expected, and commissioners may follow up at a later date to continue the conversation.

So we will now have a brief break and we'll resume for panel number two at 10:15. Thank you.

(Whereupon, the above-entitled matter went off the record at 10:00 a.m. and resumed at 10:15 a.m.)

CHAIR BAUER: Welcome back to this public meeting of the Presidential Commission on the Supreme Court of the United States.

We're now going to turn to a panel which is devoted to perspectives on Court reform.

And so, at this point, I'd appreciate if all the panelists please turned on their cameras, and I will introduce each one of them in turn to give their three to five minutes of testimony, and thank you very much for

participating today.

Let me begin by introducing Nan Aron, the founder and president of the Alliance for Justice.

Ms. Aron, thank you very much for joining us, and please proceed.

MS. ARON: Thank you, Chairs Rodriguez and Bauer, and distinguished members of the commission.

Thank you for the opportunity to testify today. It is wonderful to be here with so many dear friends and champions of justice with whom I've worked over the years.

Today, I ask the commission to endorse real reforms to the Supreme Court up to and including the number of justices.

First, I understand the gravity of the reforms that I'm advocating for. I do so with great reluctance, not zeal.

I've been president of Alliance for Justice for 42 years, and conservative justices have always commanded a majority, yet no matter

how contentious a nomination fight, we have never supported Court expansion.

I've dedicated my career to fighting for a fair and independent judiciary, and I've often made the same arguments advance before this commission.

I'd always believed that expanding the Court would damage the institution and further politicize the judiciary, and I fear an untenable arms race.

Now, however, I believe reform is the only action, that the risks are simply outweighed by the reality of our current crisis.

The Court today is partisan, politicized, and anti-Democratic.

Look no further than its composition. Since 1992, a Republican candidate for president has only won the popular vote once, yet two thirds of the bench is comprised of Republican-appointed justices.

Two are on the bench after Republican-appointed justices handed the presidency to the

Republican candidate in Bush v. Gore.

Justice Gorsuch sits on the Court because Republicans refuse to consider Merrick Garland, and then change the Senate rules to confirm Gorsuch.

To confirm Justice Kavanaugh, Republicans hid documents and hamstrung the FBI's ability to properly investigate credible allegations of sexual assault.

Justice Barrett was confirmed only after Republicans broke from their own principle on Merrick Garland to confirm her days before an election, and now Mitch McConnell has pledged not to confirm any Biden nominee, should a Republican-led Senate consider a vacancy in 2024.

It would be one thing if these justices then turned around and were fair and impartial.

However, in scores of democracy cases, they've consistently undermined democracy and aided the very party that appointed them.

In fact, Republicans are using this

unDemocratic and partisan majority on the Court to cement their own power and enact an unpopular agenda that they cannot achieve legislatively.

Years after the Powell Memorandum urged the business community to capture our Courts, these Republicans appointed justices have consistently ruled in ways that aid the wealthy and powerful.

Let me remind this commission, we have a Justice Kavanaugh, who in his confirmation hearing, threatened revenge on his political opponents, who has been described by his former law clerk, now a D.C. Circuit judge, as a warrior who will, quote, not surrender in a way, end quote, being fought.

If a justice has declared war and has repeatedly ruled to undermine our democracy, civil rights, workers, and consumers are we those who care about the independence of the judiciary, supposed to just remain silent?

Second, there's been a lot of discussion about talks surrounding Court reform

on abstract notions of norms and traditions.

This discussion ignores the real world harm that the Court is doing to people around the country, victims of wage theft and discrimination, families who otherwise would be eligible for Medicaid, voters who have to risk their health to exercise the franchise.

What good are norms if they protect the Court that twists the law to advance a policy agenda eroding and eliminating the rights and protections of millions?

Given the stakes, the country cannot afford for this commission to become purely an academic exercise.

This commission must aim higher than simply producing a carefully worded report taking the form of a glorified law review article.

Real people's lives are at stake. Hear from them.

Members of the commission, if you believe in protecting and preserving our Constitution and the integrity of our system of

government, I believe you too will conclude reform is imperative.

In short, if the Court continues to work hand in fist with Republicans to undermine fair and free elections, then the only possible conclusion is reform is imperative.

If the Court day after day continues to bend the law to side with the wealthy and powerful over civil rights and the rights of all workers and consumers, then the only possible conclusion is that reform is imperative.

If the Court continues to subvert the will of the majority of the American people and quash the power of their elected representatives, then the only possible conclusion is reform is imperative.

Unfortunately, unless there are real reforms to the Court, including expanding the number of justices, something completely Constitutional and done regularly throughout our history, our system of government and our rights and legal protections will be eroded for

generations. Thank you very much.

CHAIR BAUER: Thank you, Ms. Aron.

Our next witness is Christopher Kang, the co-founder and chief counsel of Demand Justice, and as deputy counsel in the Obama administration, was very much involved in the judicial selection process.

And so the floor for five minutes is yours, Chris Kang.

MR. C. KANG: Thank you, Co-Chair Bauer and Co-Chair Rodriguez, and to all of the commission for the invitation to be here today.

I am Chris Kang, co-founder and chief counsel of Demand Justice, and we are fighting to bring balance and legitimacy to our Courts through Court reform and by diversifying the bench.

To be honest, this is not where I thought I would be.

I knew going into law school that I wanted to work in government, I wanted to work in and through institutions to advance change.

I've worked on the Senate Judiciary Committee on the Senate floor.

I worked in the White House Office of Legislative Affairs, and then the White House Counsel's Office where I led President Obama's judicial nominees for a majority of his presidency.

After I took a break from government, I watched Republicans steal a Supreme Court seat from President Obama and then unilaterally change the Senate rules to confirm Neil Gorsuch when he was unable to gain a sufficient bipartisan support.

And I looked around and I thought, where's the Democratic response, where is the progressive movement rising up to fight this theft of a Supreme Court seat?

And that is why I founded Demand Justice.

You know, at the time, I had bought into the conventional wisdom that the problem was that Republicans cared and understood the impact

of the Courts, but Democrats just didn't get it, so I thought that with my experience and background I could help connect the dots.

But you know, that's not the problem. The problem is not that Democrats don't care, it's not that progressives are unable to organize around the Courts, the problem is that we're actively told that we shouldn't organize around the Courts, that the Courts are not a political institution, and therefore there cannot be a political response, there cannot be a political solution, and really there can't even be criticism of the Court and the justices.

You know, what crystallized this for me was a symposium we held on Court reform in 2018.

This is where we first came out in support of Supreme Court expansion, but the moment that struck me in particular was a comment made by Penn State law professor Eleanor Brown, and she said this.

She said, we've all been sold this

notion that there's an impartial, independent judiciary working for the common good.

People on the left have disproportionately bought this fiction, people on the right have never bought that fiction.

If people on the left buy the fiction and people on the right do not buy the fiction, it means people on the right are behaving in activist ways.

They're always acutely aware of the stakes to implication in a way that people on the left are not.

You know, the reason that that stuck with me is because I was somebody who had bought that fiction.

Working the Obama White House, we constantly sought to turn down the politics on judicial nomination.

And perhaps the best example of that was after I left the administration and President Obama nominated Merrick Garland to the Supreme Court, a fine jurist to be sure, but a 63 year

old moderate judge, former prosecutor recommended by Republicans to fill the Supreme Court vacancy, and we all see how that turned out.

So, I realized the problem is not just Democrats versus Republicans and how they're approaching the Court.

If progressives are disproportionately buying the fiction of an independent judiciary, then who is selling it?

The answer quite frankly is people like those in this meeting, legal elites, academics, Supreme Court practitioners who benefit from not criticizing the Court, and many of the elite journalists who cover the Court, and see men tamper, manufacturing public trust and projecting an image of moderation before the final partisan shoe drops every single term.

Now to be clear, I'm not referring to particular commissioner or witness or everyone. There clearly have been examples of those who have brought this uncomfortable truth to bear, such as Professor Niko Bowie last month, but

that's the point.

We're acceptant. There's a broad legal elite culture that fosters and promotes the myth of an independent, apolitical judiciary that must be preserved.

And I will say that I believe passionately in the ideal of an independent judiciary.

I fought for years to hold the line, thinking that that would help maintain the legitimacy of the Courts, but I was wrong.

The reality today is far different from the ideal, and that is my concern, that the debate around Court reform has become too academic, too theoretical, too detached from the impact of the Court and its decisions on people's everyday lives.

We simply do not have an apolitical, independent Court.

We have a Court that consistently rules in favor of the Republican party, the wealthy, the powerful, and corporations.

Republicans do not deny their politicization of the Court, they revel in it because they benefit from it.

But more alarmingly, the Court decisions are not just for Republican, they're anti-democracy.

From Shelby County to allowing voter roll purges, to allowing partisan gerrymandering, to making it harder to vote during a pandemic, and this pattern continued this year with Brnovich, our democracy is under assault by this Supreme Court.

So we cannot evaluate reform proposals under a rubric of whether or not they will preserve this Court.

We need reform sufficient to expand democracy injustice. We need to expand the Supreme Court.

As a candidate, President Biden said he was not a fan of expanding the Court, and I agree, I'm not a fan of expanding the Supreme Court either, but doing so is rooted in our

Constitution, it's rooted in our history, the size of the Court has been changed seven times before, and this is the Constitutional response to a political Court, and it is the only way to restore balance and provide relief right away.

We cannot continue to look the other way while Republicans continue to use the Courts to pursue their radical agenda, and I know that this commission will not make recommendations, so I know that it's not going to deliver the results we need to right these wrongs, but thankfully in our democracy, our future is not meant to be decided in rooms like these alone, but in the country as a whole where momentum is building and a grassroots movement is on the rise for Supreme Court reform. Thank you.

CHAIR BAUER: Thank you very much, Mr. Kang. Our next witness is John Malcolm.

He is the director of Heritage's Edwin Meese Center for Legal and Judicial Studies, and he is also the Ed Gilbertson and Sherry Lindberg Gilbertson senior legal fellow.

And so, Mr. Malcolm, you have the floor.

MR. MALCOLM: Thank you. Distinguished commissioners, congratulations on your well deserved appointment.

I hope you won't take it personally when I say this undertaking risks feeding the misperception that Supreme Court justices are just partisans in robes and that it's okay to manipulate the judiciary, hoping it will produce decisions that fulfill a particular political agenda.

Let's face it. This commission was established because President appointed three justices, resulting in six Republican and three Democrat appointees.

That prompted President Biden to declare the Court is getting out of whack.

I doubt those insisting the Court is out of whack would be saying so if a President Hillary Clinton had replaced justices Kennedy, Scalia, and Ginsburg, resulting in a six to three

split in favor of Democrat-appointed justices.

Saying the Court isn't out of whack doesn't mean I agree with everything the Court does. Far from it. Just read Dred Scott, Plessy, or Korematsu.

While these cases are universally reviled, and rightly so, we all could name cases where the Court has reached results that we like and others that we dislike, and we would likely disagree about many of those, and that's why any reforms should focus on the needs of the Court, not on decisions the Court has rendered or might render.

Engaging in open-ended discussions about reform without first identifying the defects to be remedied could erode public confidence in the Court as trustworthy, apolitical, and independent.

Some proposals would do great damage, while others would do little to no harm. I will focus on three. Court packing, jurisdiction stripping, and term limits.

The biggest threat to the judiciaries' independence is Court packing.

Displeased with some recent opinions, Court packing proponents want to replace the current Court with a larger, more reliably liberal body that will be more likely to issue rulings they like.

Disagreement with this or that decision is the most dangerous reason to manipulate the Court.

I'm sure, for example, that all of you would have objected had the Senate succumbed to the demand to impeach Earl Warren after that Court issued several decisions that rankled many conservatives.

Significantly those who claim the Court is out of whack haven't explained how. Does it mean an imbalance between justices appointed by different parties?

If so, there have been times when the imbalance was far greater.

All nine justices who served from 1945

to 1955 had been appointed by Presidents Roosevelt and Truman, yet the Eisenhower administration didn't threaten to pack the court.

From October 1991 until August 1993, there were eight Republic appointees and only one Democratic appointee, yet the Clinton administration didn't threaten to pack the court.

And any attempt to pack the court would undoubtedly be met with tit for tat retaliation the next time Republicans control the White House and Congress, which is exactly what happened with ending the filibuster for judicial nominations.

Regarding jurisdictions stripping, legal scholars have long debated whether the Constitution gives Congress the authority to decide what cases the Court can consider.

Thankfully, we have not had to resolve this issue, at least not yet. The threat of jurisdiction stripping has a lamentable history.

During the Warren Court, there were attempts to strip the Court of jurisdiction to

decide cases involving racial desegregation, religious freedom., reapportionment, and the right to political subversives and criminal defendants.

While some might favor stripping the Court of jurisdiction to consider a case challenging Roe v. Wade, others might favor stripping the Court of jurisdiction to consider the Constitutionality of a pro-life statute that effectively overturns Roe.

Denying the Court the ability to decide whether a law is Constitutional would effectively end its ability to ensure the Constitution remains the supreme law of the land.

Term limits for justices are less objectionable.

It would likely require a Constitutional amendment, would apply to future justices regardless of who is president, and would require broad bipartisan acceptance.

Many respected scholars support staggered 18 year terms. While the potential

benefits are real, I doubt it would be a panacea.

Eighteen years is still a long time, and tying the Court's membership to the results of each presidential election might actually ramp up partisan rhetoric and lead to even more contentious confirmation hearings.

In conclusion, the Supreme Court shouldn't be treated like a political football. There have been times the Court's credibility has proven to be invaluable.

For example, the Court was a stabilizing influence during the school desegregation effort following Brown v. Board of Education.

The Court spoke. Some agreed, others didn't. But because the public had confidence in the Court, they all ultimately obeyed the ruling.

We shouldn't take this for granted. Politicizing the Court risks undermining that credibility so it won't be there the next time we need it, and we will.

Any reform that diminishes the

independence of the Supreme Court should be rejected.

Thank you for inviting me to testify here today and I look forward to answering your questions.

CHAIR BAUER: Thank you very much, Mr. Malcolm. And our next witness is Gabe Roth.

He's the executive director of Fix the Court, previously managed the coalition for Court transparency, which was a national alliance of media and legal organizations that advocated for the broadcast of Supreme Court proceedings.

Mr. Roth, five minutes is yours.

MR. ROTH: Thank you, Bob, and to the members of the commission, thank you all for inviting me to testify about my research and experience on federal Court reform.

I guess I'm here kind of as a palette cleanser or an optimist, which is a weird role for me and for those who know me, but I am here to talk about consensus and what we can do to build a Court that we could have some more faith

in.

A little about my background.

I am executive director of Fix the Court, which is a national non-partisan organization that advocates for non-ideological fixes to make the federal courts, and primarily the Supreme Court, more open and accountable to the American people.

My background, though, is in journalism and political consulting, not the law.

For years, I had to explain to clients that no, you can't watch the Supreme Court on C-SPAN 8.

You'll have to fly to Washington and spend six or 106 hours in line just for the chance to watch your case being argued.

But about seven years ago, I realized that broadcast was not in fact at the heart of what made the Court the most powerful, least accountable institution in Washington.

It was their life tenure, lack of an ethics code, and the black box surrounding their

conflicts of interests, finances, and junkets.

Almost no one at the time was diving into this work from a non-partisan perspective, so in 2014 I started Fix the Court.

The impetus behind fix the Court has always been fairly simple.

Public officials in a democracy need public scrutiny, and since federal judges and justices are public officials, they should not be exempt from it.

That scrutiny will build trust in the third branch as a whole at this critical juncture in our history.

Now, oddly enough, a blueprint for reform might already exist among the recent rules and regulations enacted in Congress for Congress.

The public can watch Congressional committee hearings and floor activities in both houses live.

Senators and representatives must release within a month extensive details about the transportation, food, and lodging that third

parties pay for.

These travel reports are posted online for the public to see.

Congress men and women must report within 45 days when they buy or sell a stock. These reports go online. Members must post their annual financial disclosures online, as well.

Congressional staff are covered by a series of anti-harassment, anti-discrimination, and anti-retaliation laws.

Committee chairs, in some cases, have term limits.

These reforms show not only what's possible but what's needed in the Federal Judiciary, plus judicial reform is already deeply popular.

Seventy percent of Americans believe livestreaming in SCOTUS should be required, about the same percentage supports ending life tenure in SCOTUS, and about 90 percent want the justices to adopt a formal ethics code.

Importantly, across party lines, three

in four Americans say the Courts should be subjected to as much public scrutiny as the president and members of Congress are.

Of course, the Courts themselves could implement these reforms, and it has been my fervent wish that judges, justices, and judicial administrators would act as partners in my modest modernization efforts.

But time and again, they've thrown up roadblocks, in many cases lobbying against reform. I'd argue that the Judicial Conference has the best lobbying shop in town.

Now historically, Court reform efforts have been tied to partnership. John mentioned Impeach Earl Warren signs that we all remember.

But there's been a bit of a change in recent years.

Many of the highly visible reform efforts, though seemingly partisan, have been facially neutral when applied more broadly.

Liberal attempts, including some led by Nan, who's on the panel, to push Justices

Thomas and Scalia off certain cases due to their associations with mega donors on the GOP side, show that the public should know more about all judges' and justices' travel.

Conservatives failed to get Justice Kagan to recuse from the ACA Cinematic Universe, but it showed that all justices should be more thoughtful about potential conflicts of interest.

Buoyed by these partisan/non-partisan efforts, as well as greater attention from the press and public and the judiciaries' work, lawmakers or the ones who actually care about making laws, have begun to coalesce around the idea that reform should not simply be used as a tool to expose the other side's misdeeds, but a more consistent application of best practices in government oversight.

And this experience is what sets me apart from all the other witnesses. Reform isn't theoretical or academic for me, it's my job.

I am doing the work every day with both parties to see where lawmakers are, and

what's legislatively possible.

Legislative, since, again, the Courts are not acting in good faith here.

Here's a sample of what I've been hearing from the Hill.

Quote, my deep respect for the judiciary does not mean there are no improvements we can make to the Court system, particularly when it comes to transparency.

That's Congressman Nadler, a Democrat of New York.

Quote, when it comes to transparency, when it comes to the ethics of the judiciary, we have an obligation.

We cannot simply say, let's impeach a judge from time to time. That's Congressman Issa, a Republican of California.

No one doubts that Congress has the authority to regulate the administration of the federal courts, so it should, and I believe it soon will.

After all, life tenure must not

insulate the judiciary from basic measures of oversight.

Also, there shouldn't be life tenure, and that topic is covered in my written statement.

In my view, fixing the Court is not adding four justices or six justices or 29 justices, it's ensuring that members of the third branch are held to the same high standards of ethics and transparency a those in the other two.

I want to thank the commission again for inviting me here today, and I look forward to your questions.

CHAIR BAUER: Thank you very much, Mr. Roth.

And now I would ask the commissioners who will be asking questions to turn on their cameras, please.

And I will introduce them in the turn in which they will be asking the questions, and we'll begin the questioning with Professor Michael Kang.

He's a William G. and Virginia K. Karnes research professor at Northwestern Pritzker School of Law.

Professor Kang, the floor is yours for ten minutes.

COMMISSIONER KANG: Thank you, Bob, and thanks to all our panelists for helping us with our work and giving us their perspective and experience.

I'd love to start with Ms. Aron if I could.

Ms. Aron, you've been deeply involved for a while with the federal appointments and confirmation process, and as I think everyone agrees, the process has become more political and partisan over the years.

And I think a worry that a lot of people have about any reform is that hyperpartisanship that we have in the country could overwhelm any reforms, the size, composition, term length of the Court.

And I think the idea here is if you

change the size of the Court, it expands under Democrats, then might lead to a spiral where the Republicans retaliate, and you either change it back or increase the size even larger, and we end up kind of just exacerbating the situation.

Alternatively, some scholars and advocates are arguing that, instead of changing the size or term length of the Court, a better approach might be to decrease the overall importance of the Court through so-called disempowering measures.

I think in your testimony you said you reluctantly support Court expansion, but I was wondering if you could give us your opinion about these kinds of disempowering measures?

And I think the most prominent examples are jurisdiction stripping, where you limit the number of cases that the Court takes, and therefore, reduces influence, requires supermajority on the Court before it can strike down legislation, which makes it harder for the Court to, you know, overrule Congress.

Or some have suggested that we should give Congress an override of Supreme Court decisions, and so the idea here is you reduce the power of the Court, and it reduces the stakes with the Court for both sides by making it less important, and we sort of make some headway on the kind of partisan fight that we currently have over Court politics.

And I was wondering if you could tell us kind of where you see the strengths and weaknesses of these kinds of disempowering measures, clearly vis-a-vis, changing the composition, term length, personnel of the Court.

Is that a better approach, a worse approach, and how should we think about that?

MS. ARON: I'd like to first address the first part of your question because I think it's important to know that the system of choosing judges has always been a contentious one, it's always been a partisan one.

George Washington's first nominee to the Supreme Court didn't make it through, so the

very design of the Constitution Article 2, Section 2 ensures that there will be a healthy debate, and partisanship will always be part of that.

Number two, a point that you make, Michael, is that, well, there'll be an arms race. If we expand the Court now, Republicans, once they're in power, will do the same.

The fact remains they're going to do it anyway.

Who would have thought that Mitch McConnell would hold up a seat for a whole year on the Supreme Court, block the appointment of Merrick Garland to ensure that a Republic-appointed president would get his choice?

PARTICIPANT: You're on mute.

MS. ARON: No, I'm not. Am I on mute, Michael?

COMMISSIONER KANG: No.

MS. ARON: No. I mean, I don't think any of us would've expected that to happen. They will do it regardless of what.

They will expand the Court if they think it's in their interest.

If the Court by some miracle were to have two new Democratic-appointed justices, they would expand the Court. They know no bounds.

Even McConnell, as I've said, has indicated, you know, block any nominee put forth by President Biden.

So, that brings us to smaller reforms, and I would include in those smaller reforms Supreme Court ethics, which I didn't mention in my verbal testimony, which I think is incredibly important.

There are ethics codes for lower court judges, we should have one for the Supreme Court.

Two, I think these other issues jurisdiction stripping, term limits, are interesting. I think they should be considered.

I know back in the 1980s, we fought jurisdiction stripping when some members tried to remove certain cases involving civil rights and abortion from the federal Court, so I do think

these are interesting ideas, I think they bear more conversation, but at the end of the day, given the monumental existential crisis we find ourselves in at the moment, expanding the Court I believe is the only action.

COMMISSIONER KANG: Thank you. I think I'd love to shift over for a second to Mr. Malcolm.

As part of our work, we've looked quite a bit at the history of reform proposals to alter the Supreme Court, and of course political actors support or oppose reform based largely on whether the Court at the moment is serving their interest.

And I think your argument in your testimony has been that that's exactly what's going on right now in the Supreme Court reform proposals.

I think I would also say though that it's been true that political conservatives have supported proposals to restrict the Court at times in the past.

Things like jurisdiction stripping, as Ms. Aron just alluded to.

And I think more generally have been critical of judicial activism or activist judges.

Obviously today, conservatives might be happier with the Supreme Court than at other times, given the composition of the Court, but I wanted to ask you whether -- from your perspective -- and I think from a conservative perspective -- whether there's any value in generally reducing the role of the Supreme Court, and maybe shifting power back relatively speaking to the political process, whether it's Congress, the Executive, or the states, and moving power away from the Supreme Court and the federal courts?

I guess I'm asking how you see the structural question in principle, apart from the partisan politics of the moment?

MR. MALCOLM: Great question. Thank you, Professor Kang.

I pointed out actually that there were

conservatives that led the effort to strip the Court of jurisdiction during the Warren era.

I do want to comment very briefly on breaking norms.

So that, you know, President Obama, when he was a senator, was leading a filibuster for Justice Alito, and when he was chairman of the Senate Judiciary Committee, Joe Biden announced George H. W. Bush when he was running for re-election, that if there was a vacancy on the Court, don't bother sending him a name because the Senate Judiciary Committee would not take up that name.

So, the norm breaking has been going on for a long time and it's quite bipartisan.

I think your question is an excellent one, I just wouldn't propose doing it the way you did in your question to Ms. Aron, which is to say have supermajority votes to strike down a statute and you know, I think our Constitutional rights should not be subjected to the elected branches, other than they should keep the Constitution in

mind when they pass laws to make sure that the laws that they are passing, at least by their lights, are Constitutional, but I think the Constitution should not require a supermajority in order to, you know, uphold them.

What I do think should happen is -- and Mr. Shapiro in the first panel alluded to this -- is that the Supreme Court has taken on, and if you will, Constitutionalize many issues that I believe under the framework of the Constitution were probably left to the people and their elected representatives, so part of me would say, you know, Court, heal thyself, and you know, stick to textualism and the original public meaning of the Court, and don't be quite so hasty to jump in and Constitutionalize an issue that would be best left to the people to decide as I believe the framers intended.

COMMISSIONER KANG: Great, thank you so much. This is probably going to be my last question.

Mr. Roth, you suggested a number of

proposals to improve judicial policies and procedures, clarifying recusal, increasing access to the Courts, financial disclosures.

I wonder if you had any thoughts about policy and procedure to improve the confirmation process itself?

We've talked so far about changing the structure or power to the Court, and the idea here is if you reduce the importance of the Court, then maybe partisanship will decrease and the process will improve as a result.

It's probably true that the Court's going to remain pretty important even if the structure or powers of the Court are changed a lot, so I was wondering if there was anything that can be done in terms of the process itself?

Whether it's through regulation or new norms, as we discussed a little bit in the morning.

Jeff Peck had some suggestions about timeframes for confirmation hearings and votes.

I was wondering if there's anything

along those lines that can be done in the confirmation process, and whether you think those would be effective in improving the process in the end?

MR. ROTH: I mean, I think it's worth trying. Right?

The recent term limits bill that was introduced by Congressmen Khanna-Beyer-Kennedy back in September of 2020 had -- and it would kind of be hard to enforce, but at least it's stated -- you know, if the Senate didn't act on a confirmation within 120 days, it would be forfeiting its advice and consent, and that was actually based on a speech that Brett Kavanaugh and Alberto Gonzalez wrote for George Bush in October of I think 2001, where they said, you know, 180 days really should be the limit of advice and consent.

So I think that if there's some way just to sort of limit advice and consent where you have people being added to the Court regardless of the partisanship on a regular

basis, I think overtime that would actually lower the temperature. Right?

I think the goal that I have with the term limits proposal of 18 years is to make Supreme Court nominations more like regular Senate business.

So whatever we can do to do that in terms of what -- you know, changing the confines of advice and consent possibly, either through norms or new laws, or obviously an amendment would work, but that's hard.

I think that's worth looking into, and you know, just to throw something out, in some of the research that I've done, you know, I did a bunch of focus groups after the Kavanaugh confirmation hearing just to talk to people in Iowa and Pennsylvania and New York about term limits, and we said, you know, that 18 year term limits means a new justice every two years.

I said, oh, that's way too much, that's too much, you know, SCOTUS confirmation, too much contention.

And then the next question was, tell me something about the Neil Gorsuch confirmation, which had happened like I think 14 or 16 months prior. No one remembered anything.

And so, I think that, you know, within the framework of terms limits bills, of norms, of, you know, working within the Senate Judiciary Committee, turning a Supreme Court confirmation, or even lower court confirmations, into something that more closely resembles regular Senate business is something that I think I would support and I think would benefit us over time because again, I'm not just talking about the Supreme Court here.

The lower courts are at such a deficit when it comes to the number of judges that they need.

I mean, estimates range from 70 to 270 judges that were down in terms of access to justice, so having more judges and justices being added on a more regular basis I think is something that should be considered and something

that can happen via legislation.

COMMISSIONER KANG: Thank you.

CHAIR BAUER: Thank you very much, Professor Kang.

Our next commissioner to ask questions is Professor Margaret Lemos, the Robert G. Seaks professor of Law at Duke Law School.

And so, the floor is yours, Professor Margaret Lemos.

COMMISSIONER LEMOS: Thank you, Co-Chair Bauer, and thanks very much to all of our witnesses.

Your testimony, both the written testimony and your comments here today, are hugely helpful for us.

Mr. Kang, I'd like to start with you if I might.

In your written testimony, and again in your oral remarks, you've argued that Democrats need to abandon the fiction of an apolitical Court.

You say we can't preserve an

apolitical Supreme Court because we cannot preserve something that doesn't exist.

And I want to be sure that I understand the claim exactly. Do you think that the Supreme Court is inherently a political institution?

So not just not apolitical, but just unavoidably political all the way down.

Or is the argument that while it might be possible to imagine a world in which the Supreme Court were independent and not entirely political, that is not our world because the Republican party has politicized the Court and will continue to do so?

I take it largely through its approach to judicial appointments. And so, in that world, Democrats have no choice but to take a simpler approach?

I'm guessing it's more the second, but I'd love to hear from you about the contours of the claim.

MR. C. KANG: It definitely is more

the latter, that there is a theory of an independent apolitical judiciary that I think could be possible.

I think it's something that could be worth aspiring to, but I think that the trap we're in now is that, again, there's this asymmetry here, and but look, I completely agree with Mr. Malcolm that politicizing the Court undermines the legitimacy of the Court.

I think that's the problem we have right now.

Republicans have politicized the Supreme Court so it is no longer legitimate. We have this asymmetry here where we're in a race to the bottom.

Republicans are politicizing the Court and Democrats think, well, the only way we can depoliticize it is if we don't engage, and that's not working, that's not the way that Constitutional hardball works.

There's no way to depoliticize the Court by unilaterally trying to stop it.

And so that is where I think that Democrats have to engage in this fight and really take up and organize around the Court, and put in some necessary reform in order to eventually.

I think that if there were an opportunity to restore balance to the Court, there might be a possibility in conjunction with term limits to one day depoliticize the Court and sort of lower the temperature, but where we're at right now is simply unsustainable.

COMMISSIONER LEMOS: So let me follow up on just that point -- and recognizing that none of us has a crystal ball here -- but what do you predict in terms of consequences if Congress were to add seats to the Supreme Court right now?

So this is sort of a version of the question that Commissioner Kang started us with.

Do you buy the idea that if Democrats show themselves to be willing to engage in Constitutional hardball, that that will, you know, cause the Republican party to back off similar expansions to the Court's size so that we

don't end up with a 100 person Court, or is your vision something different from that?

Perhaps showing a willingness to engage in Constitutional hardball then opens up other lines of policy that might not otherwise be possible. For example, term limits.

MR. C. KANG: I mean, I think that if last fall Republicans credibly thought legitimately that Democrats would expand the size of the Supreme Court, they would not have rushed through the confirmation of Justice Barrett after 60,000,000 Americans had already voted.

Republicans had a 5-4 majority on the Court, and if they thought they were legitimately at risk of being on the wrong side of a 7-6 Court, they might not have.

The problem is that Democrats have never responded.

Democrats did not respond to the theft of the Garland seat. They did not respond to the changing of the Senate rules to confirm Gorsuch.

They did not respond to Brett Kavanaugh being confirmed despite not only credible allegations of sexual assault, but credible allegations of perjury.

None of those responses happened, so Republicans last fall thought, why not grab another Supreme Court seat?

Why not solidify our majority instead of 5-4 with John Roberts in the middle, 6-3 and Brett Kavanaugh is the median justice? Like, why not?

And I think there have to be real opportunities for Democrats to engage in this fight, and not just threaten retaliation, and sort of be able to engage here, but actually do it, to show there are real consequences?

That is the only way we're going to be able to restore some balance in how both sides are treating the Court.

COMMISSIONER LEMOS: Thank you for that. So I want to now switch gears now to hear about something completely different, and that's

the ethics reforms, and that actually several of you have argued for.

You haven't mentioned that in your testimony today, Mr. Kang, but that's one of the steps that Demand Justice has outlined for Supreme Court reform.

And so I want to ask you particularly about the idea of a, quote, binding code of ethics for the Supreme Court.

As you and others have highlighted, the Supreme Court is alone among the federal courts in not having a formal code of ethics because the code of conduct that applies to the lower federal courts by its terms does not apply to the Supreme Court.

But as you know, that code of conduct is advisory.

It provides guidance to lower court judges, but it's not as self binding in the way a statute would be, and instead, there's a different statute that creates a mechanism for filing complaints about misconduct for lower

court judges.

And so, I'd love to just hear from you a little bit about what your vision is for what a formal code of conduct would look like for the Supreme Court?

Do you think it would be enough for the Court to just say, either on its own steam or through a director from Congress, we are formally bound by this code of conduct, or do we need some sort of enforcement mechanism, and what would an enforcement mechanism look like for the Supreme Court?

MR. C. KANG: So, I'm not a Constitutional scholar and be able to speak about the enforceability, but I think it's become clear that we cannot trust the Supreme Court to police itself, and you look no further than how this judiciary has responded to the allegations and the incidents of sexual harassment within the judiciary, and their inability to even track these complaints, more or less respond to them, shows that the judiciary is not capable of

policing itself.

But I think there's a real problem here with the Supreme Court not even being bound theoretically by any code of conduct. Right?

There were legitimate complaints, ethics complaints raised against Brett Kavanaugh's conduct, his testimony, the sexual assault allegations.

Because he was confirmed to the Supreme Court, the Court was forced to dismiss those allegations.

What kind of world is that that a circuit board judge, if he had not been confirmed, would have been subject to these complaints and they would've been investigated and dealt with, but because he was elevated to the highest board, they were dismissed.

Ethics reform is absolutely essential to restoring the legitimacy of the Supreme Court.

The reason why I don't dwell on that in testimony is because it's insufficient to reform the Supreme Court, and we need much more

important structure reform to really bring balance and legitimacy back to it.

COMMISSIONER LEMOS: Mr. Roth, can I ask you the same question about an ethics code?

Issues of ethics and recusal has been a real focus of the Court and you've done a lot of extremely informative work on it.

And so, I'm curious what your views are on an enforcement mechanism, whether one is needed, and if you think the answer is yes, what it might look like for the Supreme Court?

MR. ROTH: I mean, I think the enforcement mechanism already exists with the impeachment power in Congress. Right?

If a justice was found to do something unethical, impeachment proceedings could begin, but the reason Ethics of Court and other groups, I think, support ethics reform at the Court is because symbolism matters.

It's just weird that top judges in the country don't have, you can call it a formal code of conduct, a binding code, whatever you want to

call it, that that doesn't exist for the judiciary.

You know, Justice Breyer says, oh, he consults the code, and Chief Justice Roberts says he thinks about the code, and everyone sort of interprets it different, right?

You know, some law ethicists get calls from Supreme Court justices when they have ethical issues, and some justices just go down the chambers and ask their colleague.

So, there's no -- you know, this is part of the whole -- these nine Supreme Court justices are running nine law offices conceit that we hear.

And I think that having a formal code of conduct that all the justices say that they're going to follow, just like there are formal gift rules, right?

The most recent gift rules for the federal government were passed in 1989, and then Chief Justice Rehnquist said, well, we're not going to, you know, opine on whether or not it's

Constitutional for Congress to pass gift rules, but we nine are going to follow it, and that ninth is a resolution that was -- it's in my testimony -- written in 1991.

The justices continue to follow it, they continue to follow the gift rules regardless of the Constitutional issues, the one Supreme Court clause, all that.

They're still following the gift rules.

Similarly, I think that just saying, like, you know, Justice Kagan in 2019 said Justice Roberts is studying whether or not we could have a separate code of conduct for the Supreme Court.

Great. There hasn't been any follow-up.

I've asked the justices many times since, and everyone's like either silent or, oh, we're still thinking about it. So, you know, I think symbols matter.

Having the top of the food chain in

the third branch without this code is egregious, and it'll send a message to the 870 -- or if you include the senior judges, 1,370 other judges throughout the country that they need to take their ethics more seriously.

Every day, every month there are issues in the lower courts, from double-dipping salaries, to going on junkets across the world that are hard to track, to not filing financial disclosure reports, that are happening on the lower courts and they don't get enough attention.

I'm trying to change that they don't get enough attention, but at least having someone at the top saying we're going to recommit to ethics I think would send a message to the rest of the federal courts saying this is something critical to filling out our duties and our job, and we're going to follow the SCOTUS here.

COMMISSIONER LEMOS: Thanks.

CHAIR BAUER: Thank you very much Mr. Roth.

I'd like now to introduce the next

Commissioners Michael Waldman, who is the president of the Brennan Center for Justice at the NYU School of Law.

The time is yours, Mr. Waldman.

COMMISSIONER WALDMAN: Thank you, Bob, and thank you to the members of this panel for bringing your experience, your passion to this critical set of issues.

I want to start by following up with Mr. Roth on some of the specific reforms that you've suggested, and then I actually have a broader question for the whole panel to engage on.

You've described the importance of recusal rules and of justices having to explain their decisions in your written testimony.

Do you mean that justices should explain why they don't recuse as well as why they do recuse, and why is that rather extensive kind of commentary a valuable thing?

MR. ROTH: Well, I think I want to start with explaining why they do recuse, right?

So, 28 USC 455(b) has several reasons as to why justices recuse, and there's a law that was introduced -- versions of it have been introduced several times, but most recently, called the 21st Century Courts Act, about a year ago that said, you know, if you're a judge or justice and you have a conflict of interest, you say, you know, I Judge Smith took no part in this case because of a reason stemming from 28 USC 455(b)(4) which is like a financial conflict.

So something just very succinct, and the Supreme Court actually used to do this.

When judges were riding circuit, a lot of them would get sick or they wouldn't get back to D.C. in time, so they'd say, you know, Judge Reynolds was recused because he's like lost in a swamp in Alabama.

So, I mean, they wouldn't be that specific, but that's, you know, usually the reason.

So I think that bringing back that practice would very critically have justices

become more cognizant of their potential conflicts of interest.

Every year, every few months I find a missed conflict of interest at the Supreme Court.

You know, it's on the Fix the Court website, and it's ridiculous.

There's no reason that, you know, someone like me should be telling the justices, oh hey, remember you own United Technologies stock and Raytheon is now United Technologies so you need to recuse from the Raytheon case.

And they fix it and whatever, but it erodes trust.

In terms of, you know, having reasons for saying why you're not recusing, I think that like, that's like three steps removed from what I'm aiming at right now.

I think maybe in the future there could be like, you know, the Laird v. Tatum rule or something and if enough people sign a petition saying, you know, tell us, Justice Kagan, why you're not recusing from the ACA case, then maybe

she'd be forced to do a response, but I think first, I want the judges and justices to be cognizant of what their conflicts of interest are, tell us briefly why they're -- you know, the justices recuse 250 times a year and, you know, I do the research to try to figure out why, but it's not always clear.

And just briefly to add to that, when lower court judges recuse, they don't even know that they're recused. Right?

They have a sheet of paper that says these are my conflicts of interest that's fed into software, and then when it's like, you know, Smith v. Jones, if Jones is on my conflict sheet and I'm a judge, it just skips over me, so I never even know that I'm recused.

So I think that having, again, a mechanism that says, okay, I am recused from this case and you can put it in PACER. You know, I'll even pay ten cents for that.

You know, it says that Judge Smith is recused because of his conflict and not just, you

know, glossing over it through the software, but again, judges need to be more cognizant of what they're doing, and having to actually write down I am recused because X, Y, Z even briefly I think would be a step in the right direction in terms of helping the public and then themselves just be more cognizant of their ethical obligations.

COMMISSIONER WALDMAN: Thank you very much.

I have a question that really is something that I hope can receive some thought from more than one witness.

It's been striking for us as members of this commission, both in the previous public testimony and today as well, how widespread the support for or perhaps acquiescence to term limits is across the political spectrum, whether it's supported, or as Mr. Malcolm said, the least objectionable option of the big ideas that have been discussed.

One of the questions of course is do you believe that term limits could be done

Constitutionally through a statute, or would it require a constitutional amendment?

And I ask that question of each of the witnesses.

Mr. Roth, you talked about term limits extensively in your testimony, but I'd like others as well to give their views.

MR. MALCOLM: Well, if that's a jump ball, I'll jump in quickly. So I read and gave testimony.

I've read Akhil Amar's testimony, who's appearing before you later, who thinks that this can be done by statute, and I realized that there are distinguished scholars on both sides.

I just think that the good behavior clause means that they serve during good behavior, and I believe that anything that shifts them out of one office into another is not -- you know, we're confirmed to that office, subject to good behavior.

There had been suggestions, well, there are judges out there who take senior

status.

Yes, it's in their rules, it's about when they are eligible for senior status, but they are not required to take senior status, and you have, for instance, Judge Tjoflat, just took senior status.

He's well into his 90s.

I know judges who are beyond, you know, I'll say the age of 75, who are still serving as active judges, and although there is a debate about whether this can be done by statute, I not only think it has to be done by constitutional amendment, but I think that that would be a good thing because it would again engender that broad, bipartisan acceptance not only within the halls of Congress itself, but also among the population.

COMMISSIONER WALDMAN: Do any other members of the panel want to speak on that?

MR. C. KANG: I'll just add that I think that it can be done by statute, but I don't think that this Supreme Court is likely to uphold

it if it is.

I think that the problem right now with so many of these Court reform measures, whether they deal with jurisdiction, or judicial review, or term limits, is that they inevitably will be considered by this partisan Supreme Court that has been the result of a 50 year plan to take over our Court.

They're not going to give away that power easily.

And so, that is why I think that we need to restore balance to the Court by passing the Judiciary Act of 2021, and then with a balanced Court, maybe some of these Court reform procedures or reforms would have the opportunity to have a legitimate shot at having their constitutionality considered.

MS. ARON: I would just add, Michael, that term limits would require probably years of more law review articles, debates in Congress.

I agree with Chris. I can't see the Supreme Court upholding it. There are scholars

on both sides of the issue.

As to whether or not you need a constitutional amendment, some say yes, some say no.

And if we did need a Constitutional amendment, it's doubtful that we'd ever achieve term limits. I think this commission has to be bold.

I think this commission needs to look at expansion, which is essentially democratizing this Court now and for future generations. I think that ought to be the focus.

COMMISSIONER WALDMAN: I'd like to follow up on that question.

Ms. Aron, as you've said, you in your career have previously always opposed Court expansion as an option, and as we are learning from the history, even President Roosevelt at the height of his popularity, found public concern about it that he had not necessarily expected.

What do you say to Mr. Malcolm's argument that this is just, you know, Democrats

do what they'll do, Republicans do what they'll do, but right now the Republicans came out ahead?

Or, do you believe something very different and fundamental has happened in recent years that people need to look at with clear vision?

MS. ARON: So, I've seen a sea change over the years.

In terms of the engagement, it's not just the Democratic party, but it's members, it's constituents, it's progressives who have really been awakened to what Lewis Powell tried, and in fact successfully created, in terms of his progeny.

I think Americans realize how politicized the Court is, but when I say that, I think they do see these decisions that make it harder to vote, that make our air dirtier, that make life much more difficult for workers to organize, that allow people with disabilities to be discriminated against.

I do believe that there is growing

interest, growing engagement.

Progressives are galvanized by doing something, taking action about the current state of the Court right now.

Interestingly, there was a poll that came out right after the election, and really for the first time I've ever seen, Democrats more than Republicans were interested, were energized by the Supreme Court.

Finally, we went through four years of contentious, polarized discussions.

I would say Democrats in many of those battles performed admirably, did what they could to raise arguments, to make the case that what was happening to the Court was wrong, that we are at a crisis moment.

And I do think the constituents part of the party and beyond the party now realize that something has to be done.

CHAIR BAUER: Thank you very much, Mr. Waldman.

We actually have time for a second

round, so each of the commissioners can ask additional five minutes of questions to take us to the end of panel, so we'll go back to you, Professor Kang.

COMMISSIONER KANG: Great. Thanks, Bob. I think I wanted to start off just by following up a little bit with Mr. Malcolm about these disempowering reforms.

I think if the power of the Court was reduced, it wouldn't necessarily mean that there wouldn't be judicial review or that no one would decide constitutionality.

It might mean that authority, when it comes to constitutionality or interpretation, would shift to other actors, and that might be Congress or state legislatures.

It also might mean that lower federal courts, or state courts actually, get the final say, and I wanted to get your view specifically about state courts vis-a-vis the Federal Judiciary.

And I guess I'm thinking about

federalism arguments for devolving some power to state courts and moving some of that judicial review on constitutional questions, maybe some other questions, you know, closer to the states and not at the federal level, and I'm wondering if that dovetails with some arguments along federalism lines if there was some sort of disempowerment of the Supreme Court, whether that would be beneficial in your view, or worrisome to move power from the Federal Judiciary to the states?

MR. MALCOLM: That's a great question. I do have to respond very briefly to something Ms. Aron and Mr. Kang have said repeatedly about how these current justices are hyperpartisans and rogues.

You know, 64 percent of the cases that were decided by the Supreme Court this past year were by unanimous or by substantial majorities.

This is also the same Supreme Court that upheld Obamacare, unanimously held that President Trump had to turn over his financial

records to the Manhattan DA, they said that he couldn't end the DACA program, that he couldn't add a citizenship question to the census, and they did not get involved in the election dispute.

Plus, they held that employment anti-discrimination laws apply to people based on their sexual orientation and gender identity, so this is not, you know, Donald Trump, six Donald Trumps in robes.

Now, the answer to your question is, look, for a long time there was a sense that you couldn't get fair justice, so that the quality of state Supreme Court justices were just not there, and you would get home cooked.

I think that denigrates the lower courts. I know a number of state Supreme Court justices.

I think that they are outstanding jurists, and I think that there are some federal statutes that have devolved power down to the state courts, and I think that that is very, very

appropriate, and creating a more deferential standard of review by the federal courts.

At the end of the day, I think it's important that the Supreme Court, you know, be the ultimate arbiter when it comes to deciding important constitutional questions.

You could end up having the same sort of split among state Supreme Courts as you could among the lower federal court, and you talked before about jurisdiction stripping.

What if we took jurisdiction away from the Supreme Court, but you let the lower federal courts do this?

You know, I agree with the sentiment, and I think that state Supreme Court justices do not get the credit or the respect that they are due.

COMMISSIONER KANG: Great, thank you so much. I guess I'll finish by asking a question of Ms. Aron.

And I guess basically the question is why have the politics of the federal appointment

and confirmation process gotten worse over your career and over my career?

Certainly you're right that there's always been partisanship in the appointments process, but I think my sense is -- and it seems like the sense of most -- is that it's gotten worse, and I think at least you and Mr. Kang believe that it sort of inevitably will get worse if nothing changes.

Is the mystery why partisanship is so bad in the process right now, or is the mystery why the partisanship wasn't as bad 50 years ago?

And I think I could give you a political science story about the growth of partisanship kind of generally in America across all levels of politics that probably explains at least some of this.

But I'm wondering if there's something specific about the Federal Judiciary or the politics of the appointment process that helps us understand what's happened at the federal level over the last 40 years or so?

MS. ARON: Well, Michael, when I first practiced law in the 1970s, I appeared before Republican-appointed judges, Democratic-appointed judges, and frankly in many instances, I couldn't tell the difference.

Judges were open to listening, not just hearing, but listening for the facts and interpreting the law.

I often didn't agree with their results, but I thought they were fair.

But then came 1984 when the Republican party put language in its platform, party platform, when Reagan was running for a second term, calling for the appointment of judges who would oppose abortion, oppose civil rights, and support prayer in school.

And I looked in 1984 as really the beginning of modern day court packing. Packing, not expanding, packing.

And Ronald Reagan and the Bush presidents afterwards used very specific litmus tests for the selection of judges.

That continued to Trump. Don again was proud to announce that he was looking for judges who would overturn federal regulations, make it harder for plaintiffs to get into Court, prove discrimination, make it more difficult for workers to get fair pay.

Republicans have been openly brazen about this, and I think what happened is this plan of theirs exploded during the Trump years, I think culminating in the recognition by Democrats, by progressives, by people around the country, that there is something monumentally wrong with the justices that we are putting on the Supreme Court.

And I do think that because of this program instituted in 1984, which is fomented by big business on the one hand, and religious community who is trying to stop abortion, these two social forces continue to fuel money, energy into the Republican party, into candidates to continue to politicize our Court, and I think we are now at a moment where we are seeing Democrats

and their constituents realize the dangerous position we as a country are in.

COMMISSIONER KANG: Thank you.

COMMISSIONER LEMOS: I think it's my turn.

Ms. Aron, can I start by asking you the same question that I asked -- or a version of the question that I asked Mr. Kang and Mr. Roth earlier, just to tell us a little bit more about what your vision for ethics reform would look like at the Supreme Court?

MS. ARON: It's interesting.

A couple years ago, Alliance for Justice produced a film with some leading experts on the topic of Supreme Court ethics to focus in on just that question.

And we produced this film because of four phenomenon we saw.

One, I remember Justice Scalia loved to attend overtly political events.

Justices Alito and Thomas lend their names in prestige to fundraising events organized

by the Federalist Society.

In the past we've seen some justices fail to turn in their financial disclosure reports.

And we've also seen justices in the past receive pretty significant gifts from parties who might someday be arguing before that justice. So there are real problems.

If these Supreme Court justices were lower court, on the lower courts, they could not engage in any of these activities, and what we have been pushing for several years is the notion of an ethics system which essentially applies that code for lower court judges to Supreme Court justices.

Interestingly, after our film, we did see some of the justices begin to stop attending some of these events, hand in their disclosure forms, but we still see justices routinely attending Federalist Society fundraising events, lending their names and being the primary featured speakers at these events.

That should not happen, and if they were lower court judges, they couldn't do that.

COMMISSIONER LEMOS: Do you agree with Mr. Roth that impeachment is enough of an enforcement mechanism, or do you think we should have a formal complaint filing system for Supreme Court justices like we do for lower court judges?

MS. ARON: I would support an enforcement system.

I do think though just ensuring that that code applies to Supreme Court justices would inhibit a lot of the justices from engaging in some of what I view -- well, what the public should view as improper, inappropriate behavior.

COMMISSIONER LEMOS: I think I may have one more minute, so let me try to sneak in one more question for you while we're talking.

Just to take you back to where you just were with Commissioner Kang, you talked about a shift in 1984 when the Republican party started emphasizing the judiciary in the platform.

You know, both you and Mr. Kang have described sort of a transformation in your own views over time, so that you've come to support reforms that you used to oppose.

We've heard from other witnesses about, you know, sort of a break the glass moment, such that, you know, one might recognize that there are costs to things like expanding the size of the Supreme Court, but at some point, it becomes necessary or worth it.

I'm curious whether if you could go back in time, knowing what you know now, when would you have started advocating for a different approach, and why?

MS. ARON: Well, I should say we've certainly thought about it, but advocating it is different.

And I think that breaking the glass moment has been a series of Supreme Court decisions that make it much more difficult for people to vote, exercise the franchise.

That I think is the moment I think

that has -- the fact that a Republican Court has allowed voter purges, has sided with Republican partisan gerrymandering, has gutted the Voting Rights Act, Section 2, Section 5.

It's made it more difficult for Native Americans to vote in North Dakota.

I think the moment is really upon us, given the incredible importance and the need to democratize our country to ensure that every American has the right to vote.

This is a Court that has entrenched its power to do everything and anything it can to ensure that Republicans will continue to win elections at the expense of our democracy.

CHAIR BAUER: Thank you, Commissioner Lemos, and Commissioner Waldman, it's on to you now to bring us to a conclusion.

COMMISSIONER WALDMAN: Thank you so much. I have a question for Mr. Malcolm.

In your testimony, you note for example that between 1991 and 1993, there were eight Republican nominated appointed justices and

one Democrat, but at the time, people did not call for expansion of the Court as a remedy.

And I want to go into that a little further and ask you whether that is really a fair analogy to the situation today?

At that moment, Republicans had won every presidential election but one for the previous 24 years.

Currently, as we heard earlier -- and we know that Democrats won the popular vote in seven of the last eight presidential elections -- but as we know, Republican presidents nominated six of the nine Supreme Court justices.

Isn't there a greater risk now of a loss of legitimacy for the Court, relative to the country, given that kind of mismatch, or do you think that that's not a terribly different situation?

MR. MALCOLM: Well, that isn't why the Democrats didn't threaten to pack the court back then.

It's because they were very happy

having John Paul Stevens and David Souter, and for the most part, happy with Sandra Day O'Connor and Anthony Kennedy on the Court.

So, you know, Ms. Aron I remember in her written statement says, well, there's only one Supreme Court justice that was appointed by a Republican president who captured a majority of the popular vote, and that is Clarence Thomas.

You know, Bill Clinton won two elections, and because there were third-party nominees, he didn't garner a majority of the popular vote in either of those elections.

I do not consider the appointments of Justice Ginsburg and Breyer to have been in any way, shape, or form illegitimate.

Look, these people take oaths. They take an oath to administer justice without respect to persons and to do equal right to the poor and to the rich.

They may have different approaches. Some may be living constitutionalists, some may be originalists in terms of how they approach

their jobs, but, you know, these are honorable people who I think are doing their jobs with fidelity as each one sees that role in order to do justice.

And when you start talking about, you know, packing the court here, and what do we do there, I mean, look, you can do it.

The Supreme Court of China has 370 justices. Is that what we really -- what we want?

Do we want a Supreme Court that's, you know, bigger than the Senate or bigger than Congress? This is just a dangerous path to go down.

COMMISSIONER WALDMAN: I have a final question for Mr. Roth.

You've said that there's a model for the Courts or judges and justices, and the reforms that Congress has imposed on itself.

Do you see any lessons of what not to do from the reforms that Congress has imposed on itself?

Some critics say there are unintended consequences with some of the reforms in Congress.

Do you see anything that the Courts should avoid, or is it in fact something that trends in a positive direction?

MR. ROTH: I think it trends in a positive direction.

I mean, I hear arguments against cameras in the Court. You know, look what C-SPAN did to Congress. It's an apples and orange comparison.

The partisanship of Congress has nothing to do with C-SPAN, and if justices were on camera, you know, there's not enough time to quote, unquote play to the camera or grandstand.

Like, those arguments are ridiculous, and lower court judges have cameras, they're fine.

A live audio experiment that happened from May of 2020 to May of 2021, that was fine, so any sort of livestreaming issues that people

prescribe into Congress would not exist in the judiciary.

No, I think, look, you know, Congress.gov is free, PACER should be free. Go to ethics.house.gov and get all these different online reports, and travel reports, and disclosures.

The same thing should exist in the Supreme Court and, you know, the challenge is is that, you know, even if Congress passed these laws -- and I want to stress this -- that would bring the justices and lower court judges in line with these modern expectations of transparency and initiatives and exigencies, you know, the judicial conference is going to throw up roadblocks. Right?

Right now, you know, the Fourth Circuit just ruled that, you know, a Court filing should become public when it's filed, but to get an online financial disclosure, it's got to be reviewed by a panel of judges and by this whole staff, and it takes -- like, we still don't have

the 2019 and the 2020 financial disclosures for anyone except the nine SCOTUS Justices, and it's three years later.

So, you know, I think that what you would hear is pushback from the judiciary saying, oh it's too much, we can't do it, you know?

No, there are sort of basic tenets of modern democracy which involves the internet and we need to do what we can via laws that are passed by Congress that are very prescriptive and very specific that says, you know, if you are a federal judge, your stock sales got to go online, your disclosures got to go online, you got to be better at listing your conflicts of interests and your recusals, and you got to livestream your proceeding so the public has faith that you're not hiding behind this black box and trying to get something past them.

And that's something that exists in nearly every state court and courts of last resort around the world, and really the Federal Judiciary is the outlier in not recognizing that

the twenty first century has arrived.

CHAIR BAUER: Well thank you very much, and thank you very much to the commissioners who asked the questions, and to the panelists who have given us this time, and very helpful testimony.

We are now going to conclude this panel and we will resume after a break at 11:45, so thank you very much.

(Whereupon, the above-entitled matter went off the record at 11:33 a.m. and resumed at 11:46 a.m.)

CHAIR RODRIGUEZ: Welcome back, everyone.

This is the start of our third panel of the day, a second one on perspectives on Court reform.

At this time I'll ask each of the witnesses to turn on their cameras, please.

Each of our four witnesses will have three to five minutes to provide their opening statements, after which we'll turn to a panel of

three commissioners for questions.

I'll call on the witnesses in alphabetical order.

And again, their complete biographies are on the commission website, as is their written testimony.

We'll begin with Craig Becker, who's the general counsel to the AFL-CIO and a former member of the National Labor Relations Board.

Mr. Becker, the floor is yours.

MR. BECKER: Thank you very much, and thank you for inviting me to testify here today.

I'd like to make two points in my very brief time, one about the unprecedented form of partisanship on the current Court, and the other about the fairness of access to the Court. A conclusion of proposal for a view of cert petitions.

So first, the consequential decision after consequential decision in the last several decades the Court has ruled against the interest of working people and wholly partisan votes.

The reports all realness now in the famous phrase, and none of us is naive enough to believe that the justice's political perspectives do not affect their opinions.

And most of us still hope that there is some line between judging and advocacy, but that line is now increasingly being crossed.

Let me give you just one example.

Justice Alito in dicta in a series of cases between 2012 and 2018 actively solicited a case in order to overturn a 40 year old precedent key to collective bargaining in the public sector.

No party in the initial case questioned the precedent, but Justice Alito did, labeling it, quote, unusual, and quote, extraordinary.

In a concurring opinion in that case, Justice Sotomayor wrote that Justice Alito's opinion, quote, breaks the Court's own rules, and more importantly, disregards principles of judicial restraint.

In the subsequent decision, Justice Alito continued, quote, taking potshots at the precedent, in the words of Justice Kagan's descent.

The upshot of Justice Alito's unsubtle hints that he wanted to overturn this precedent was a race to the Supreme Court by opponents of unions.

In the first case to reach the Court, plaintiffs actually asked the Court of Appeals to rule against them, quote, as quickly as practical so that the appellants may take their claims to the Supreme Court.

In 2018, the Court predictably overturned this 40 year old precedent by a 5 to 4 vote.

In the descent Justice Kagan wrote, quote, today, the Court succeeds in a six year campaign right there in those recent decisions began the assault that culminates today.

So this was more than typical partisanship, more than the typical partisanship

you've been hearing about.

This case would never have even come before the Court if Justice Alito had not actively solicited in his prior opinions.

The commission should condemn this form of judicial activism.

Second, a growing perception among litigants that they must retain one of a small number of lawyers who are almost exclusively employed by corporate law firms in order to receive a fair hearing in the Court.

That perception was reinforced by an excellent piece of investigative reporting published by Reuters in a law review article by Professor Richard Lazarus, the former director of the Georgetown Supreme Court Institute.

Reuters found that 66 of 17,000 private lawyers who petitioned the Supreme Court in a ten year period succeeded in obtaining cert grants at six times the rate of other lawyers.

That is increasingly troubling as the number of cases heard by the Court continues to

decline.

The argument stage.

Reuters' investigation found that eight lawyers, all men, accounted for 20 percent of all the arguments before the Court, a dominance that is increasing over time.

So why is this of concern? Three reasons.

First, there's a growing perception that the Court and its bar are a closed, elite club, and that personal relationships may influence outcomes.

Second, the experience and knowledge of those lawyers and what they bring to the Court is narrow, as is the range of clients they agree to represent.

Typically their experience is limited to years in the Solicitor General's Office and in private firms representing corporations.

Members of the Supreme Court bar ordinarily will not represent parties with interests adverse to their corporate clients.

Reuters quoted one member of the bar acknowledging, quote, we are generally conflicted from representing individuals in litigation against corporations.

They are typically suing our clients or perspective clients.

This growing dominance of the corporate bar -- Supreme Court bar has played an important role in shifting the Court's jurisprudence against working people and in favor of corporations.

Third, the Supreme Court bar lacks other crucial types of diversity.

Reuters reported that 66 members of the bar -- of those 66 members of the bar, 63 were white and only eight were women.

Here I have a possible solution for at least at the cert stage.

The submissions should be stripped of any information identifying counsel.

Similar to common procedures of blind review of submissions to most academic journals,

blind grading of law school exams, and blind auditions for symphony orchestras.

Research conclusively demonstrates that a non-blind review of submissions to law reviews, for example, leads to what's called prestige bias.

It makes it harder for women to publish and undermines the credibility of those journals.

Blind review is fair and less subject to bias, conscious and unconscious.

By similarly implementing blind review of petitions for cert, the Supreme Court could reduce the potential for bias and favoritism at that increasingly critical stage.

There it would be judged based on the power of the arguments and not the names on the cover.

That would help mitigate inequities and access to justice stemming from the position occupied by the Supreme Court law.

Thank you, and I look forward to your

questions.

CHAIR RODRIGUEZ: Thank you, Mr. Becker.

Our next witness is Curt Levey, who is the president of the Committee for Justice. Mr. Levey, you have the floor.

(No audible response.)

CHAIR RODRIGUEZ: You're on mute, Mr. Levey.

MR. C. LEVEY: Can you hear me now?

CHAIR RODRIGUEZ: Yes.

MR. C. LEVEY: Great. Thank you for this opportunity to testify.

The non-profit organization that I have, the Committee for Justice, has been involved in each of the last seven Supreme Court confirmation battles, or eight if you count Harriet Miers.

We're an advocacy group that promotes constitutionally limited government and promotes judicial nominees who will strictly interpret the Constitution and statutory text.

And I've been struck recently by how many progressives -- so, basically on the opposite side of the spectrum from me and my organization -- now describe the Court as undemocratic and too powerful, feeling that it intrudes into issues that are better left to democracy.

It wasn't long ago that when one heard such characterizations of the Court, they typically came from conservatives.

And, you know, now there seems to be agreement on that, for what it's worth.

You know, I realized that people do not agree on, you know, which cases would fall in that category.

Progressives will typically point to relatively recent cases like Citizens United or Shelby County or Bush v. Gore, whereas conservatives' concerns about judicial activism go all the way back to at least to the Warren and the Berg reports.

For any Supreme Court reform to have

a realistic chance of being enacted, it will need to pour it from conservatives, and winning that support I think will require all of those on the commission who aren't conservatives to understand what troubles conservatives about the Court, even now when there are five or six, you know, conservatives on it.

And as one of this commission's more conservative witnesses, I hope that I can contribute something by helping to answer that question.

I think the answer about why conservatives are unhappy with the Court boils down to the living Constitution.

There may be a conservative majority on the Court.

I mean, we'll know more after we see, for example, what Justice Barrett does, but American life continues to be governed by a significant number of important Supreme Court precedents pertaining to issues ranging from religious liberty and the death penalty, to

abortion and same-sex marriage, that resulted from progressives' living Constitution approach to judicial interpretation.

Under that approach, the Constitution is seen as an evolving document rather than a fixed contract between the American people and their government that can be changed only with the Democratic consent of the amendment process.

And conservatives don't like that.

They believe it leads to unrestrained judicial power, in particular, a one-way ratchet that is used to advance values, reflective of the nation's elite, and in service of a decidedly progressive policy agenda that, you know, often lacks the wide public support necessary for Democratic enactment.

Now, my point is not to deny that judges across the ideological spectrum have their biases, both personal and political, all human beings do.

There just simply are no constraints when judges use the living Constitution approach.

And I think, you know, we've seen that the result is a more polarized society. Probably the most famous example is, you know, Roe and its progeny.

You know, they're emblematic of the way in which the living Constitution, you know, leads to overreaching judicial decisions that aren't really grounded in the text, and that in turn begets not just deep dents in the Supreme Court's legacy, but also the sort of societal polarization that has brought us here today.

Now, you know, the transformation of the Supreme Court confirmation process into a political circus is something that's now been going on for a long time, at least since Judge Bork was defeated in 1987, but I see it as a symptom rather than a cause.

Again, I think the cause is the Court's unwarranted intrusion into political and cultural issues and, you know, we've now had more than three decades, as I say, and things are only getting worse.

It's spread to Appeals Court nominees, and, you know, to quote the late Senator John McCain, the surest way to restore fairness to the confirmation process is to restore humility to the Federal Court law.

I'm not naive to think that, you know, that's going to be easy.

I am sympathetic to anything that might disempower the Court a bit, but I'm also skeptical.

I worry that, you know, anything that is seen as political meddling will make the problem worse, not better.

The one thing I think I could support would be a constitutional amendment that prohibits court packing.

That would fix the number of justices on the Court at nine, for example, and take it out of the realm of politics, and there is such an amendment, the Keep Nine Amendment that has been introduced in the House and Senate, and it has a lot of sponsors.

Finally, I should say that I'm not against all reform.

I do think there's a number of things that can be done to the Senate confirmation process. It can be shortened.

We certainly don't need four day long confirmation hearings like we have now, and the whole process itself I think would be better if it was shorter.

I didn't think that before the Barrett nomination, but I think it went, you know, so quickly that there wasn't as much time for mischief, and I'd like to see that be the case with both Democratic and Republican nominees, and I also am certainly sympathetic, you know, if the details are right, to have something that makes it harder for nominees to not get serious consideration.

And admittedly, that was done to Justice Garland five years ago now.

I don't think any rules or norms were broken because of the fact that it's typical that

when there's a vacancy in the final year of a presidential term, and the Senate and president are controlled by the same party, that the person is confirmed, and when they're not, the person typically isn't confirmed.

But that doesn't mean that we're stuck with that norm, and I would support something that guaranteed or at least made it highly likely that nominees would get a fair hearing.

I think I'll stop there because I'm probably over my five minutes.

CHAIR RODRIGUEZ: Thank you, Mr. Levey. Our next witness is Sharon McGowan, who's the chief strategy officer and legal director of Lambda Legal.

Ms. McGowan, the floor is yours.

MS. McGOWAN: Thank you, Co-Chair Rodriguez.

Throughout our nearly 50 year history, Lambda Legal has litigated in federal and state courts, including multiple times in the U.S. Supreme Court, to realize more fully the

Constitution's promises of liberty, equality, and justice for LGBTQ people and everyone living with HIV.

My written testimony speaks to the significant damage that has been done to the credibility of the Court in recent years, and offers five recommendations to improve both the public's confidence in our federal judicial system and the system's ability to function effectively.

First, institute a binding code of ethics for the Supreme Court.

Second, continue the practice of livestreaming oral arguments to the Court.

Third, limit the use of the Court's shadow docket to shift legal doctrine without the transparency of full briefing, amicus participation, and oral argument.

Fourth, create additional safeguards in capital cases, especially where anti-LGBTQ or other forms of bias may have infected the proceedings below.

And fifth, expand and diversify the bench of the lower federal courts.

In this statement, I wish to emphasize just a few key points.

First, instituting a code of ethics for the Supreme Court is long overdue.

There is no reason why the justices should not commit publicly to avoiding not just the fact, but also the appearance of partiality or impropriety, and to limiting their extra judicial activities to only those that are clearly consistent with the obligations of judicial office, which necessarily excludes political activity.

The lack of a formal system of accountability for the Court has contributed to increasingly brazen and disturbing behavior, some of which happens in public view, and some behind closed doors.

A system of pure self-regulation is plainly inadequate. Reform is needed to restore faith and the fairness of the institution.

Second, an ethics code alone will not resolve the grave concerns about how the Court has been commandeered to serve an extreme, reactionary agenda.

The commission should not dismiss any proposal, excluding expansion, that could reposition the Court as the trusted top guardian of the rule of law and protector of civil rights.

There is nothing sacrosanct about the number nine.

We also urge the commission not to buy into the argument that any attempt to reform the Supreme Court will initiate a political arms race.

Efforts to ideologically recast the Court began years ago, and there's no reason to believe that those determined to use the Court to roll back rights will relent or forgo options to advance their objectives, particularly as their ability to do so through more Democratic means lacks popular support.

Today's imbalance came from repeated

flouting of good-faith and checks and balances, and that makes reform important.

Finally, I would like to respond to those who say, who is the LGBTQ community to complain about the Court? You all have made out just fine in recent years.

Some even point explicitly to the Court's 2015 Obergefell marriage decision as rebutting all claims that fixing is needed.

First of all, let's start by putting some of the key constitutional cases in their proper context.

Romer, Lawrence, Windsor and Obergefell.

Each case dealt with laws that unabashedly targeted LGBTQ people for mistreatment or legal disadvantage.

Less than 20 years ago, the existence of criminal sodomy laws not only harmed those of us living in the 13 jurisdictions where those laws were still on the books, but created an environment nationwide in which other

discrimination against us was viewed as legitimate and to be expected.

As for marriage equality, we are still repairing damage caused by the blatant discrimination against same-sex couples and their children, which existed until only recently in our laws.

For example, we are fighting now on behalf of LGBTQ widows and widowers who are still trying to access the safety net of Social Security survivor's benefits because although they paid into the system, they were denied the ability to marry, in some cases for decades and in other cases, altogether.

The commission should reject any attempt to recast the narrative of our ongoing struggle for equal citizenship as somehow netting out shocking and devastating recent decisions of this Court that have stripped force and meaning from many of our core guarantees of equality and freedom.

Furthermore, we are facing a Supreme

Court whose membership has been manipulated for the express, albeit not exclusive, purpose of reading LGBTQ people out of the Constitution once again.

A Court packed with jurists who publicly proclaimed their belief that stare decisis means little when it comes to the key case as establishing our rights, and who are willing to upend longstanding constitutional principles to reestablish what they believe to be the proper social and moral order.

Current members of the Court currently endorse calls of a well coordinated campaign determined to gut critical protections against discrimination through a weaponization of religious liberty arguments.

Meanwhile, transgender children and their families must flee across state lines to escape laws that criminalize their healthcare or exclude them from school athletics.

We recognize that on the Court's current course, we may be about to enter a period

similar to the years following Bowers v. Hardwick, when for all practical purposes, the constitutional door had been slammed in our face.

To be clear, Lambda Legal will never stop demanding full equality and civil rights for our community.

The question, however, is whether the Supreme Court, and our federal courts more broadly, will be a place where our laws' promises have any real meaning for LGBTQ people.

Thank you so much for inviting me today, and I look forward to your questions.

CHAIR RODRIGUEZ: Thank you, Ms. McGowan.

Our final witness for this panel is Dennis Parker, who's the director of the National Center for Law and Economic Justice.

Mr. Parker, the floor is yours.

MR. PARKER: Good afternoon. Thank you for this opportunity to submit testimony.

My name is Dennis Parker and I've had the honor of serving as executive director of the

NCLEJ for the past two and a half years.

When I joined NCLEJ, I became part of an organization, which for nearly 60 years has fought to advance the cause of economic justice and racial justice, particularly for individuals and communities who have historically been denied opportunity and power, especially people of color, low income people with disabilities, and low wage workers.

From its founding in 1965, NCLEJ has been in the forefront of legal and legislative efforts to recognize and enforce the rights of those denied the most basic access to the opportunities of American civil life.

Participating in landmark cases such as Goldberg v. Kelly, NCLEJ was instrumental in bringing cases that resulted in basic equal protection and due process to public assistance recipients, thereby assuring that access to the safety net upon which these clients' survival depended, could not be arbitrarily denied or interfered with by the state.

In the decade since, NCLEJ has advocated for increased access to public benefits while expanding the rights of workers engaged in agriculture, home healthcare, restaurant, and other low-paying industries, pregnant women facing employment discrimination, public housing residents exposed to health hazards resulting from severe mold conditions, and indigent people assessed with unfair and illegal fines and fees.

Too often, our clients share a general lack of access through no fault of their own to employment, housing, healthcare, education, public safety, and the opportunity to live a full and productive life, and as a result of a combination of unfair policies and practices.

Also shared is the inability to address adequately this inequality through a resort to the justice system.

We believe that a significant part of the failure of the Court system to be responsive to the needs and rights of our clients stems from the lack of representation in the courts,

including the United States Supreme Court.

In our written submission, we highlight the absence of diversity on the current Court.

We recognize and believe in the need for many different types of diversity, but focus on two particular types in our submission, professional and racial diversity, because these are two areas in which there has historically been a particularly striking absence of diversity.

We do not believe that white justices who have not worked in legal services or non-profit organizations are incapable of being fair, but we do believe that it is important to have people with different experiences on Courts considering matters which will affect everyone.

Our submission sets forth specific suggestions to start to address the lack of full and Democratic representation in the Supreme Court and other federal courts, a diversity that reflects the full diversity of the nation as a

whole, and can give meaning to the words equal justice under law, which are the words inscribed over the entrance of the Court.

A corporate or a government attorney might have very different perspectives on questions of standing or class action certification than would public interest attorneys who have experienced the way that heightened pleading standards and increasingly stringent class action requirements impose extreme burdens on those with the greatest need and the least resources, and may effectively amount to slamming shut the courtroom doors to those people.

Judges who are members of groups who experience or represent people who experience discrimination could be expected to bring a different perspective, a perspective painfully absent in Courts filled with justices and judges who deny the continuing existence of discrimination and systems which carry the effects of past discrimination into the present

and future.

A failure to reflect those differences in experience erode the very legitimacy of the Courts.

Also undermining the legitimacy of the Courts is the absence of clear standards and enforcement of disqualification of justices for conflicts of interest.

A Supreme Court which lacks diversity of background and disproportionately reflects the interests of the most powerful invites the conclusion of bias when one of its members fails to recuse him or herselves in cases where there is the appearance of a conflict regarding a particular group of people.

Finally, the extent to which political considerations have replaced sound jurisprudential ones, then the appointment of Supreme Court justice further threatens the legitimacy of the Court and substantially threatens the ability of marginalized groups to protect previously recognized rights and

recognize new ones.

That threat becomes particularly important when the tax on the ability of the already marginalized to vote continue to be real and growing.

For these reasons, we respectfully submit that exploring the consideration of terms for Supreme Court justices would be one way of mitigating the impact of political gamesmanship in the selection of Supreme Court justice.

This is an especially important time for consideration of the functioning and purpose of the Supreme Court and the lower federal courts.

We're still in the midst of a pandemic which has exacted a much harsher toll on communities and individuals of color.

Whether as it relates to healthcare, mortality due to COVID-19, likelihood of facing eviction, loss of employment, BIPOC and low-income people have suffered disproportionately.

Rectifying those inequalities which were revealed in the pandemic will fall in large part on the Courts, particularly the Supreme Court.

Whether that Court will be up to the task will depend on its success in making it into an institution which is accountable to and caring for all of the people in the country. Thank you.

CHAIR RODRIGUEZ: Thank you, Mr. Parker.

At this point, I'll ask the commissioners who will be asking questions to turn on their cameras. Okay.

So, we will begin with Guy-Uriel Charles, who's the Charles Ogletree, Jr. professor of law at Harvard Law School.

Commissioner Charles, it's all yours.

COMMISSIONER CHARLES: Thank you. Good afternoon to all and thank you so much for your wonderful written and oral testimony.

So I'll begin my initial round of questions by directing it to Mr. Becker and Mr.

Levey.

First, Mr. Becker.

So I was taken by parts of your testimony on the question of access and the relationship between those who argue at the Court and the cert process and the development of law and doctrine.

And I wanted to invite you to say a little bit more about that.

You didn't get a chance in your oddly short oral testimony to talk about it, so I want to invite you just to expand a little bit more about that, and then to also expand on what you think the solutions could be, particularly what this commission can do.

At least as I understood the proposal blind cert review solution, it seemed to be more hortatory to the Court, and so then it's not clear sort of like what structurally can be done, but I wanted to see if you had any more thinking about it?

So if you wouldn't mind expanding on

both aspects of the question, I'd appreciate it. Thank you.

MR. BECKER: I appreciate the opportunity very much to expand.

You know, as someone who's teaching law, and I've dabbled in that arena myself, I think we would just unquestionably agree that blind grading is fairer than fully open grading, not knowing the identity of the students whose exam you're grading.

And not even intentional blinds but unintentional blinds.

The student who was most articulate in class, and then you see the blue book with that student's name on it, you can't avoid thinking that that exam is likely to be a more superior exam.

So, in all these areas, I think we would clearly agree that it's fair to have a blind review process, grading.

Akin to article submissions to journals, orchestra auditions.

And the research confirms that conclusively in all those areas, that blind review is fair in grading, it's fair in acceptance of articles, and even in the rather unusual context of orchestra musicians, not being able to see the musician allows the judges to judge the quality of the sound, and has led to a significant increase in the number of women musicians accepted to major symphonies.

So I think, you know, our instincts and the research are all absolutely clear that this would be a fairer system.

The solution is not perfect.

Of course, you can't hide who argued a case in the Court of Appeals, you obviously can't hide the identity of the parties. Those are important facts.

But you can hide the identity of counsel and I think that would be appropriate to allow the power of the argument to speak and not the familiarity of the names on the petitions.

As to how it would be implemented, I

think first of all it would be important just for this commission to surface the idea, which I think has not been part of the debate, unlike some of the other larger issues that we've been hearing about.

But to say, you know, here's a process which we know is fair in all these contexts and which should be used by the Court, and at least urge the Court to adopt it would be an important first step, and you know, the other thing I would say about the rasa matus proposal is even individual justices could do it.

So perhaps individual justices would say, I want to make sure that I'm not influenced by the name on the cover, and they say and I'm going to review the submissions blind.

So I think even surfacing an idea and urging it upon the Court would be important.

COMMISSIONER CHARLES: Thank you, I appreciate it.

Mr. Levey, I appreciate your perspective and helping us to understand the

importance at least of considering multiple perspectives, and understanding that consensus may be important to future reform.

So I have also a two part question for you.

One is just I want to get a better understanding between the problem as you understand it, and then also to think about what are solutions to the problem?

So as I understand your articulation of the problem, it is the substantive rules and the way that the Court has engaged itself substantively in all areas of our lives.

Now presumably, now so there's six conservative justices on the Court.

Presumably that ought to mean that the method of interpretation ought to make the probabilization less acute.

So I'm wondering if you share that, if you think that's true?

And then I want to explore a little bit more what the solutions are that you would be

willing to entertain because it didn't seem like there were very many that you would be willing to entertain.

So for example, what about the code of judicial ethics, turns out Ms. McGowan talked quite a bit about in her testimony?

So are there solutions beyond the status quo that you would be willing to entertain?

If we're looking for common ground, what would that common ground be?

(No audible response.)

COMMISSIONER CHARLES: Once again, you're muted, sir.

(No audible response.)

COMMISSIONER CHARLES: Mr. Levey, you're muted.

MR. C. LEVEY: There we go. I was just trying to say that given your affiliation, I wanted to point out that Professor Ogletree was one of my favorite professors in law school.

Really cared about his students and

just a generally good guy, in addition to being so smart.

I'm trying to remember your first question because you asked a few.

Oh, I think the first question was now that we have six conservative justices -- I don't know that we have six conservative justices.

Certainly conservatives haven't viewed Roberts as a conservative in recent years, and I've seen polls indicating that liberals like him more than conservatives do at this point.

Republican presidents don't have a stellar track record of picking conservative justices.

I think Democrat presidents have done a very good job of that. It's been more spotty with Republican presidents.

It still remains to be seen how conservative Kavanaugh is and how conservative Barrett is, but I would certainly hope that going forward, we'll see less of the living Constitution type approach that conservatives

have been complaining about since the Warren Court.

But, you know, there are all these precedents that still remain around and I don't expect them to go away.

Look, you know, I guess I am skeptical that we're going to be able to rise above the difference in judicial philosophies.

I would love it if progressives would give up the idea of the living Constitution, the idea that it's their job to help the Constitution evolve.

Like I said, I think it's standardless and just basically functions as a one-way progressive ratchet, which is, you know, one reason that conservatives don't like it.

I'm not sure that that's going to happen voluntarily, and, you know, the next bet would be just to take some power away from the Court.

I mean, there's a variety of proposals for doing that, jurisdiction stripping,

Congressional override, requiring a supermajority of justices in certain types of cases.

And again, I am sympathetic to that, especially the requirement for a supermajority.

I just worry that if we make any change it could very well make the problem worse, the problem being a perception that the Supreme Court is political and it will function as a camel's nose under the tent where, what might seem like a reasonable reform now will beget a more radical reform, you know, once you set the precedent that Congress can fiddle with the structure of the Court.

So, did I answer your questions?

COMMISSIONER CHARLES: From the chair. Yeah.

MR. C. LEVEY: I hope.

CHAIR RODRIGUEZ: Okay, thank you. Thank you, Commissioner Charles.

We will next hear from Nancy Gertner, who is a senior lecturer and the former U.S. district judge for the district of Massachusetts.

COMMISSIONER GERTNER: Thank you.

It's a pleasure to be here, particularly as someone who has gone through the confirmation process as described in previous panels.

But let me sort of draw a larger focus on all of the panelists to today.

Much of the discussion before has been on the importance of change because of changes distortions in the confirmation process because the Republicans change the rules.

Yeah, with respect to the filibuster.

Republicans changed the rules with respect to the timing of confirmation with a Garland appointment, or the lack of a Garland appointment.

So that just sort of focuses on the ways in which the procedure has been broken.

You all are focusing on the ways in which the substance has been broken.

You're all talking about anti-labor, three of you are talking about anti-labor, anti-

voting rights, anti-LGBTQ, pro-corporate.

Tales of this Court, Mr. Levey was talking about that it's insufficient originalist, and that's a problem with the Court.

Substantive criticisms of the Court leading then to procedural change, raising more questions than procedural criticisms of the Court leading to procedural change.

In other words, the notion that the Court is already broken with respect to the Garland appointment or lack thereof, with respect to the way the three Trump appointees made it through.

That's one set of criticisms that said we need change.

Your criticisms are -- or do they are more I don't like the outcomes. And that's a very different genre. Let me start with Ms. McGowan.

I don't disagree with your criticisms of the Court, the question is whether that should be the trigger for change, or whether that raises

exactly the kind of tit for tat problem exactly.

There's so many ways people have described it, which is, you know, Constitutional hardball.

Just using your criticisms of the substance of opinions to trigger change, isn't that dangerous?

MS. McGOWAN: Thank you so much for the question, Commissioner Gertner, because I actually think it really kind of gets to the heart of the fact that the two are in this case very much sort of intertwined, and one of the things that we talk about is the legitimacy of the Court is a function both of the substantive outcomes in cases, but also a perception about whether or not the system is fair and the people participating in the system can be trusted to be fair and impartial.

And I think one of the things that really struck me from earlier testimony was, you know, a conversation about judicial independence, and we absolutely support the notion of an

independent judiciary, and we know that in many circumstances, you know, we have seen dangerous attacks on the independence of the judiciary.

The Fair Courts Project of Lambda Legal was founded in response to judicial recall of three of the justices of the Iowa Supreme Court, notwithstanding there was a unanimous and bipartisan decision recognizing marriage equality for same-sex couples.

But it's important that we not lose the fair when we talk about fair and independent, and that is part of what I think is so disturbing about the way in which the process has been manipulated for a very clearly substantive ends.

And so, it is not just sort of a concern about the substantive direction in which the Court is going, although I do think part of what is really troubling about the substance are the ways in which the substantive rulings -- particularly in the area of voting right -- but in other areas as well, have really made it much more difficult for other aspects of our

Democratic process to work effectively because we know that the Court is not a non-political entity.

Obviously the president has the power of appointment, the Senate has the power of confirmation, but the extent of which we have seen a radical sort of overriding, a changing of the rules mid-game to ensure permanent victory.

You know, Lambda Legal's not afraid of litigating in front of Republican judges. We need fair judges.

We need judges who do not come to the bench already selected and chosen because of their stated commitment to sort of write us out of the rules of the game.

And so that is where I would sort of push back a little bit on the fact that this is not just a purely substantive concern, although obviously I'm here today.

You know, not normatively, you know, sort of ambivalent about where I believe sort of LGBTQ people should fit in our Constitutional

structure, but I do think there are the procedural sort of machinations that have resulted in a lack of credibility that thus then also sort of puts the substantive concerns into greater relief and call for urgent responses in this moment, as well as some longer term planning.

COMMISSIONER GERTNER: Again, we've been coming up with metaphors with each of the hearings, and so, there is the break the glass moment.

There's tit for tat or break the glass moment. You're a break the glass person it sounds like. We're at a break the glass moment.

MS. McGOWAN: I think that we have seen a number of decisions that dramatically have shifted sort of the ability of our Constitutional democracy would work.

You know, and I think that, you know, we can sort of put together a series of decisions --- you know, somebody include Citizens United.

I think we would include Hobby Lobby

compared with Citizens United in terms of the sort of elevation of corporate rights, you know, in this democracy, plus the elements that have come with the suppression of the votes, and that the capacity to suppress democracy.

I do think that we are in a place where to just sort of act as though we are going to sort of stand down and leave the status quo really undermines and downplays the great damage that has been done.

COMMISSIONER GERTNER: But you're in favor of expanding the Court to 13.

And I believe in your testimony you said one of the reasons was you were trying to come up with a number that would not admit of another number in the next administration.

This tit for tat problem -- and so you said the 13 would make sense because there are 13 circuits, and each of the justices would presumably be, you know, the circuit judge.

Isn't that a little bit of a contrivance? The judges don't really ride

circuit anymore.

There are relatively minor -- not minor cases, but not very many cases come up through their capacity as the circuit judge, so, is that really a way of keeping, you know, having this from not being this year and next year it'll be -- the next administration will be 20 because it is a little bit of a contrivance.

MS. McGOWAN: So Commissioner Gertner, let me just clarify it, Lambda Legal is not endorsing expansion of the Court to 13 to just sort of offer our perspective on what are the options that are viable.

And from our perspective, expansion of the Court is perhaps the most clearly constitutional option on the table, whether or not that in and of itself sort of is either politically reliable, or will resolve the larger issues that were are calling the commission's attention to.

That was sort of the purpose of that.

To the extent that we've sort of

offered 13, you know, having a grounding in the circuits offers a potentially limiting principle but again, as we also say in our testimony, I don't think that a recommendation from this commission that there shouldn't be expansion would prevent expansion down the road from those who believe as though they need to capture the Court to continue to pursue their political agenda.

So that was that context in which those comments were made.

COMMISSIONER GERTNER: So I want to ask, Mr. Becker, so there are the big reforms?

Thirteen term limit reforms, and then your testimony was intriguing because you were also talking about second level reforms.

Your comments about the Supreme Court bar were very interesting.

Essentially, the broader question is look at all the channels that lead to the cases that the Court considers, and all the channels that lead to who's on the Supreme Court.

All the roots and they seem to be one and the same.

It was not just a question of concern about the diversity of the stripping Court bar. Implicit in your testimony was the notion that expertise was really only on one side.

It's not just the judges know them, it's that this expertise is, for the most part, available to only side of the equation because the disqualification rules would keep a Supreme Court practitioner in a big firm from representing individuals.

I'm representing individuals that have challenged corporations.

How do you reform Supreme Court diversity? Would you imagine Supreme Court bar diversity?

Can you imagine, you know, rules about who can practice? How would you imagine taking care of that?

MR. BECKER: I agree with the premise of your question that it's not an easy problem

because it's caused by many different factors but I would argue a little bit with the premise of your question, which is that expertise is only on one side.

I think it's a very narrow type of expertise, which is not only on one side, and that increasing dominance of lawyers holding that narrow form of expertise I think has been deleterious to the way the Court decides cases.

They bring certainly a comfort with the Court because of their experience there, and the facility with a kind of formal legal analysis.

But they don't bring a depth of expertise in the substantive areas, or working with the types of clients many of us represent.

In the area in which I work, they don't bring substantial expertise, knowing how labor unions function, how they represent working people.

What are the challenges facing working

people?

So I think they bring to the Court precisely the type of expertise the Court doesn't need.

The Court knows how to read cases. The Court has very smart clerks who know how to read cases.

What the Court needs is a broader perspective and the depth of expertise about what these cases actually mean when they decide them.

You know, if you look at the labor cases again, just speaking from my own perspective, they've become increasingly formal and arid documents without a real appreciation for what those decisions mean.

So I'd think it's a serious problem, not only because we don't have access to those lawyers, but what the dominance of those lawyers means for the Supreme Court's decision-making.

You asked the solutions. Obviously that's complex.

I offered a modest solution, but I do

think, you know, increasing awareness of what this dominance means.

You know, I think one of the central problems that your commission is grappling with is the legitimacy of the Court.

So to go to the first question you had, sir, it's not simply that we don't like the outcome.

It's that those outcomes are predictably produced by the same divisions over and over. Right?

No one can possibly believe what Justice Roberts said, and I'm just calling balls and strikes, when every time the same umpire see it as a strike, and every time the other umpire sees it as a ball.

It's causing the Court to lose legitimacy. That's what's important.

It's not simply the outcomes, but the predictable part of some nature of the outcomes.

I think that's really the challenge that you face, and I think, you know, naming them

is important.

Surfacing possible solutions, this is important. Even if we can't get to those solutions in the year currently.

CHAIR RODRIGUEZ: Thank you, Commissioner Gertner.

I will now turn to Caroline Fredrickson, who's the distinguished visiting professor from practice at Georgetown Law, and a senior fellow at the Brennan Center for Justice at the NYU School of Law. Commissioner Fredrickson?

COMMISSIONER FREDRICKSON: Thank you so much, Co-Chair Rodgriguez, and thank you to all the witnesses for providing me a very illuminating testimony today.

It's extraordinarily helpful to our process, and I think as Commissioner Gertner said, you know, it's also a really important iterative process to have the success of panels touching on similar but also distinctive approaches to how to or whether to reform the

Court.

And I want to direct my question now to Mr. Parker, and I would say, Mr. Parker, thank you so much for your very helpful submitted testimony.

I want to ask you a question, so we really haven't talked so much about the ethics and code of conduct.

In addition to touching on a number of other issues, which I hope we can get to, you do say in your statement that the ABA code of judicial conduct is not binding on the Supreme Court justices, and that, well, litigants can make a motion requesting that a justice recuse himself or herself.

There's no right to appeal the justice's decision and decisions are typically quite brief.

If parties ultimately find themselves arguing in front of an obviously biased Supreme Court justice, they have no recourse at all.

The result of this lack of clarity,

transparency, and accountability is that recusals happen inconsistently.

Unclear and unenforceable recusals standards have been a source of controversy throughout the history of this country, but some recent examples are demonstrative of the problem.

Can you speak a little bit about this issue and in particular, how it affects the other issues that you have raised about the lack of diversity on the Court and the need for and diversity of all kinds?

As you mentioned in your statement, diversity of practice area, as well as diversity of demographic background, and so, do these things go together at all, and if so, how?

MR. PARKER: Thank you very much, commissioner, for your questions, and they do very much go together.

I recall a client once who losing a case against a large financial institution thanked me for the work that we had done and said, but we never expected to win because of who

was on the other side and who was deciding the case that we were in front of the Court on.

And that's really at the heart of the issue.

The question isn't one of whether or not we're not happy with the outcomes, it's a question of whether the system itself is legitimate and appears to be legitimate.

And certainly in an instance where someone is appearing before a justice or an issue is being decided by a justice, of someone who has had, who has benefited personally from receiving money from one of the parties, whose family members are deeply involved in the issue, that invariably leads to a sense that the deck is stacked against people who have historically been excluded from the Courts.

And that's one of the reasons for the importance of the diversity.

One way of looking at it is to turn the question around and ask, what would be the harm of having a more diverse Court?

What would be the harm of having justices subject to what seem like very common sense and basic rules about conflicts, and what would be the benefit?

And the benefit would be a Court where it appears and is more open, where the rules are clearer, and where your chances of prevailing are not based on who your lawyer is or who you are, what your past experience has been.

The diversity we're talking about, the accountability we're talking about, is particularly important for people who do not see themselves reflected on the Courts, who have not seen instances where people like them are prevail in the cases, and who have a sense that the justice system has not included them historically.

And certainly everything we've seen over the last year has highlighted that as a problem.

When people look at a criminal justice system that operates very differently against

people of color, then they question the legitimacy of the broader system, and that's really where we are historically now in this country.

We have to find ways to make sure that the Supreme Court and the federal courts represent or include everyone in the country, not just a relatively small number of privileged people.

COMMISSIONER FREDRICKSON: Thank you. Thank you for your very fulsome answer. I'd like to continue on certain issues that you've raised to ask you.

I mean, you clearly articulated the benefits of a diverse judiciary, as well as the benefits of ethics rules and transparency and accountability in restoring perhaps.

Some might find that a strong word, but certainly shoring up the credibility of the Court, the Supreme Court and the federal courts generally.

Do you have ideas or suggestions that

the commission might consider about mechanisms that one might adopt or recommend, or certainly at least surface in any report we might put out, that would advance the ability to have a more diverse judiciary?

Are there particular proposals that you think could help the process function in a way that didn't seem to eliminate so many highly qualified candidates who don't fit the traditional white male mold?

MR. PARKER: I think that the Courts really have to undergo the same kind of self-examination that every other industry and every other part of the country has in an effort to become more diverse, in an effort to reverse the impact of prior discrimination.

And that is recognizing that that, the practices that have been used tend to reinforce the pattern of exclusion that has occurred historically in this country.

And so, you know, I have certainly heard about the different standards that are

perhaps unconsciously applied -- and we've seen this in confirmation hearings -- the fact that someone who has been an ardent civil rights advocate somehow makes them less likely to be fair and less likely to be able to decide on the law.

There are so many things that are disadvantages to being appointed a judge, otherwise, how would you explain the absence of people who have the kinds of backgrounds that we are talking about?

People who have the experience in legal services, in representing the interests of poor people, who have the experience either themselves or their clients, of experiencing racial discrimination.

We have to assure that that never becomes a disadvantage in terms of approval for a position in the Court.

So examining both explicit and implicit bias in the process, affirmatively trying to increase the number of people who come

from diverse practices.

These are things which have been in place, in unemployment and in education, and in other practices, for a very long time. It's time for the Courts to do the same.

COMMISSIONER FREDRICKSON: Not to put words in your mouth, but I'm presuming perhaps by your not suggesting the statute, or some kind of more affirmative requirement, that this is something you see as the Courts need to take on voluntarily because of separate of powers issues or simply because there's no other adequate mechanism?

Is that what you would suggest?

MR. PARKER: I'm certainly not excluding the possibility of a statute, but I am just saying starting at the point of recognizing that what we have now is a system that's not representative, and it's not merely a matter of chance.

It's not, you know, 50 diced rows that come up 12.

It is policies and practices that have resulted in the exclusion of a significant number of people in this country.

COMMISSIONER FREDRICKSON: I appreciate that, thank you, and if I could just add one more thing?

And maybe you can comment on this in our few remaining seconds.

Which is the clerkship process which obviously funnels into some of what Mr. Becker was talking about in terms of the kind of limiting Supreme Court bar and the kind of expertise that the Court seems to require seems to reinforce, not just at the Supreme Court level, but throughout the course where we had almost no information about the diversity of the law clerk, but the clear outcomes that are available to law clerks of higher pay and greater advancement, and then becoming Supreme Court litigators themselves seems all of a piece with what you were saying.

MR. PARKER: That's absolutely

correct. I think you can look at the pathways to clerkships, and the subsequent pathways to judicial positions.

It is a pathway that is still too limited in terms of the schools people come from, in terms of the backgrounds and the experience that the people have had.

And all of that has to be considered.

There are great lawyers who would make wonderful justices from many different law schools with many different types of experience, and we're not tapping that now.

CHAIR RODRIGUEZ: So we have 15 minutes left, which means we can go through a second round of questions, and each of the commissioners will have five minutes if they'd like to use it.

I'll return to you, Commissioner Charles, to see if you have any further questions you'd like to pose?

COMMISSIONER CHARLES: Sure. If I may start with Ms. McGowan? On the tit for tat

problem.

You said in your testimony that, look, it's overblown, and we, you know, and shouldn't be a barrier to reform, but of course we're living in a context that is extremely and highly polarized, and then all this panel -- in fact, I think all of you have testified to that effect, and which reforms, no matter what the reform.

So what advice might you have for the commission to try to think through the reception of potential reforms or non-reforms?

In a world in which everything is polarized and which tit for tat is a realistic possibility, how should this commission think about these sets of questions?

MS. McGOWAN: Thank you so much, Commissioner Charles.

I think my comment again about not shying away from considering these proposals merely because it might trigger something else.

The goal here is to just be clear that nothing this commission does or does not do is

going to take away sort of the political incentives that -- we have seen one side of the ideological spectrum very willing to use and kind of use again and again to ensure sort of a permanent sort of calcification of a view of law in the Courts, and part of what I think is sort of motivating.

Some of the calls for expansion of the Court right now is because it is the most immediate thing to potentially sort of stop that in its tracks, and could potentially sort of create conditions in which, you know, voting reform, other things can actually kind of restore some of what has been lost that has actually allowed for the level of polarization to exist.

I mean, one question is, you know, thinking about how can we really talk about Court reform without actually having a conversation about what is happening in the Senate, and the undemocratic way in which the Senate currently is sort of operating by design, and is that then in fact sort of, you know, the place where we

realized that there are going to continue to be, you know, challenges to this entire sort of enterprise?

So I think that there are certainly certain things, and part of why we placed so much emphasis in our testimony on some of these other proposals as well is because Court expansion in and of itself is not sort of a permanent solution because it's always going to depend on who is selecting it, how they're selecting it, and we know that there has been one party who has made very clear that they're comfortable using their power to not confirm justices, and we had a revision in the size of the Court to eight for more than a year.

So it is very clear that these are political realities, but again, you know, when we talk about in judicial ethics and the expectation that we need to find new ways to demand a fairness and impartiality, that in some way sort of is the gloss that we would use over sort of this larger conversation, you know, to make sure

that, again, nobody is sort of expecting that they are going to win all the time, but when an entire sort of, you know, bench has been stacked with people who are selected precisely because sort of the way in which, you know, that they are going to sort of adopt a philosophy that writes core, you know, elements of our Democratic constituency sort of out of the Constitution.

You know, that is why I think we are seeing the level of response right now calling for something that will immediately recalibrate that so that we can then have sort of the larger conversations about other things that might be necessary to change the political context in order to move to perhaps a less highly polarized environment.

Again, like I said, this is not about us, you know, only sort of wanting judges that are guaranteed to come out in our favor.

We litigate in front of Republican-appointed judges all of the time, and we have success a lot of the time because we apply the

law, we build a factual record, we do the work, and we are willing and eager to make the case in front of a judge who hasn't already been selected by guaranteeing the result in the case as a condition of their taking their oath.

CHAIR RODRIGUEZ: Commissioner Gertner, do you have any further questions?

COMMISSIONER GERTNER: I have questions for Mr. Levey.

Do I take your point to be that we don't need major change on my typography of -- you know, major change versus little change?

We don't need major change if the Supreme Court sort of cabined itself, restricted itself to an originalist philosophy, a textualist philosophy.

Then they will stay in their lane. Isn't that in conflict with your view, though?

I think you put it that, for most of the past 40 years, the Supreme Court decisions have been in the service of the liberal elite.

So of course an originalist won't go

out of its lane, except with respect to undoing the precedent that came from that, quote, liberal elite? Isn't that a problem?

(No audible response.)

COMMISSIONER GERTNER: You're not on.

(No audible response.)

CHAIR RODRIGUEZ: You are still muted.

COMMISSIONER GERTNER: We still can't hear you.

(Simultaneous speaking.)

MR. C. LEVEY: Yes, I mean, you're right.

There's now been, you know, starting with the Warren Court, 60 years of the living Constitution being used to push the law in a progressive direction.

And while there are certainly, on the conservative side, you know, there have been, you know, politically influenced decisions, you haven't had this sort of, you know, freewheeling, making things up out of whole cloth that you have had with the living Constitution.

So yes, if we go back to a more textualist, originalist approach, it would ultimately undo some of it, although, you know, there's a debate about where a precedent kicks into all of this.

But I really do have to push back against the idea that, you know, we're dealing with some sort of right-wing Court here. Look at just this term that ended.

I mean, progressives were unhappy with the decisions on the final day of the Court, but before that, everyone was talking about how this has been a surprisingly moderate Court with all kinds of interesting configurations other than the predictable 6-3 or 5-4.

In the previous term, conservatives were bitterly disappointed by what we saw in June with the Bostock decisions, the census decision, an abortion decision.

I think conservatives were angrier than liberals at what this supposedly conservative Court did in that term, and the term

before that.

Kavanaugh's first day on the Court, you know, I remember there being more liberal than conservative victories.

So, you know, this idea that we're dealing with this far-right Court, or that there's something illegitimate about Republican presidents appointing conservatives, both parties try to skew the Court in their direction.

Now, in the case of Democrats, I think it's toward the living Constitution, and in the case of Republicans I think it's towards textualism and originalism, but the idea that one side is trying to manipulate the composition of the Court and the other isn't or that one side is using hardball tactics.

I mean, look what was done to Justice Bork, look what was done to Justice Thomas, look what was done to Justice Kavanaugh -- I shouldn't have said Justice Bork because of course he never became a justice.

We just haven't seen that being done

to Republican nominees.

I am sympathetic the situation with Garland, but, you know, I'm not sure which is worse.

Not getting a hearing or being treated like, you know, you're an evil Nazi at your hearing, such that you wind up not even being sure that it was all worth it.

So again, at the end of the day, I don't think you have to worry about wiping out many of the precedents that certainly -- Obergefell, you know, there's not a chance in the world that that would be wiped out.

Even with the Court as it is now, I don't think you're going to see -- I'm virtually certainly you wouldn't see Roe overturn.

It might be constrained a little bit, but not overturned.

I remember when federalism cases were big. Everyone said, oh you know, it's just a matter of time before statutes.

Some of the big civil right statutes

are, you know, said to be not within the commerce clause. That never happened.

Conservative justices tend to be conservative.

They tend not to make things up out of whole cloth, they tend not to completely overturn precedent.

So I really don't think that you have to worry about that.

COMMISSIONER GERTNER: Let me follow up with Mr. Becker's testimony because -- Mr. Becker, you obviously disagree with that because you were describing, I believe it was in your testimony, the way in which an overturning precedent lurked as a theme in many decisions, even decisions this year, so just you wait, we will be able to deal with this in the next case.

In fact, we went through the story of was it Abood, in which Justice Alito was essentially inviting people to challenge the precedents, the long 40 year precedent.

You want to speak some more about

that?

Are you a sanguine, as is Mr. Levey? That, you know, an originalist court won't need any more reforms than that because they'll stay in their lane.

MR. BECKER: Well, as I said, we're all realists now and I don't think anybody honestly believes that you can read the Constitution.

Originalists with, there's only one way to read it. It's just not true, and I think we all know that.

In the world in which I live, you can just look at the data.

There's a very compelling article by Eric Posner and two colleagues who found empirically that this is the most low-corporate anti-worker Court in history, in modern history, and that two or three of the most pro-corporate anti-worker justices are sitting on this Court.

So there has been a sea change, but that's not the question.

The question is the increasing predictably partisan nature of the Court.

It used to be 40 years ago that you couldn't predict how justices would come out in labor cases, Republican or Democrat. Now you can absolutely.

So I don't think, you know, going back to your original question, you can't think about tit for tat here. The Court is losing legitimacy right now.

We can't stand still. It's important to the rule of law in this country that the Court not be seen as simply another partisan institution.

And while that's a very difficult problem, you have to come up with solutions that are going to speak to the moment and that are going to speak to the problem that we have right now, and that are going to be compelling to the public.

Yes, there's a chance that one side does it, then the other side does it.

The only way to counter that is the soundness of the proposals which you endorse, and the way they speak through this moment and the preservation of the rule of law before the Supreme Court.

CHAIR RODRIGUEZ: Commissioner Fredrickson, I'd like to give you the last two minutes and 20 seconds to pose a question.

COMMISSIONER FREDRICKSON: Great. Well thank you.

That's very hard because I had so many questions that I would love to pose, but in the short time we have, I want to go back to Mr. Parker because one of the things we didn't talk about is the issue of term limits, that also is a recommendation in your statement.

And again, I want to sort of bring it back to some of the broader issues that you raised about the question of the credibility of the Courts and the perception of fairness or bias.

How does term limits play into that,

if at all, or are there other kind of normative reasons why you believe that term limits might be an important reform to be considered?

MR. PARKER: I think term limits need to be considered because the situation that we're in now is actually a very good example of the importance of it, where you have a Court that has been disproportionately filled by one particular administration, the Trump administration, and the effects of the number, the sheer number of judges will continue to be felt long past the time when the administration is over.

That, and particularly when you consider the things that we've been talking about, the attempts that have politicized the Court, that really contributes to the lack of legitimacy for the Court where it is not truly a representative Court, and we don't have an exact suggestion.

We know that there are a number of ways out there that would consider ways that would make it possible to bring in new members on

a more regular basis and to not lock the Court into a particular position for decades, which is what is in essence what is happening now, and making the Court an institution that is completely separated from what is going on in the rest of the country.

CHAIR RODRIGUEZ: Thank you so much, Mr. Parker, and thanks to all of the other witnesses.

We know how valuable your time is and we really appreciate your insights here, and also your written testimony.

We will now take a lunch break, and we'll reconvene at 2:00 for a panel with a group of scholars who will discuss term limits and turnover on the Court, picking up on it at 2:00.

We'll see you soon.

(Whereupon, the above-entitled matter went off the record at 1:00 p.m. and resumed at 2:00 p.m.)

CHAIR RODRIGUEZ: Good afternoon. I'm happy to welcome everyone again, Commissioners

and the public alike, to our fourth panel of the day where a group of scholars will discuss term limits and turnover on the Court. At this moment, I'd ask the witnesses to please turn on their cameras. Professor Amar, are you there? Wonderful.

MR. AMAR: Yes.

CHAIR RODRIGUEZ: Welcome, everybody. Each of the four witnesses will have three to five minutes to provide opening statements, after which we'll turn to a panel of three Commissioners for questioning. I will call on the witnesses in alphabetical order, but ask everyone else their complete biographies are on the Commission website as is their written testimony. And so I'll begin with Professor Akhil Amar who's the Sterling Professor of Law and Political Science at Yale University. Professor Amar, you have the floor.

MR. AMAR: Distinguished co-chairs, distinguished Commissioners, thank you. Five quick points, here is my proposal. In the

future, each Supreme Court appointee should do 18 years of active service followed by a lifetime on the Supreme Court itself of relaxed service.

Relaxed service justices, also known as emeritus justices, would generally not sit en banc with active service justices but would perform other Supreme Court functions, administrative, educational, ceremonial, advisory, and more, the precise duty roster to be established and occasionally revised by the active service justices. New justices would join the Court every odd year. And the system would be phased in purely prospectively.

Two, this is not a partisan political proposal. I first endorsed it in 2002 when a Republican, George W. Bush, was president and Republicans controlled the Senate. I'm a Democrat, and my co-author back then was a Republican, indeed the co-founder and co-chair of The Federalist Society.

Versions of this proposal have been endorsed over the last two decades by leading

scholars across the spectrum, including the eminent scholars David Shapiro and Paul Mishkin, co-editors of the canonical Hart and Wechsler case book. Three, a general idea of 18 years of active service has many advantages as several other witnesses have acknowledged. I catalogued 18 distinct advantages in my written testimony.

Four, my proposal is easily and obviously constitutional as a mere statute. It does not require a constitutional amendment. It recognizes a single office, and it simply modifies the duties of that office purely prospectively. It's closely akin to rules of procedure that are universally understood as constitutional and indeed no different in its essence from laws dating back to the first Congress supported by James Madison, signed into law by George Washington, and enforced without objection by every early justice, including John Marshall and Joseph Story.

Fifth and finally, my proposal is strictly speaking not a term limit. A justices

serves on the Court for life, gets paid for life, holds a formal office, a Supreme Court justice, for life, and does various kinds of Supreme Court work for life. Some casual observers have expressed concern about the idea that relaxed service emeritus justices might ride circuit and thus might need a separate judicial commission creating certain technical constitutional complexities.

If this were an issue, the circuit riding feature in the proposal can be eliminated altogether. But in fact, the circuit riding feature is an echo of the Judiciary Act of 1789. The law and custom today plainly permits Supreme Court justices to sit on lower federal courts by designation.

Thus, Chief Justice Rehnquist sat by designation in the mid-1990s while also serving as Chief. At least 11 retired justices since 1937 have sat by designation and in effect have ridden circuit, to wit, Justices Van Devanter, Reid, Burton, Clark, Stewart, Powell, Brennan,

Marshall, White, O'Connor, and Souter. See generally 28 USC Section 294. I welcome your questions. Thank you.

CHAIR RODRIGUEZ: Thank you very much, Professor Amar. Next we will hear from Tom Ginsburg who is the Leo Spitz Professor of International Law, and the Ludwig and Hilde Wolf Research Scholar at the University of Chicago School of Law. Professor Ginsburg, please.

MR. GINSBURG: Thank you, Chair. And it's an honor to be with everyone at the Commission today. My end goal on this discussion is a comparative one. My academic work is on constitutions and judicial systems around the world, and I've worked with a number of governments and international organizations on constitutional design and judicial reform.

And so you might begin by saying, well, why is that relevant? What does the rest of the world have to offer us? American exceptionalism, of course, is a longstanding trope in our national discourse. And it's true

that we do have the world's oldest constitution, now 233 years old.

But my view is that looking around the rest of the world can tell us something. The issues before the Commission today about the balance between judicial independence and accountability, how to produce a responsive, high quality legal system are important concerns in many countries. And I submit that were we to start drafting the U.S. Constitution anew, there is no way we would have true lifetime tenure for Supreme Court justices.

No other country has it. While many other countries do nominally provide for lifetime service or service during good behavior, every one of these has an age limit or a mandatory retirement age. And many other Supreme Courts which do not have lifetime tenure do have term limits. I offer the example of Mexico where justices serve for 15 years.

Constitutional courts of the kind that the Commission heard about in its first hearing

typically have term limits between 9 and 12 years most commonly. And significantly, many of these institutions are considered to be highly independent. Now as a social scientist, I have to report that measuring judicial independence cross-nationally is a very tricky endeavor, and the U.S. tends to score highly. But other countries like Germany, Australia, Finland, and Japan do so as well with limited terms and rotation on the highest court.

Pointedly, I would point out that there are only a handful of officials anywhere in the world with true lifetime tenure: the Pope, the Dalai Lama, 28 monarchs, and 9 justices of the Supreme Court. And while some of those other officials exercise only symbolic power, the Supreme Court justices in our country have very real power. Term limits make sense if you think that there are others whose participation in the job would not have necessarily any cost to the institution.

And I believe that we do have many

lawyers in the United States of equal or similar qualifications to those who do sit on the Court. And furthermore, as others have talked about, the high stakes of appointments now have been exacerbated by the fact that Supreme Court terms are now longer, 25 years at least for those who have retired since 1970. So just one additional benefit I'd like to point out has to do with end of life issues.

I am not a big fan of age limits. I think that they're quite artificial. But it is interesting to note that many of our Supreme Court justices do serve a true lifetime term. Of the 106 persons who have served as justices and left the Court, nearly half have died in office. And while some of those deaths are quite sudden such as Justice Scalia, in many other case, they may be accompanied by a decline in capacity which really does affect the course of American law.

How long should the terms be? Well, I'm perfectly happy with Professor Amar's proposal. That seems to be the focal one. But

from my point of view, anywhere beyond 10 or 12 years would be sufficient to ensure judicial independence. And I think the comparative literature supports that.

Many American institutions have been enormously influential around the world: the Bill of Rights, judicial review. And many others have not been borrowed: the Electoral College, the Third Amendment. My view is interpreting good behavior to provide for true lifetime tenure is one of those institutions that have been rejected by other countries that nevertheless have found ways to ensure independent judges. We should follow suit. Thank you very much.

CHAIR RODRIGUEZ: Thank you, Professor Ginsburg. And now we will hear from Vicki Jackson, who is the Laurence H. Tribe Professor of Constitutional Law at Harvard Law School. Profession Jackson?

MS. JACKSON: Thanks so much for the opportunity to speak on these important topics. Let me leap right in to say why I think it is

time to try to reform the Court's tenure provision, three reasons. First, as you just heard, we've learned from the experience of foreign countries and also U.S. states.

A hundred years ago, our during good behavior approach drawn from British law was also in effect in Canada and Australia which, like the U.S., are federal countries with written constitutions and judicial review. All three have highly independent national courts, yet Canada and Australia adopted constitutional amendments during the 20th century, establishing mandatory retirement ages of 75 and 70 respectively.

In Hamilton's Federalist 78, he explained that the most admired state court systems then provided tenure during good behavior no fixed retirement age. But now with judges living much longer, all but one of our states has either term limits or a retirement age. Judicial independence remains vital, but it can be achieved in other ways.

Second, there's a troubling gap between public voting and national elections and which parties' presidents have appointed members of the Court. President Carter appointed no Supreme Court justices in his four years. President Trump appointed three. Since 1976, there have been four four-year presidential terms with no appointments. It had been very rare before that.

The Court's legitimacy depends, in part, on the indirect democratic input provided by appointments. And very uneven distribution of the opportunities for appointments reduces the legitimacy derived from having political branches involved in appointments to the Court. Finally, constitutions are supposed to provide a framework for peaceful resolution of disputes.

Losers of elections, of court cases accepted the results because they trust the overall fairness of the system. But the Court structure now contributes, I fear, to doubts about the overall fairness. So on what reforms

should be adopted, the 18-year nonrenewable staggered term idea, a version of which we've heard from Professor Amar, could be quite effective, I think, in addressing serious concerns, including uneven opportunities of appointment.

But it could only be effective if the Senate cooperates. And limited terms might call for employment restrictions on those who leave the bench after 18 years to avoid temptations to skew judgment while in office. Moreover, there may be tradeoffs between effectiveness and feasibility.

Notwithstanding thoughtful arguments that a statute would be constitutional for the 18-year terms, there are counter arguments that it would be unconstitutional, that an amendment would be required given the weight placed on permanency in office at the framing and the decline in power and prestige that the post 18-year justices would experience. So I worry about the feasibility of the proposal. A less

effective but perhaps more feasible approach is for the Congress to use its undoubted power over Court size to allow each president to appoint at least one member every four-year term.

As several scholars have suggested, this could occur not by limited justices' terms but by allowing the number of seats on the Court to float up or down. Under this approach, if President Biden made one guaranteed appointment this term, the Court's authorized size would go to 10. In the next four-year presidency, a guaranteed appointment could raise the Court size to 11.

Now the Court size could be capped at a specific number. You could require reversion towards 9 once presidents make their own appointment and other variations exist. But a fluctuating Court proposal could, I think, be adopted by statute and would improve over the current situation.

More briefly, let me mention the possibility of a mandatory or incentivized

retirement age. Any mandate to retire would raise constitutional questions. But Congress could try to incentivize retirements by pension boosts, though their effects on wealthier judges are uncertain.

On worries that a retirement age would incentivize younger appointments, an alternative to the minimum age idea mentioned in my written statement might be a pension boost conditioned on retiring at the earlier of either the end of a fixed term of years, 18 or 20, or reaching a set age, whichever comes first. This would, I think, avoid creating incentives to appoint very young people. I hope the Commission considers both sets of ideas with a view to effectiveness and feasibility, and I look forward to your questions. Thank you.

CHAIR RODRIGUEZ: Thanks so much, Professor Jackson. I'll now invite the Commissioners slated to ask questions to turn on their cameras. Excellent. Thank you. So we'll start with Caleb Nelson, who is the Emerson G.

Spies Distinguished Professor of Law and the Caddell and Chapman Professor of Law at the University of Virginia School of Law. Commissioner Nelson?

COMMISSIONER NELSON: Thank you, Co-Chair Rodriguez, and thank you to the panelists for taking the time to prepare such thoughtful testimony. Professor Amar, I want to start with one of the issues that Professor Jackson raised in her oral testimony, the constitutionality of the statutory time rules that you're proposing. Just to make sure that we're on the same page, I want to start this with a threshold question about the office that judges who serve on the Supreme Court hold.

You referred to the office of Supreme Court justice. And the good behavior clause of Article 3 does arguably refer separately to the judges of the Supreme Court and the judges of lower federal courts. And the Appointments Clause of Article II specifically addresses the appointment of what it calls, quote, judges of

the Supreme Court, close quote.

Do you agree that Supreme Court justices need to be separately appointed to the Supreme Court in particular so that the office that they shall hold during good behavior is that of being a judge on the Supreme Court? Or could Congress establish a genuine term limit system, not just your time rules but a system under which an appointee as a judge of the Supreme Court only for a set number of years and then becomes a judge on a lower federal court for the rest of the lifetime appointment? You're muted, Professor Amar. I'm sorry.

MR. AMAR: Thank you, Commissioner. I prefer the first approach. The second one might be constitutional, but I think it raises some concerns. I'm smiling because I remember way back when, when you were a student of mine, one of my best students ever in Fed Courts.

And I'm smiling also because I thought of you uniquely when I modified maybe an earlier, slightly more careless version of the idea that I

floated back in 2002 because I've been very powerfully influenced by your idea about liquidation, about paying close attention to the early practices, especially of the first Congress which had a lot of framers and ratifiers, laws signed by none other than George Washington. And I want -- my current version is I've tried to structure it so it's virtually indistinguishable from the first Judiciary Act in which people received, I believe, one Commission as Supreme Court justices.

They also rode circuit. That was connected to their Supreme Court function of bringing Supreme Court ideas to everyman's door and in turn reporting back to their fellow justices akin to nisi prius and the assize system. But I think, why push the envelope? Why stretch it if you can bring it into perfect conformity with the early practice established by the likes of James Madison, George Washington, John Marshall, and for that matter, Joseph Story?

COMMISSIONER NELSON: Fair enough. So

let's assume that the Constitution does contemplate a distinct office of judge of the Supreme Court. And let's assume appointees are entitled to hold that office during good behavior without any fixed term.

Under the system that you're proposing, everybody who's appointed to the Supreme Court could stay in office for life. But of course, the duties of that office would change pretty dramatically after 18 years. I'm wondering whether somebody who can no longer participate in any of the Court's decisions, unless perhaps there's a short staff situation, is really still a judge of the Supreme Court in the sense that the Constitution contemplates.

How should we think about that question? Is the essence of being a judge of the Supreme Court in the sense that the Constitution contemplates just the title and the salary and the existence of some official functions? Or does it also include the authority to participate in the Court's exercise of judicial power, its

decision of actual cases that come before the Supreme Court?

MR. AMAR: So once again, I think back to the early practice and the early liquidation. I now understand in a way that I never did before, Commissioner, why the original Supreme Court size was six which is an even number. And if you think it's all about a Supreme Court en banc, that looks weird. Their most important function at the founding was actually writing circuit.

There were three circuits and divided actually two justices per circuit. They were spending most of their time actually on circuit, not en banc. And that was an important part of their function.

England lost -- Britain lost the loyalty of America because actually the center wasn't paying attention to the periphery. So having justices on your central court out there in circuit is a huge Supreme Court function, central court function. Also, even if you're not

actually sitting en banc, you are permitted to if the Court is short staffed.

But you're performing other public educational, ceremonial, public service, docket management if you like, advisory functions. Supreme Court justices today do administrative stuff. They testify before Congress. They meet foreign diplomats. They show the flag. They explain the Constitution to Americans and the world.

Those are central Supreme Court functions and especially if Congress wants those to be front and center. And if the justices themselves promulgate a sensible duty roster, it seems to me in a real way and not just a formal way, they are Supreme Court justices in every way. And one person who agreed with me about that was named John Marshall because actually he took the position with the Jeffersonian repeal of the judiciary of the Midnight Judges Act.

As long as justices got their salary, all sorts of other things -- and their title, all

sorts of other things were totally negotiable. That was John Marshall's own position, somewhat formalistic. But I'm going beyond mere formalism and paying attention to what the early practice actually was.

COMMISSIONER NELSON: So with respect to the historical liquidation, are there historical examples of Congress passing statutes that prevent justices from hearing any cases that the Supreme Court decides? I mean, the circuit riding practice gives additional duties to the justices so that they sit on lower courts when the Supreme Court isn't in session. But they're also deciding Supreme Court cases. Are there historical examples of Congress enacting statutes that categorically exclude some categories of justices from participating in the Court's merits docket?

MR. AMAR: Well, there are recusal rules, both regulatory and statutory, and not just unique to the Supreme Court that do say, you're not supposed to hear certain categories of

cases where you have a financial self interest. And in a way, you can think of my idea as a recusal rule of sorts. You could be generally recused after you've had your fair -- your turn at bat, so to speak, and let others do it. So I do think it's akin to a certain kind of recusal idea. So --

COMMISSIONER NELSON: To the extent Congress does have the flexibility to do that, could Congress establish other criteria for stripping justices of the authority to participate in the Court's merits docket besides just length of service? I mean, what are the constitutional limits on Congress' ability to this sort of thing in your view?

MR. AMAR: Well, I take that word, proper, very serious in the Necessary and Proper Clause. And I think when we're thinking about propriety, we can look at practices of other democratic countries as my colleagues have identified. That's not the only test, but let's look at those things. Let's look at the states

and how they've done it.

And so here are things that, to me, make it proper. It's not gerrymandered. It's not pegged to someone's party. It's not treating any justice differently than any other justice possibly on the basis of congressional displeasure with a past justice's ruling or a justice's predicted ruling.

So there's a generality to it, a prospectivity to it, a nonpartisan feature to it. It's about future presidents, whether Democrat and Republican in their appointment practices. So I think in all of those ways, it passes a Wechslerian neutral-principles idea, it seems to me. And I do think we see versions of this sort of thing in state Supreme Courts as my colleagues have mentioned and in courts around the world.

COMMISSIONER NELSON: So Professor Amar, you're a distinguished scholar, and your judgment certainly carries a lot of weight with me and with others. Of course, there are also some distinguished scholars, including people who

support term limits as a policy matter who at least have constitutional doubts about such a statute or think it would be definitely unconstitutional. Should Congress worry that a statute adopting your proposal would lead to destabilizing disputes about whether the Supreme Court is properly constituted?

I can imagine pretty messy disagreements about which justices should sit on a case that involves the constitutionality of such a statute or that involves whether the one portion of the statute is separable from the portion establishing new appointments. And no matter how the Court answers those questions, I can imagine some citizens and public officials who had the opposite view might think that all subsequent decisions issued by the Court are tainted because the Court isn't properly constituted. Should we worry about that?

MR. AMAR: Yes. But under the Rule of Necessity, I think justices have always been allowed to rule on issues, even if they make

relates to the jurisdiction of the courts and all the rest. That's a general principle of law. Honestly, many of the objections that have been raised have been raised to earlier versions of the proposals that are different than the one that I'm offering today. It's much more tailored.

So if Congress is serious about this, I welcome the opportunity to testify with an individual, another scholar or set of scholars. And they can identify the specific concerns that they have because I don't think actually the current version is as vulnerable to a constitutional criticism as some various other incarnations, in fact, have been. But yes, we should try to do this in a way that maximizes legitimacy.

Remember also, I've been trying to invite the existing active justices to be participants in this proposal by giving them an important regulatory voice in identifying what they think are proper functions for relaxed

service emeritus justices. And it's very important, I think, to get their buy-in into the regime. That's one of the newer features of the proposal that I put forth today which to repeat is not the same as earlier versions that have been floated, the Cramton-Carrington proposal and others.

COMMISSIONER NELSON: Thank you.

CHAIR RODRIGUEZ: Thank you very much, Professor Amar. Now we'll turn to Rick Pildes who's the Sudler Family Professor of Constitutional Law at NYU School of Law. Commissioner Pildes, you have the floor.

COMMISSIONER PILDES: Thanks very much. And first of all, I want to thank the witnesses for your extremely helpful written testimony as well as your time before the Commission today in these hearings. So thanks for that. Professor Ginsburg, let me start with you. When we drill down into the specifics of how any term limit proposal might be designed, there are at least difficult issues that have to

be confronted.

A major advantage of these proposals as their proponents put them forward is that they would give each president roughly equal opportunity to appoint the same number of justices. Under the 18-year proposals, each president, for example, would have two appointments. The first difficult issue is one that's been mentioned already, and I want to get your thoughts on this, which is that for this system to work as intended, we have to consider the possibility that during divided government, the Senate might not be willing to confirm any nominee of the president. If that happened, it would significantly undermine one of the purposes for the term limit scheme.

I want to discuss the issue with you in the context of a constitutional amendment for term limits, not a statute. So in your written testimony, you say that there are a myriad of ways to design means to deal with the potential impasse of this sort. And I'd like to ask you,

what are some of the more promising ways in your mind for addressing that problem?

MR. GINSBURG: Thank you very much. It's obviously a critical one. What do you do in the case of obstruction in the process? And you can't just assume that it will go smoothly.

Most other countries, especially presidential systems where presidents are appointing, do assume a kind of good faith on the part of the legislative approval of the process. But we do have some examples of institutional design which explicitly contemplate obstructionism. So actually in Mexico which I mentioned, the president sends over three names and the Senate chooses one of them.

And if the president -- if they reject them entirely, the president gets to send over more names, three more names. And if the Senate again refuses to act or rejects them, then the president as a default position can pick one of those names. And that person will be placed on the Court.

So that's a way of allowing deliberation across the branches but also having a kind of default position where one could get around it if necessary. In Colombia, they have a somewhat similar situation where the president and the Supreme Court and the Council of State each send three names over and the Senate choose among them. So that's a kind of variant of institutional design that one could look to.

Now you might imagine in our situation that the Senate would just still refuse to act. And so I think the broader problem to which you are referring, I think we might be able to grapple with even without a constitutional amendment by sort of thinking about the bargaining between the president and the Senate in ways maybe Senate rules could deal with this, for example, where the Senate rules would ensure that the Senate Judiciary Committee could commit to hearing a particular nominee in advance that could be negotiated in advance one might imagine. Or the Senate could give a list of people whom it

would presumptively confirm.

I mean, that could be done without a major constitutional amendment where political forces so inclined, not that I am saying that they are at the moment. But I think there may be some workarounds even short of constitutional amendment. Once we move to constitutional amendment as you suggest, then I think there are ways of ensure that the process can go forward notwithstanding obstructionism.

COMMISSIONER PILDES: One of the proposals that's been made for dealing with this issue is actually in Professor Jackson's testimony. And I'll ask her about it separately. But I want to get your reaction to it because it's an idea I hadn't seen suggested before which is if this impasse occurs, there are concerns about the president having the default power and essentially having unilateral power at that point, or the Senate having the default in which case the Senate can continue to block if that's their policy choice.

Professor Jackson suggestion in the case of an impasse giving the chief judges of the Courts of Appeals of the United States the power to appoint a justice if the Senate repeatedly fails to confirm. Since we're talking about a potential constitutional amendment here, that option, of course, is a feasible option in theory. I wonder what your reaction is to that as sort of a bypass of both of the political institutions in the context of a repeated impasse over filling a term.

MR. GINSBURG: Yes, one might imagine that it would come to pass quite often, certainly in the current state of our politics. And I don't think there's anything wrong with that. In many, many judiciaries around the world which are considered independent, judges play a really important role in naming justices to the Supreme Court, either through judicial commissions or, as in the case of India which I discussed in my testimony, actually they're designating who's going to actually be a justice of the Supreme

Court. The sitting justices have a big role in that.

And obviously, there's some risks with that. And countries like Israel, we've seen that debated with self appointing court. But the proposal that Professor Jackson outlines makes that a default, not the normal circumstance and I think is an appropriate thing to do in an instance of political impasse.

COMMISSIONER PILDES: Okay, thanks. I'd like to shift to the second obvious difficult issue that has to be confronted in designing a term limit amendment. And again, let's think about this in the context of the constitutional amendment so we have more degrees of freedom perhaps to try to solve these problems. And that's the transition concern.

How do we get from a current Court with lifetime tenured justices to a full Court with 18-year term justices? And a couple of suggestions have been offered to handle this transition issue. One is that the most senior

justice would be required to leave on the sort of third odd numbered year after the enactment of such an amendment given the president will have the power to appoint one justice in the first and the third year of each term.

And that justice would then be replaced by an 18-year term justice. So for example, if this provision were adopted constitutionally in 2022, the most senior justice on the current Court would leave in 2027, the next justice in 2029. That's one option that's been discussed.

A second option is that the sitting justices retain their positions and lifetime tenure. When the amendment goes into effect, presidents begin nominating 18-year term justices in years one and three. And so for a time, the Court expands and the number of justices would fluctuate some. And you'd actually have even numbered justices in some years potentially.

Those are two of the options that have been put on the table for the transition issue.

I would benefit, and I'm sure the Commission would from hearing your thoughts about either of those. Or if you think there's a better approach than one of those two, how you would design the transition process.

MR. GINSBURG: Yes, I think one has to distinguish what's constitutionally and politically feasible from what's ideal. From an idea point of view, I see no reason why one would want to keep superannuated justices, right? And my examples of basically religious institutions and monarchies as the only people who have any kind of power who serve for life indicates that's probably not something we want to do.

With something like the law which needs to be responsive and independently exercised, finding ways to renew the Court is really important in this particular milieu. So I don't see any idea benefit from having a system where we simply expand. On the other hand -- and Professor Amar, Professor Jackson can speak more to the constitutionality.

In terms of what is politically feasible and constitutionally feasible, perhaps that is a better approach or a more practical one. I don't see a big problem with it. Obviously, the Court's size would then be indeterminate.

One would imagine that it would expand and contract. And that would give rise to interesting and perhaps unpredictable dynamics within the Court where perhaps there would be disagreements that cross generations or cross eras of appointment. Those are very hard to predict. But certainly as a second best, that seems fine to me.

COMMISSIONER PILDES: Okay. And then I think I'll waive the rest of my time because I don't want the hearing to go on for too long. So I'll stop here. And then there'll be a second round of questions, and I'll continue there. So thanks very much.

CHAIR RODRIGUEZ: We'll certainly have time for a second round. But now my co-chair,

Bob Bauer, Professor of Practice and Distinguished Scholar in Residence at NYU School of Law, has the floor.

CHAIR BAUER: Thank you very much. Professor Jackson, let me start with you. I want to talk to you -- pursue again this whole question of how we should be looking at the constitutional versus statutory amendment alternatives here. And I want to refer to your written testimony where you talk about the legal creativity of those who argue that a statutory amendment is constitutional.

And you say you are somewhat doubtful. Those are your words, somewhat doubtful that this is possible given that it would be, and I'm quoting you, a significant change from how the tenure of Supreme Court justices has been understood. So I wanted to ask you to respond to Professor Amar on this point.

His argument would be -- and I apologize, Professor Amar, I'm going to shorthand this -- that it's been misunderstood and that

therefore this current understanding ought to receive only so much weight if we take a close, hard look at the history that he has described and the reasoning that follows from a good grasp of that history. So I wanted to get your response to that and ask you, where do you fall on the somewhat doubtful kind of spectrum here? Are you very doubtful, maybe not so doubtful, open to persuasion? Where do you stand on that?

MS. JACKSON: Thank you for the question, Commissioner Bauer. I'm not sure exactly where I stand. I am not arguing that the statute would be clearly unconstitutional.

I don't think that. I think Professor Amar and others have made very thoughtful arguments for why it should be considered constitutional. But I think there are, as I tried to indicate, significant counter-arguments.

For one thing, current understandings really -- it's not just today in 2021. It's over the course of decades and centuries of understanding of what those words in our

constitution have meant. And I get nervous about throwing those things away, absent extremely persuasive reasons.

Second, I re-read Hamilton's arguments in Federalist 78 and 79 in preparing my testimony. And I was struck by how powerfully he argued permanency in office as a way of ensuring that judges would not be worrying about what their next job is. The worry about what the next job is, I want to say, I think is not only about salary which Professor Amar's proposal would take care of.

It's also, I think, not only about title. But rather I think it's also about power and prestige. And I'm doubtful that judges subject to the 18-year term idea which I think has much to commend it. I should say that, much to comment it as a policy matter. But I am doubtful that judges serving under that regime would feel as powerful and would be regarded as prestigious as those who are in the active 18-year phase of their term.

The last thing I'll say is that I also have some generalized apprehension about making changes to the office of Supreme Court justice that would be regarded as adverse to the interest of the holder of the office by statute. It's not easy to enact the statute in the United States. But it's much easier to enact statutes than constitutional amendments.

And the world has unfortunately provided us with vivid examples of countries that at one time had really good independent courts and vibrant democracies and then changes were introduced. In Hungary, the retirement age of judges which have been set at 70 was changed to 62 to get rid of a bunch of judges who were particularly independent minded. And it took a year -- over a year to sort out the legality of that move during which time other judges were moved into those positions so that the judges who were kicked out eventually got back into some sort of position.

But the independence of the court was

quite severely damaged. There's no particular -- Professor Amar's proposal or many of the others -- that raises those concerns. It's prospective only and so forth. But changing conditions to the detriment of the interest of the holders of the office by statute makes me more concerned than doing it by constitutional amendment which I think is entirely proper as long as it's generalized and so forth.

CHAIR BAUER: Well, thank you. That's helpful. Let me follow up on this whole question of the impact of a statutory change. You also say in discussing the risk the statute poses, and I'm going to quote you from your written testimony.

Comparative experience suggests that statutory authority you change terms in retirement age is at some risk of being abused should a tyrannical party gain the presidency and the Congress. And I think your larger point being every time we move by statute, there's a danger that you're with a political majority that

is taking advantage of the situation and what we perceive, however high minded it believes its objectives to be by its adversaries as operating in its own interest.

But you also put forward a proposal for a procedure which you described earlier for giving presidents by statute the opportunity to enlarge the Court by one, at least one in a term. Once that door is open, don't you run exactly the same risks? Wouldn't a proposal like that also be subject to the view that tinkering with the composition of the Court, even in a modified form, presents the risk that you described in your written testimony?

MS. JACKSON: It's a really great question. And yes, you properly understood my worries about statutes. But I think that the power of Congress to adjust the size of the Court overall is well established. And I think there is some difference between action that detrimentally affects the life of an individual serving justice which I think the threat of which

might cause a reasonable justice to hesitate in rendering a truly independent judgment.

There's a difference between those kinds of actions, retirement, term limits with respect to people sitting, and on the other hand, the exercise of a power to expand the Court. I have also written in my testimony against some colleagues who have argued for what I would regard as expansion of the Court to pack it. And that, I think, while it might be well within Congress' powers would be very, very unwise and imprudent right now. But a proposal that would regulatory give every president, whoever gets elected, to a four-year term one appointment I think does not raise those kinds of concerns at nearly to the same degree.

CHAIR BAUER: Thank you. Thank you very much. That's very helpful. So I'm going to come back to you, Professor Amar, since I'm on this question. And I'm going to ask you, if you could, to come back because I wasn't sure that you and Commissioner Nelson quite connected on

this point.

If I understood Commissioner Nelson's question, it was, if we have any constitutional doubt here, and certainly in the public to date, the intensity of that doubt would be -- let's put it this way. That would be intensely expressed in the partisan give and take over the wisdom of a particular proposal. I think he's raising the question of whether proceeding by a statutory amendment would have a destabilizing effect.

And in this hyperpolarized environment, if we ever have any doubt about the constitutionality of a proposal like this, then we should go the constitutional route rather than the statutory route. And I didn't fully understand your response because I wasn't sure the two of you were sort of on the same wavelength on the question. So can I ask you to come back to that?

Wouldn't -- even those who are very sympathetic to your point of view are still, as far as I can tell, coming away with the thought

that there is going to be a big argument about this. You suggest you might bring people together and bring them into a conversation and be happy to testify before the Congress. But there's going to be resistance on the merits of the argument on the part of those who don't agree with you. Is that not game, set, match for how we want to make a change like this, that we want to do it in a constitutionally accepted fashion if there's any doubt about the statutory route?

MR. AMAR: It's very relevant. But it's not game, set, and match because their arguments would have to be actually, at the very least, extremely plausible, maybe even extremely good. And I've got to be honest. I haven't heard anything yet.

I've heard objections to multiple commissions. But you don't need that at all. And we didn't have that actually with the first Judiciary Act. Okay? We've already decided that.

I hear objections to, oh, sitting by

designation. Eleven justices have done that since 1937 and that includes retired justices. And that includes also -- that doesn't include Chief Justice Rehnquist sitting on the mid-1990s. Yes, he got reversed by the Fourth Circuit, I believe, when he sat as a trial judge in that capacity.

My colleague, Professor Jackson, says she's worried. She's concedes. Okay. You got the title for life. Okay. You got the payment for life. Oh, but your power is going to be less after 18 years.

Yes, that's true also if you double the size of the Supreme Court for good government reasons because you add a whole bunch of new circuits. And no one things that that's unconstitutional. So there's not actually a vested constitutional interest in the amount of power that you current have.

And John Marshall says all of that when he says, you can take away -- actually for these midnight judges that were lower court

judges, you can take away their jurisdiction. You got to pay them and their judges for life. But they're not invested, right, to a certain amount of power when you -- even without any proposal of my sort.

When you appoint new justices, the old swing no longer is the new swing with a new composition. And that old person loses power to some extent. That's not actually a valid constitutional objection.

So yes, if on a careful analysis by respected scholars of this version there are lots of folks who say, I still have a serious constitutional objection, you should take that into account because I'm trying to suggest that this will actually lower the stakes of a confirmation hearing because it's not for 30 years. It's only for 18. I'm trying to suggest we can get bipartisan buy-in.

If we don't get that because people think this is actually a constitutional problematic idea, that is relevant. It's not

game, set, and match that one person or even three people, even three people that I really respect have doubts. I want to hear specifically what those are because I don't think truthfully there is yet one on the table.

I'll tell you what the most serious concern that hasn't been raised that I do think exists which is I'm suggesting -- and you don't have to have this in the proposal, you could get rid of this too, just like you could get rid of circuit riding -- a slightly different way of thinking about the chief justice doesn't affect the senior associate justice. Now in fact, that's true. When the chief justice dies or resigns, we actually treat typically the senior associate justice as the acting chief.

I think that actually has some advantages. But I could imagine someone raising a question about that. Oh, you were appointed to be associate. Now you're chief. I think that's all built in to the nature of the office when you were appointed to it. But it is relevant if

people aren't persuaded, thoughtful people. It's not game, set, and match unless you, in your independent judgment and you're co-chair and the other Commissioners actually think those constitutional objections are well taken.

CHAIR BAUER: Thank you.

CHAIR RODRIGUEZ: So we now have time for a second set. And so I'm going to turn to Commissioner Nelson to see if you have any further questions. We have about 25 minutes, so you each have about eight minutes to pose questions to whomever you wish, if you wish.

COMMISSIONER NELSON: Perfect, thank you. Professor Ginsburg, I know you're concerned about the authoritarian turn in some countries. If the U.S. is potentially vulnerable to that trend as I assume we agree that it is, could increasing turnover on the Supreme Court and regularizing new appointments have some risks in addition to benefits?

If the U.S. keeps its current system of presidential appointments to a nine-member

Court but adopts, say, 12-year term limits for service on the Court, a two-term president who serves for eight years would've appointed six of the nine justices by the time that the president is supposed to leave office at the end of the second term. And even with 18-year term limits, a two-term president would've appointed four of the nine justices by then. If a dangerous president gets elected and sets out from the start to appoint justices who will let the president do what the president wants like keeping power past the end of the second term say, should we worry that a single president who had served two terms would've appointed either a majority or a near majority of the justices?

MR. GINSBURG: It's a great question. And I think the answer is no more than we ought to in our current system, right? There's some assumptions about the people who get on to the Court that they come from a pool of people who generally believe in the rule of law.

And I think that's been upheld and so

would not be amenable to spurious arguments to extend a term or something like that as we do see in many other countries. I don't see how more rotation in office actually makes that worse given that I believe there is a very broad pool of people who could serve and actually would improve the performance of the Court. You are correct, though, that tinkering is obviously an issue in many of the backsliding countries, including backsliding democracies.

The situation in Poland has gotten a lot of attention in recent years. And it's subject to European Union sort of sanctions at the moment. What's not very well appreciated is that this current cycle actually started with the party before the backsliding party.

When they lost power to the Law and Justice Party, they tried to pack the court. The Law and Justice Party came in and said, whoa, we're not going to recognize these justices in much of the -- in exactly the way that you posed the question in the first round to Professor

Jackson about the dynamics that might occur. And so you had a situation, which is the real Court, who are the real justices? And then, of course, since then, Law and Justice Party has packed the Court.

For this reason, I believe and I think from everything I've heard there's somewhat of a consensus that reforms ought to be undertaken in some kind of bipartisan way. And notwithstanding the current state of the Senate, I think there is a common interest -- a common American interest in ensuring greater rotation in the Court. And there would be certain safeguards perhaps that could be put in to make sure that that sort of bad outcome doesn't come to pass.

So in short, I recognize that it is a generic concern when you start tinkering with the Court. And that's all the more reason that one needs a consensus. I should add that one looks at survey data that the American public seems to be behind some kind of limitation of the tenure of Supreme Court justices.

Twenty-five years is now the average. And that's really, really long, longer than anyone else in our constitutional system. So I think there are ways to thread the needle there.

COMMISSIONER NELSON: Thank you, Professor Ginsburg. Professor Jackson, could I ask you to speak to the same question? Either at this moment in our history or looking into the future, should we be concerned about reducing the time that it takes for a president to appoint a majority of members of the Supreme Court?

MS. JACKSON: I think it's a great question, and I think it is a good concern. And it's a reason why 12 years might be too short. Eighteen years poses fewer risks of a single two-term presidency being able to dominate in that way. In the course of my reading for this hearing, I was -- I learned, I don't think I knew, that President Taft in his one four-year term as president appointed six members of the Court.

That is something we probably want to

avoid, whether we think President Taft was the greatest thing ever or not. It's just too much power over too many important constitutional issues to have a single person making all those appointments. I think, Commissioner Nelson, that if the terms are stretched out, the dangers of which you speak are somewhat diminished. But I do think that worrying about the unintended consequences of a change is a really important thing that you folks will be done.

COMMISSIONER NELSON: So one of the points that you made 15 years ago in the Georgetown Law Journal was that the Article III courts aren't the only courts in the United States. Lots of states have state court systems in which judges are elected by the people or at least are subject to periodic retention elections. And in some states, judges serve for relatively short terms before they come up for reelection.

Fifteen years ago, you described the life tenure federal judiciary is helping to

anchor that system which I took to mean that given the possible pathologies of the elected systems of the state level, maybe there's some advantage in erring in the opposite direction of the federal level. Of course, the system in which Supreme Court justices serve for nonrenewable 18-year terms could still do some anchoring. How should people think about the optimal level of anchoring or how the structure of the federal judiciary intersects with the varying structures of the state judiciaries?

MS. JACKSON: Thank you for the question. I acknowledged in my written statement that my views have shifted some, in part for the reasons that I began with in my oral statement to you today. But my awareness of the state court systems and the possibilities for popular passions to play too much of a role in the minds of judges who regularly have to stand for election concerns me.

So I know that some people in the current environment have suggested much shorter

terms if we're going to go to a term limited Supreme Court. I would be inclined to oppose them, not only because of the authoritarian risks that you asked about but because we will continue to have state court systems that rely on elections. So I would think it might be sensible to think that the term of a Supreme Court justice should be set longer than the term limits you find in the state courts.

I'm trying to remember now what they were. It's in my written testimony. But I kind of think in the state courts the terms go, like, 8 to 14 or 15 years. So something longer than that I think might make sense because I do think we still need an extra dose of independence in our federal judiciary to counterbalance the very democratically oriented processes -- directly democratically oriented processes that we see in many of the states.

COMMISSIONER NELSON: Thank you. I'm in the final seconds of my eight minutes. So I will stop there. Thank you.

CHAIR RODRIGUEZ: Thank you, Commissioner Nelson. Commissioner Pildes, would you like to pose more questions?

COMMISSIONER PILDES: Yes. Professor Jackson, many people assume a constitutional amendment for term limits would be highly unlikely to be adopted given how rare it is that we've amended the Constitution and how difficult the process is. Yet it seems that there is actually a great deal of support for this idea from across the political and professional spectrum. Indeed three justices on the current Court have been quoted as saying this is an idea worth considering.

This morning, we heard testimony from a very distinguished bipartisan group of experienced Supreme Court practitioners who were very resistant to many of the proposals that have been put forward for reforming the Court but who said this was one of the two ideas that they thought was worth considering. And I have not seen a good deal opposition actually to any

tenure term, particularly if it's done through constitutional amendment. Obviously, there are debates about whether a statute can do this or not.

What's your perception about how much resistance there is among people who write about the Court, who study the Court, practice before the Court to an 18-year term? It doesn't have to be 18. We can debate the particular length. And is it right to think that there -- it would be sort of such an impossible hurdle to enact an actual constitutional amendment on this issue?

MS. JACKSON: So I -- thank you for the question, Commissioner Pildes. I do not regard myself as an expert on political feasibility. So is there a great deal of intellectual resistance in scholars who write about the field to the 18-year term if it were done as a constitutional amendment? I don't think so.

I would think the weight of views that I've read are that it's basically a good idea

given everything. And there's lots of details that would need to get worked out. But my hope -- the history of amendments getting approved in recent decades has not been a strong one. It's a very rigorous process. So I think one needs expertises other than the ones I bring to the table to figure out the political feasibility factor.

COMMISSIONER PILDES: Okay. Thank you very much for that. Professor Amar, I want to return to the question that several people have raised, particularly with the comparative expertise on this panel. One of the things that we have become more familiar with unfortunately in recent years among European democracies is what has sometimes been called democratic backsliding.

And in particular what has happened, of course, is that electoral majorities that do get elected through the normal electoral process then leverage their power once in office to seize control of the independent institutions that

might resist their future efforts to entrench themselves. And that particularly applies to the independent courts. And the political scientists who have looked at this issue across democracies where very similar kinds of forces are at work across a lot of the western democracies have concluded that the systems that are most prone to this electoral authoritarianism, as it's sometimes called, are those in which a simple majority can fairly directly through the political process take control of institutions by doing things like changing retirement ages of justices and the like.

And the U.S. is offered as an example the system most resistant to this risk, particularly because we have bicameralism, we have the Article III Supreme Court as it currently exists. Leaving aside whether it's constitutional to do this by statute, but just in terms of whether it's wise policy, do you think the U.S. is largely immune to the same forces that have generated electoral authoritarianism in

other democracies in recent years? And as others have asked, how concerned ought we to be that legislation to impose term limits does open the door to future legislative majorities doing what they have done in some of these other democracies to really dramatically undermine the democratic system? You're muted.

MR. AMAR: Thank you, Commissioner. We should be very worried, and it can happen here. And I might've given you a different answer six years ago. But Donald Trump's presidency chastened the cockiness that I may have had then about just how great our system is compared to the rest of the world.

A few quick points, first on 18 years as the sweet spot. Again, forget, as you invited me to forget, how we get there, I do think -- and in regard to what my colleague, Professor Jackson mentioned, I would want to remind everyone that in 2009, there was an open letter signed by more than 40 distinguished constitutional scholars from across the spectrum in support of an 18-year

idea. That was -- I didn't sign the letter. I just generally am not a signer of things.

But that was the Cramton-Carrington proposal signed by people including Professors Barbara Babcock, Jack Balkin, Paul Carrington, Roger Cramton, Dan Meador, Frank Michelman, Paul Mishkin, Robert Nagel, L.A. Scot Powe, Jeff Powell, Judith Resnik, Chris Schroeder, David Shapiro, Peter Strauss. So I think that was interesting that there was that sort of range. And it was on 18 years.

The other thing I want to tell you -- two other things. One, in the long run if the people of the United States want to take us to hell, it's a republic in which they're going to have their will. But we want to structure things so that that's not an easy road.

And if you lose three presidential elections in a row, then I do think it's going to just be hard to hold to some crazy type. That's going to be hard. I agree with my colleague that 18 years is a good length that's going to require

three.

I think 18 fits well with 9. But here's my final point because just as I thought a lot about Commissioner Nelson's ideas about liquidation and trying to structure something that reminded me of the Judiciary Act of 1789, I thought a lot about your ideas along with Levinson's about separation of parties and not really of powers.

And since you mention the presidential model, here's why. Eighteen years not only equalizes power across presidencies. So Trump doesn't get three compared to Carter's zero and equalizes presidential elections. So we always know that there are going to be two coming up.

My specific idea to have these confirmations in years one and three was twofold. It equalizes things within a presidential administration, one pre-midterm, one post-midterm. And you know that that may change the partisan nature of things because presidents often lose seats in the Senate after the first

two years. So you might have one unified party appointee and one bipartisan divided government nominee if you have it in years one and three. And so I thought a little bit about that and equalizing that because there are pathologies and possibilities and promises with each kind of configuration.

And the second thing that it does, it not only equalizes power within a presidency between pre-midterm and post-midterm which relates to partisan control and divided government. But it also picked, I thought, the least superheated moments to do it, not in election years but in off years, in years one and three and not two and four. And I thought that had a modest advantage.

Final thought since it was asked before, what about judges picking someone if the parties are at loggerheads, the president and the Senate? And my colleague, Professor Ginsburg, says, actually, that's how some other societies do it. As a practical matter, we are beginning

to do that when lower federal court judges are actually testifying for and vouching on behalf of some of their appellate court colleagues in Supreme Court hearings.

At best, that makes it less superheated because you're actually getting distinguished jurists who have impressed other jurists before they even sort of get to a final round of consideration. And if you add to that, having these hearings being held in years one and three rather than two and four and it's only for 18 years rather than for 35, those are ways of trying to reduce the temperature, reducing the possibility that toxic politics will destroy the judiciary. But in a democracy, it's always a long-term risk, of course.

COMMISSIONER PILDES: Thank you.

CHAIR RODRIGUEZ: Commissioner Bauer, would you like to pose any kind of questions?

CHAIR BAUER: Yes. How much time do I have?

CHAIR RODRIGUEZ: You have eight

minutes.

CHAIR BAUER: Eight minutes? Okay. I think I'll slip two in and not challenge anyone's schedule. Let me start with Professor Ginsburg. I want to ask a question about the sense in which we need to be mindful in these debates about what we know, don't know, and can never know.

So I read your testimony and I saw, for example -- and I believe it is on page 10 where you have a paragraph in which you talk about work that you have done on the correlation between constitutional design and observed levels of judicial independence as measured by political scientists. And I turned out to be a complex question. And so as we talk about what would happen if we moved from the life tenure arrangement we currently have to a different one -- and by the way, this reminds me also Professor Jackson's comments about interdependency of various proposals.

The question becomes, what can we

actually really know? Isn't there sort of necessarily, as we have this debate, a leap a little bit into the void? We would never know for a long period of time what it is that we should've been most worried about or the benefits that accrue that we might've been most delighted to imagine. We'll know when we've given it our best shot.

And so my question to you is based on what you know now, what would you think is most at risk? What concern of all the potential adverse consequences would you identify based on what you could imagine now, what you would foresee if suitably designed we move from life tenure to a term limited arrangement like the one we're talking about now? What would be the consequence you'd say in the back of your mind most nags at you?

MR. GINSBURG: So first of all, it's a great question. And welcome to the world of constitutional design. You go back to Madison and you realize that he was engaged in the same

enterprise of basically kind of guessing how institutions would work out based on his reading of what had happened in other ancient and modern federations just to quote one of his sources and sort of speculating on local conditions and how things might play out.

So there's certainly no science here. It is much more of an art of institutional design. And I'm quite careful in the testimony to say that we shouldn't necessarily just draw a conclusion from a general statistical study.

The statistical study does remind us that it is complicated and institutions are interdependent. And I guess I would say that we do have many other things which if you don't change, we are going to have -- our judicial independence wouldn't be under threat. But in terms of the risks, what's the biggest risk, I think given our state of politics, you may have to do something along the lines of changing the appointment process because if you just change the term length and didn't change the appointment

process, you'd have exactly the kind of issues arising that Professor Pildes' question to me at the outset suggested.

There'd be basically, yeah, 18-year terms for anyone who could get appointed to the Court. But no one would ever get appointed to the Court. And eventually, you could have a Court of three or four people or something like that.

So that's a major risk. You've got to deal with the appointment process as well as the removal -- or not really removal, but tenure -- end of tenure process at the same time because they really do go together. So I think that is something for the Commission's consideration -- very careful consideration. You can't just do one without making sure that the other is resolved.

CHAIR BAUER: Thank you. That's very helpful. And then my last question is for your, Professor Jackson. You mentioned earlier you're not in the business of assessing political

feasibility, and I don't have any PhD in that area either. But I want to ask you a question. It comes at it a little bit differently.

When we talk here about the possibility -- and I'm just going to put this to you as a proposition -- a possibility that proceeding by statute would be subject to constitutional objection. And if such a statute were enacted, it would be tested and it might fold to constitutional objection. It might ultimately fail upon final review by the United States Supreme Court.

Is that, in fact, in your mind, a dispositive objection? Or could we look at it differently, which is that if there are strong arguments in favor of proceeding by statute and you could develop a bipartisan consensus of sorts -- it's not obviously going to be unanimity, some strong support from elements from civil society. What a statutory route provides is the opportunity for a vigorous national debate on well founded national debate, even as some people

would disagree.

And if, at the end of the day, the Supreme Court, 7-2, 6-3, 5-4, whatever it does, strikes the statute down, we will have learned something. We'll have the debate and then maybe the basis upon which a constitutional movement begins because it's left to us to decide how much we cared about it. Does that strike you as at least some way of not necessarily catastrophizing a bad constitutional end for a proposal like Professor Amar's?

MS. JACKSON: Wonderful question. I don't think my worries, my constitutional doubts are, in my mind, dispositive on what route should be chosen. I identified the feasibility issue as something that needs to be thought about.

I do think that there are some risks, but it might work. As you said, it might be the statute is upheld, that Professor Amar's arguments will be persuasive. It might be that the statute is struck down, and we certainly in history have seen statutes get struck down

followed by efforts to amend the Constitution that have been successful in varying degrees.

And so that would certainly be a possibility that I would not want to rule out. If I might just say a word to add on to what Professor Ginsburg said in response to what are you most worried about, I agreed with his what is the most worrisome thing which is on the front end, the appointment process and the need to have some alternative appointment or backup plan for it. The second worry I have is that 18-year term limited justices may choose not to stay in the Article III judiciary as emeritus judges and that it might be very important to develop a statutory set of restrictions on post-service employment that some other very good court systems that have short terms do have, just part of the interdependent analysis.

CHAIR BAUER: Very good. Thank you very much. I really appreciate it. I will use the last 47 seconds so we can stay on time.

CHAIR RODRIGUEZ: We're all -- we're

almost at the end of the panel. This has been enormously illuminating and very substantive. We can't thank you enough, your testimony and your time. And we look forward to speaking further about this. We will reconvene at 3:30 for a panel on the Court's composition. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:14 p.m. and resumed at 3:33 p.m.)

CHAIR BAUER: Welcome back to the resumption of the public meeting today of the Commission -- Presidential Commission on the Supreme Court of the United States. And we are now going to have a panel that is dedicated to the topic of Court expansion and other changes in the composition of the Court. And so I'm going to ask the witnesses who have kindly testified today to please turn on their cameras. Thank you very much.

So let me begin to introduce the witnesses in order here. And we will then have a set of Commissioners -- as we manage these

proceedings, a set of Commissioners who will be asking questions. But first we'll have a five-minute testimony from each of our witnesses.

So I will begin here by introducing as our first witness Randy Barnett. He is the Patrick Hotung Professor of Constitutional Law at Georgetown University Law Center and Director of the Georgetown Center for the Constitution. Welcome, Professor Barnett. And the floor is yours for five minutes.

MR. BARNETT: Thank you so much, and thank the Commission for this opportunity to offer my thoughts on proposals to expand the number of Supreme Court justices. I agree with those who you've already heard from that tell you that any such proposal would end the Court's independence, destroy it as a protector of our rights and liberties, and greatly increase partisan polarization. To their policy arguments, I'll add one more. Partisan court packing is also unconstitutional.

To appreciate the constitutional

problem, we first need to locate the power that Congress is exercising when it sets the number of justices. It is the Necessary and Proper Clause which empowers Congress to make a law that is necessary and proper for carrying into execution the judicial power that Article III vests in the judicial department. Article III does not specify the size of the Court.

And for the past 152 years, a nine-member Supreme Court has become an entrenched constitutional norm. To change the norm of nine, Congress needs to pass a new law. According to the letter of the Constitution, any such law must be both necessary and proper.

In his opinion as Treasury Secretary on the constitutionality of a national bank, Alexander Hamilton offered the following test of the law's necessity. Quote, the relation between the measure and the end, between the nature of the mean employed toward the execution of a power, and the object of that power must be the criterion of constitutionality. Today we call

this the requirement of means and fit.

A law must have an appropriate end or object and the means it adopts must be sufficiently related to that end. In McCulloch v. Maryland, Chief Justice John Marshall elaborated on this test when he wrote, quote, let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional. Of upmost importance is how Marshall's rule of construction starts, let the end be legitimate.

Having set the number of justices, Congress may not then enact a law to change that number of the illegitimate act of affecting how the Court rules. Such an end is illegitimate. That such an end as illegitimate is evidenced by the rationales for Court expansion offered by FDR in the 1930s and by House Democrats today.

These rationales are mere pretext for

the illegitimate end of changing how the Court rules in particular cases. In McCulloch, John Marshall affirmed that a law based on pretextual reasons was unconstitutional. He wrote, quote, should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, to say that such a law was not -- such an act was not the law of the land.

While Congress has the constitutional duty to staff the Supreme Court with multiple justices, it is improper for Congress to use its power to set the number of justices for the end of affecting the decisions of the Court. Now there is a proper political means to affect or change how justices exercise their power. An elected president may nominate judges based on their judicial philosophy and elected Senate may confirm or reject nominees on that same basis.

Once selected, however, these justices are to be independent of the political actors who

selected and confirmed them. Partisan court packing is the illegitimate effort to interfere with this independence. All illegitimate is the threat of court packing.

Suppose Congress passed a law stating that if the Supreme Court overturns Roe v. Wade in the pending case of Dobbs v. Jackson Women's Health Organization, there shall be created three new Supreme Court justices' positions which can then be filled immediately by President Biden. If your theory of Congress' power to set the number of justices cannot say why such a law is unconstitutional, there's something wrong with your theory. But wait, there's more.

In addition to being necessary, the Necessary and Proper Clause requires laws to be proper. In NFIB v. Sebelius, Chief Justice Roberts wrote, quote, laws that undermine the structure of government established by the Constitution are not consistent with the letter and spirit of the Constitution and therefore are not proper means for carrying into execution

Congress' enumerated powers. Undermining the structure of government established by the Constitution is exactly what partisan court packing does.

For this reason, it is not a proper exercise of Congress' power. To sum up, partisan court packing, court expansion is unconstitutional because it is neither necessary to the accomplishment of legitimate legislative purpose nor proper insofar as it undermines our system of separation of powers and the independence of the judiciary. In 1937, the Democratic-controlled Senate Judiciary Committee issued a report on FDR's court packing scheme.

Let me close my remarks with their closing words. Quote, under the form of the Constitution it seeks to do that which is unconstitutional. Its ultimate operation would be to make this government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the government choose to

say it is -- an interpretation to be changed with each change of administration. It is a measure, which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America. Thanks.

CHAIR BAUER: Thank you very much, Professor Barnett. Our next witness is Professor Daniel Epps. He's the Truman Professor of Law at Washington University in St. Louis. Professor Epps, the floor is yours.

MR. EPPS: Thank you, Co-Chair Bauer, for that introduction, and thank you also to the other Commissioners for the opportunity to speak today. So I've been asked to talk about court expansion and other forms of the composition of the Supreme Court. In my remarks today, my goals isn't to argue for any specific reform, although I am someone who thinks that reform is necessary. Instead, I'm going to try to frame the current debate around reform and offer some thoughts aimed at helping the Commission as it thinks

through various reform possibilities.

So I'm going to have three points. First, I'm going to explain what I see as the problems that are the underlying cause of current calls for reform. Second, I'm going to explain what reforms and what other changes might address the problems I've identified. And third, I'm going to offer a cautionary note regarding what this Commission might accomplish.

So first of all, what's the problem? Why do I and a number of others think some kind of reform is needed? And so one response is just to say that this is all politics and people are unhappy with who's on the Court right now.

And obviously, there's something to that. But I think that's an imperfect explanation. People's appetite for reform of any system is going to depend heavily on how much status quo arrangements work for them. But that observation doesn't tell you whether the critics of or the defenders of the status quo have it right.

Moreover, there have been plenty of periods when one side or the other side wasn't happy with the composition of the Court but didn't produce calls for reform like we're seeing now. Something now is different. The very existence of this Commission I think is evidence of that. What is that?

And so in my view, the current situation is the combination of a number of factors. Some are older parts of our system, and some are more recent developments. First is life tenure. Life tenure means that vacancies are the result of unpredictable deaths and strategic retirements.

Second, justices tend to serve for lengthy periods which has crept up in recent decades. Third, the Court with nine justices is relatively small such that any one appointment is quite important. Fourth, the Court is very powerful.

It regularly declares federal and state statutes unconstitutional, and it wades

into some of the most controversial issues in our polity. And then finally, our political and legal cultures are both increasingly polarized. And as a result, nominees by the two political parties tend to vote quite differently from one another, though not always in ways that party affiliation might suggest.

But if you add up all these features together, what do you have? You have a system that distributes a huge amount of power in a way that seems unpredictable, undemocratic, and unfair. Appointments are extremely rare, but they're quite consequential given the small size of the Court, the length of tenures, and the growing differences between legal cultures.

And yet there's -- opportunities to appoint justices don't have any set affiliation -- set correspondence to a democratic collection. Some presidents get to appoint no serving Court justices, some get to appoint several. And I think the system is very hard to justify from first principles.

It's a system where the losers who are currently Democrats are starting to ask good questions about why they should continue living under a system that produces results like this and that they see as undemocratic and unfair. So if that diagnosis of the problem is correct, what might be done about it? Well, one possibility is just to tell losers to get over it.

The problem is that they may not. It's not obvious why they should. And to the extent that they don't, I think we're going to continue to see calls for reform.

I talk through in my written remarks some of the alternatives for reform. I think one would be regularizing appointments in some way so they correspond to presidential elections more consistently. Another is figuring out some way to share power over the Court so that there's some fixed relationship between the seats and the different political coalitions in our country. A third possibility is disempowering the Court in some ways so that it becomes less important and

less consequential. And then a final possibility is trying to rebuild greater consensus in our legal culture.

Rather than say which of those is best strategy, I would just urge the Commission to try to take any reform possibilities off the table. There's currently a lively debate happening among elected officials about certain Court reform, some of which would be attempted to be implemented through statute. There's a wide range of views about the different possibilities and their constitutionality.

And I think some of the constitutional arguments depend very much on the choice between legal methodologies that is, in part, driving some of the underlying causes for reform. So I'd urge the Commission to tread carefully here. Thank you and I look forward to your questions.

CHAIR BAUER: Thank you very much, Professor Epps. Our next witness is Professor Michael Klarman. He's the Charles Warren Professor of Legal History at Harvard Law School.

Professor Klarman, the floor is yours.

And I understand there may be some mechanics here that we have to address. Let me know how your audio is working. We are experiencing audio issues here. So I understand you might call in. I might move to the next witness and then return to you when you come back. Very good, sir. Thank you. See you shortly.

So at this point, I will turn to Marin Levy. She is the Professor of Law at Duke University School of Law. So Professor Levy, five minutes is yours.

MS. M. LEVY: Thank you, Co-Chair Bower, very much. So, I want to begin today by framing the discussion. Court expansion implicates fundamental questions about the role and operation of our nation's highest Court.

So, as I see it, these questions include whether expanding the Court would harm the institutions legitimacy, whether expansion would prompt a series of expansions in the

future, whether an expanded Court could function well as a single decision-making body, and whether expansion would contradict existing constitutional norms and conventions.

So, I see the role of the Commission as trying to gain purchase on these complex questions, and then a larger background question. Namely, how should these different considerations be weighed against each other.

It is no easy task that the Commission has been given, and I hope that the public can recognize this.

So, I think in addressing these questions, it can be valuable to take a comparativist approach. So, in June, and then earlier today, the Commission heard testimony about the experiences of judiciaries in other countries.

So, my testimony focuses on the experiences of judiciaries in our own country, by noting recent attempts and success in expanding and contracting state supreme courts.

Now, it has long been said that when it comes to the United States Supreme Court, there is a robust, constitutional norm against Court packing. So, as some scholars have put it, Court packing simply cannot be done.

So, against this backdrop, I think it's particularly noteworthy that there have been numerous attempts to expand and contract courts of last resort at the state level in recent years.

So, specifically, in a study that I conducted focusing on the period between 2007 and 2019, I found that there had been at least 20 different attempts in 11 states to change the size of the court of last resort.

So, in the majority of these cases, there was at least a colorable claim that the attempt was made to change the ideological composition of the court. That is, to shift the court further to the left, or, more often as was the case, further to the right, sometimes in direct response to decisions that have been

handed down by those courts.

Now, of particular import, two of those attempts were successful. So, in 2016 in Arizona, Republican lawmaker introduced House Bill 2537. That was meant to expand the state supreme court from five to seven justices.

The Republican-controlled legislature approved the measure, with no support from Democrats. Nor was it supported by any of the court's five justices, with the chief justice writing to the governor saying that additional seats were not required by the court's caseload, and in fact would be unwarranted, given how costly the proposal would be.

Critics called the bill an attempt to bring back court packing. And over these objections, the governor signed the bill into law and the two new justices that he appointed took their seats in December of 2016, moving the court further to the right.

I would note also, that attempts to expand the supreme court were successful in

Georgia. So, in 2016 the Republican-controlled Georgia General Assembly considered a sweeping reform bill which, among other things, sought to expand the court from seven to nine justices.

And there was speculation that the Republican governor at the time was interested in expansion for partisan reasons.

So, at that time, Georgia had four Democratic, but only three Republican, appointees on the bench.

The General Assembly passed the bill, and by 2017 the governor had filled those two new seats, resulting in what was called more conservative meaning court.

Now, stepping back, I think the difficult question here is, how should these state court experiences inform the current debate surrounding the United States Supreme Court?

So, returning to the questions noted at the outset, I think one observation is that the norm against court packing at the state level is not particularly robust.

At least it seems telling that political elites were willing to support Court expansion, and seem to have faced no significant sanctions for doing so.

That said, I would stress that we currently lack data that would help us to answer other questions.

So, for example, we do not know if public opinion of the courts in Arizona and Georgia shifted pre- to post-expansion. We, likewise, do not yet know if there will be retaliatory attempts to pack or unpack those courts in the future, should party control the state legislature and governorship change.

I think even if we did possess this information, there is still a complicated question about the extent to which lessons from the state courts translate to the federal courts.

And so, quite plainly, there are differences between the two court systems. And just to pick one example, the most common selection method for state supreme court justices

is election, and not appointment.

And so, arguably, the norms around judicial independence are weaker for state courts.

That said, I would also stress that it's important to not overstate the differences between the two.

So, as I'm happy to discuss further, in the states in which expansion did occur, the governor appointed the justices in the first instance. And other differences, I think, become less salient upon closer examination.

So, in some, I think it's crucial to consider state courts. They're vital judicial systems in their own rights, and I think that they can serve as helpful laboratories for the federal courts.

But I think that the Commission would be wise to note that we do not yet possess all of the data from these experiments, as it were, and there are difficult questions about whether those results could be generalized to the US Supreme

Court. Thank you.

CHAIR BAUER: Thank you very much, Professor Levy. I'm going to double-check now with Professor Carmen. I'm going to do a sound check with you here.

Still having audio issues. So, if you will check, we may be able to just connect you on an audio-only basis if you check with our Federal Designated Officer Dana Fowler, she can walk you through just to be sure that you can connect with us. And I'm just going to go now to the next witness and come back to you, sir.

Our next witness is Neil Siegel. He's the David W. Ichel Professor of Law and Professor of Political Science at Duke Law School, where he's also the Director of the DC Summer Institute on Law and Policy. Professor Siegel, the floor is yours.

MR. SIEGEL: Thank you, Co-Chair Bower and Commission members. I'm honored to be here.

I'm a constitutional law scholar who writes, among other topics, about issues of

judicial role, independence and power, including court packing.

I also served as special counsel or advisor to Democratic Senators on the Judiciary Committee during the confirmation hearings of Chief Justice Roberts, and Justices Alito, Gorsuch, Kavanaugh and Barrett.

In my written statement, I endorse term limits for the justices, and greater diversification of the courts of appeals. But now, I will talk about court packing.

Court packing is common defined as increasing the Court's size for the purpose of influencing its decision-making going forward. So defined, court packing is an extreme act.

It would severely undermine the Court's independence, and almost always risk its legal and public legitimacy.

Undermining its legitimacy would, in turn, impair its ability to perform key functions, like ensuring the supremacy of federal law, reducing the danger of authoritarianism,

vindicating individual rights, and sustaining the rule of law.

The Court isn't the only government institution responsible for achieving these purposes. Nor does the Court perform all its functions well all, or even most, of the time.

In the contemporary U.S., however, the Court is the best institution we have for at least partially achieving most of these goals, which is why students learn about them in law school.

My point is not that the Court is entirely independent of politics. Rather, it's that the Court is generally more distant from politics than the available alternatives.

Court packing should, therefore, be reserved for extreme situations. I've identified three in the framework I outline in my written statement.

First, where adding seats would follow a prior instance of court packing, and so be a proportionate response to a norm violation by the

other political party.

Second, where court packing would restore the Court's legitimacy, after Justices had squandered it by issuing extreme decisions that decimated basic institutions, or tore at the fabric of constitutional law.

Or third, where court packing would meet a national crisis, more important than minding the Court's legitimacy in the short term.

A crisis involves not just high stakes for fundamental values, but also a situation that's distinguishable from mainstream, substantive disagreements.

The strongest argument for current proposals to pack the Court is that they respond proportionately to the stark politicization of the confirmation process by Senate Republicans, that began with their refusal to consider any Supreme Court nominee of President Obama, and that culminated with their confirmation of Justice Barrett.

The conduct of Senate Republicans was

indeed problematic, for many of the reasons court packing is almost always problematic. It was a norm-violating, significant escalation of prior questionable conduct regarding judicial nominations.

And it was followed by a hypocritical refusal to be bound by their own stated reasons for action.

I fear it damaged the Court.

But it's not clear why such conduct would potentially justify adding four seats, as opposed to two.

It's also not clear that adding two seats would be a proportionate response, given the different nature of court packing, and the greater harm it would likely do to the Court's ability to function.

Only court packing creates the opportunity to appoint four or six justices all at once, which helps explain why most Americans view court packing as different in nature from, and as more threatening, to the system than

playing constitutional hardball with open seats on the Court.

Nor do the other potential justifications for packing the Court currently exist.

The conduct of Senate Republicans might justify the refusal of Senate Democrats to consider Republican Supreme Court nominees in the years ahead, or to confirm Democratic nominees just before elections, or in the lame duck session after them.

But disturbing this ability of the Court's composition for the first time in 150 years would risk severely damaging both the progressive court, and would presumably result in future courts. It would likely inject threats or promises of court packing into national election cycles, and unleash additional rounds of packing when the opportunity arose.

No one can know now how extreme the current Court will become. Nor can anyone know now that it will be too late to pack the Court if

extreme decisions or crises do emerge. Nor can anyone know now that Republicans will pack the Court as soon as they feel the need and have the power.

A President and Congress that has seen the very worst about these matters would be engaging in a dangerous form of reasoning, and would be practicing a crude legal realism that could become a self-fulfilling prophecy.

The framework I'm offering for approaching court packing is less politically charged than some others, but people can of course still disagree about how to apply it.

I offer it not to end this disagreements, but to channel them into potentially constructive conversations about when court packing is justified, and I hope we will have such a discussion in a little bit. Thank you.

CHAIR BAUER: Thank you very much, Professor Siegel. I'm going to now check in with Professor Klarman. Are we operational?

MR. KLARMAN: Can you hear me now?

CHAIR BAUER: We can hear you, sir. Please?

MR. KLARMAN: A small miracle. American democracy is under siege today and the assault comes from one of our great political parties. Let me summarize and then explain the connection to the Court.

Former President Trump displayed an openly authoritarian bent attacking the press as the enemy of the people, assailing judicial independence, politicizing the DOJ, delegitimizing elections, and praising foreign autocrats.

Prior to the 2020 election, he refused to commit to a peaceful transition of power, or to condemn White supremacists.

After his defeat, he lied that the election had been stolen, then incited violence against Congress.

The GOP proved astonishingly complicit with Trump's authoritarian efforts.

Congressional Republicans did not want the 2016 Trump campaign's involvement with Russia investigated, were untroubled by Trump's systematic obstruction of that investigation, rejected impeachment, despite Trump's shakedown phone call to the Ukrainian President, and mostly endorsed or tolerated his lies about a stolen election.

Immediately after January 6th, GOP leaders condemned Trump. But since opinion polls revealed that 60 to 70 percent of GOP voters believed the election was stolen, they have mainly changed course.

Despite video footage showing hundreds of Trump supporters storming the Capitol, chanting hang Mike Pence, and injuring nearly 150 police officers, GOP leaders today minimized the violence, blaming it on Antifa, and denied responsibility.

They purged Liz Cheney from her leadership position for denouncing Trump's incitement of the riot, and they have killed the

independent commission proposed to investigate it.

The forces responsible for degrading American democracy described in my written testimony have percolated for decades, but first manifested themselves around 2000 in state-level anti-democratic practices.

Republican legislature suppressed votes through restrictive voter ID laws and voter purges. They grotesquely gerrymandered legislative districts, eviscerated the powers of democratic governors, and defied the results of inconvenient voter initiatives.

Their most recent and pernicious assault on voting rights features of Georgia law, making it harder to obtain and cast mail ballots, drastically reducing the number of dropboxes around Atlanta, expanding the power of poll watchers to object to voters, and criminalizing offering food or water to voters in line.

These recent measures also contain provisions facilitating the outright theft of a

future election, by authorizing legislatures counting voting officials essentially at will, and expanding their control over state election boards.

Across the country, GOP candidates for office are endorsing Trump's election lies. Sixty-one percent of conservatives believe that GOP officials who deny widespread election fraud are part of a coverup.

The idea that an American presidential election could be stolen seemed absurd in 2020, but is no longer so.

Democracy depends on peaceful transitions of power and the repudiation of violence. Yet, today the threat of violence pervades our politics.

In addition to the brutal Capitol assault by Trump loyalists, Pennsylvania's Republican Senate leader admitted that he feared his home would be bombed if he defied Trump's efforts to overturn the election results.

Several Secretaries of State now

require bodyguard protection in the face of extensive death threats.

Rather than resisting the degradation of democracy, the Supreme Court, under GOP control, has largely facilitated it.

First, Republican justices have directly furthered GOP political advantages. In 2013, they effectively nullified the pre-clearance provision of the 1965 Voting Rights Act, unleashing a wave of Southern Republican voter suppression.

Also, on the proffered basis of the state's interest in reducing voter fraud, which is virtually non-existent, Republican justices have upheld voter purges and strict voter ID laws that disproportionately disfranchised democratic constituencies.

They've made it difficult to prove intentional race discrimination in legislative districting, and curtailed the VRA Section 2, thus greenlighting the most concerted assault on voting rights since Jim Crow.

In 2019, they declined to limit partisan gerrymandering, which today mostly benefits Republicans.

Second, the Court's campaign finance rulings have, based on contrived constitutional rationales, unleashed an enormous flow of money into politics, benefitting wealthy donors and corporations, and leaving working class Americans with little political influence.

Large majorities today favor paid parental and sick leave, an increased minimum wage and higher taxes on millionaires, yet such policies are consistently blocked, mainly by Congressional Republicans representing the interests of wealthy donors.

Third, today's Republican justices have consistently furthered the GOP's radical libertarian policies, which themselves have helped erode democracy.

They've undermined labor unions, protected corporations from class action litigation and punitive damage awards, upheld

arbitration agreements protecting corporations from lawsuits, and curbed the reach of federal antitrust and anti-discrimination laws.

Today's Republican justices are as pro-Chamber of Commerce as any in history. My written testimony elaborates on arguments for Court expansion to safeguard democracy. Thank you very much.

CHAIR BAUER: Thank you, Professor Klarman. And now, I would ask the commissions that will be doing the questioning to turn their cameras on, please.

And we will begin with Commissioner Tara Grove. She is a Charles E. Tweedy, Jr. Endowed Chairholder of Law and Director of the Program in Constitutional Studies at the University of Alabama School of Law. Commissioner Grove, the floor is yours.

COMMISSIONER GROVE: I would love to take over right now, but I think Co-Chair Rodriguez was going to go first.

CHAIR BAUER: We can do that too.

CHAIR RODRIGUEZ: Sure. I'll start. So, Professor Klarman, I'd like to start with you. In your written testimony on page 15, you said that the quickest way to restore a stable equilibrium after one party has repudiated an aura of cooperation, is to reciprocate in kind, and that failing to do so only incentivizes more of the norm-breaking behavior.

But then, you also say that Republicans will expand the Court the first chance that they get.

And given the Republican Party that you just described in your five minutes, it's hard to imagine that they wouldn't also attempt to expand the Court in retaliation, if the Democrats were to do that.

As you can imagine, and as a lot of witnesses have suggested as part of the debate in which you're immersed, one of the concerns about Court expansion is that it will generate a back-and-forth, especially in our hyper-polarized climate, that will undermine the Court's

independence and legitimacy, and lead to an unnecessarily large Court.

So, do you actually believe, and why do you believe, that if the Democrats were to pack the Court, that might actually return us to some kind of equilibrium? Or is there some other motivation for doing that?

MR. KLARMAN: So, there are three responses to the argument that Republicans will simply retaliate in kind. The first argument is, as you quoted me saying, is that the Republicans started this. Mitch McConnell stole a seat for the first time in history in 2016. Democrats didn't start this.

The second argument is, if you look at Senate Minority Leader McConnell's behavior over the last 15 years, it's quite clear that he will break as many norms as necessary to retain Republican control on power.

That's not just true about stealing a Supreme Court seat, it's true about blocking all of Obama's court of appeals appointments in the

second half of his second term. It's true about not allowing agency heads to be appointed. It's true about not allowing Republicans to vote for a relief bill during the second worst recession in the last 100 years.

So, it's clear that Republicans will do this regardless of what staff Democrats do. And as Professor Levy has shown, the Republicans are already doing this at the state level.

So, it can't be a good argument for Democrats not to do this because Republicans will simply do it. It's clear McConnell will do this regardless.

The third argument, which I think is mostly responsive to your point, is that it is possible we could move past an epic where the Republican Party is so anti-democratic, so unwilling to disavow violence, so willing to suppress votes throughout the country.

If you simply enfranchised everybody and ended the extreme gerrymandering, ended the vote suppression, made it so that African-

American didn't have to wait five or ten hours in line in Atlanta to vote, enabled university students to vote, rather than doing what Republicans are doing in Florida, Texas, Wisconsin, New Hampshire, to make it difficult for them to vote, you would actually have a world where the Republican Party needed to respond to voters, rather than relying on a smaller and smaller minority of support.

They'd have to change their policies, make them less extreme. That's what we're shooting for. The goal here is not to advantage the Democratic Party. The goal here is to protect democracy.

But in a world where one party has essentially given up on its commitment to democracy and the other party is all we have left, it may be necessary in the short term to advantage capital D Democrats in order, in the long term, to protect small D democracy.

CHAIR RODRIGUEZ: So, I guess there are two questions that would follow from that.

The first is a return to my original question, the motivation for my question, which is that, what would prevent a subsequent Republican President and Senate from expanding the Court with their nominees, such that it's not only unpredictable what the Court would look like if you open this door, but assuming the door is already going to be open, which is what you're suggesting would happen in the future, even if Democrats don't act now, what happens to the Court if that process proceeds and iterates?

And the second question, which I think is equally important, you've also said in your testimony that there are a number of structural features that make it so that we live in a context of the military rule, and that relates to the structure and composition of the Senate and the Electoral College.

And the kind of mass enfranchisement that you're envisioning can't just depend on the Supreme Court. It has to depend on the state legislatures, as well as on Congress enacting

legislation that in fact enables the kind of expansive voting that you envision.

And yet, you detail structural obstacles to that. So, how should we think about the actual impediments to what you're describing and using as a justification, or taking a step that might actually have negative consequences for the judiciary itself?

MR. KLARMAN: Well, I can start with the second question, and then work back to the first.

Just so that people who are observing and are not aware of what we're talking about, the U.S. Senate is the most malapportioned legislative body in the world. There's no good argument today.

There actually wasn't a very good argument in 1787 for why Wyoming or Delaware in 1787, with a very small percentage of people -- Wyoming has 600,000 people, California has 40 million -- there's no good argument for why they both have two Senators.

The Electoral College system has no good justification today, there's no good reason, why Joe Biden, if he wins by seven million votes, should not securely control the Presidency, rather than getting in by the skin of his teeth.

Forty-three thousand votes and three states shifting, and Trump would have been reelected.

Those minoritarian features of the system translate into a Supreme Court where even though the country clearly has center-left majority, indicated by the fact that Democrats have won seven of the last eight Presidential elections and the 50 Democratic Senators represent 41 million more voters than the 50 Republican Senators, that's translated into a Republican majority on the Court.

Of the justices on the Court, five of the six conservatives were nominated by Presidents who did not enter the White House with even a plurality of the popular vote, and four of them were confirmed by Senates that did not

represent a majority of the vote.

So, since you can't solve the problem of the Senate and the problem of the Electoral College without a constitutional amendment, and it's impossible practically to get an amendment when one of the two political parties benefits from the status quo, we have a problem.

You can solve the Supreme Court problem pretty clearly by passing a statute. It's been done many times before. There's no very strong argument that it would be struck down by the Court, and if the Court did strike it down, then something would have to be done in response to that.

The Court would invalidate voting rights legislation, or quite plausibly might. You can solve the problem at the state level by enfranchising people and making sure that states don't do what Georgia is doing.

Make sure that Georgia and Texas don't get to eliminate mobile voting units, all-night voting, make it more difficult to obtain and cast

absentee ballots, so forth and so on.

But the Supreme Court might well strike that down. So, if you really want to solve the problem of democracy, you're going to need to make sure that the Supreme Court doesn't simply entrench the Republican control.

What happens to the Court -- I mean, everything that I say is premised. I'm not making a bipartisan appeal. Everything I say is premised on the understanding that we are facing an existential crisis in democracy that we have not faced anything like this since the 1850s.

The Republican Party is no longer an ordinary democratic system party. It's not willing to repudiate extremists, it's not willing to repudiate violence, and it's willing to suppress votes on a whole scale basis.

If we could solve the problem, stop the Republican Party from doing that, enfranchise people, with a couple of election losses, the Republican Party would change its stripes, in the way that many parties have in the past.

The Democratic Party used to be the party of open White supremacy and the Republican Party used to be the party of emancipation and Black suffrage.

So, political parties will change in response to electoral incentives. The problem today is that the electoral incentives don't work because the Republican Party can maintain control of at least one branch of the national government without responding to the concerns of the median voter.

That's the problem. And the reconstituted world that I'm imagining, where we begin to secure our democracy, will go back to normal with the Supreme Court. And hopefully, neither party will be so immune to the constraints of democracy that they'll think it's necessary to retaliate. All Democrats are doing is trying to protect democracy.

CHAIR RODRIGUEZ: So, what I'm trying to understand is how we get to that point of restoring the democracy, and what role Court

expansion plays in that process.

Is your vision one of an expanded Court with new appointments that are progressive in orientation, pushing back on and invalidating state laws that are disenfranchising voters in a number of opinions that ensure this mass enfranchisement that you're seeking?

And what would limit that majority to those kinds of laws? What other forms of judicial review are part of this vision?

And then, how would that fit into the back-and-forth between the political parties, who are going to be fighting for their lives under your vision?

MR. KLARMAN: So, as I made clear in my testimony, if you want a sort of bipartisan solution to an appointment system that I think makes no sense at all -- the system we've inherited from the framers -- 18-year staggered term limits would be a great way to go forward.

That would ensure that we don't have the craziness of justices strategically choosing

the presidents who choose their replacements, that we don't have randomness -- one President, like Taft, gets five or six appointments, Jimmy Carter gets none -- that would be a long-term solution to that problem.

I'm not invested in any particular form of judicial review, as Niko Bowie testified to you. It's not clear to me that we wouldn't have a better system if we just eliminated the Supreme Court striking down statutes.

But I'm not advocating for that. What I want right now is a Supreme Court that will not do what the Supreme Court has done in the last 20 years, uphold voter suppression, strike down the Voting Rights Act, uphold gerrymandering, make it impossible to take money out of politics, and so forth and so on, and do the handiwork of the Chamber of Commerce's political agenda.

That's what I'm shooting for. And a court that was appointed that had four new Democratic appointments, would be a court that in the short-term would guarantee that we have

greater protection for democracy in that sense.

In the long-term going forward, I think there are all sorts of very difficult questions. But it's not clear to me -- I'm mostly in agreement with Niko Bowie -- judicial review is not a particularly sensible institution.

It basically takes nine unelected, elderly people and says, you go and make abortion policy, you make affirmative action policy, you decide on school prayer, you decide on campaign finance reform.

That's not a very sensible position and it doesn't have much to do with law. Everybody understands who teaches constitution law, it's almost all about politics, at least on those very deeply contested social issues.

We know how the Court's going to vote on an abortion case or a school prayer case, or an affirmative case. And that's a weird way to run a democracy. So, that's a larger point.

But right now, we have an existential

crisis in democracy, and I think the Commission should pay attention to that. I think every American citizen should pay attention to that.

CHAIR RODRIGUEZ: Thank you very much.

CHAIR BAUER: Commissioner Rodriguez and the previously introduced Commissioner Grove, the floor is yours.

COMMISSIONER GROVE: All right. Well, thank you very much. Thanks to all of you for your written testimony, and also your oral statements today.

Professor Barnett, I want to start with you. You argue that what you call partisan court packing is unconstitutional. And one of the things I'm trying to figure out is how we identify the court reforms that are partisan, versus motivated by something else.

And just to mention a couple of historical example, as you note, in 1807 and 1837 Congress expanded the size of the Supreme Court, in part because more judges were needed for a growing country.

But the timing of those court expansions was arguably quite partisan. So, in 1807 the democratic Republicans, who controlled Congress, expanded the court when their party leader, President Thomas Jefferson, would make the appointment.

In 1837, Jacksonian Democrats, who controlled Congress, expanded the Supreme Court by two members when President Andrew Jackson -- their party leader -- would make the appointments.

In 1937, as you note, President Franklin Roosevelt initially supported his court expansion proposal, which might have grown the Supreme Court to 15 members. He initially supported that by saying, hey, they need more people to do the job.

But soon thereafter, he acknowledged that the real problem, in his view, was the substantive decisions of the United States Supreme Court, and specifically, they're striking down his New Deal program.

On March 9, 1937, President Roosevelt gave a radio address to the nation, one of his fireside chats, where he said, quote, we must take action to save the Constitution from the court and the court from itself. Endquote.

Now, I'm not asking you to comment on these specific historical examples, or any of the others. I mention these examples just to tee up the question, a lot of court reform, like a lot of legislation, is based on a variety of rationales and motivations, some of which may be partisan, some of which may be other things.

So, I'm trying to figure out, do you think it might be hard for either judges or lawmakers to distinguish partisan court packing from other court reform attempts?

MR. BARNETT: Thanks for the question. It's not always easy to figure out exactly whether legislation has been motivated by pretextual reasons. But we do look for pretext all the time. We look for laws that may have had an ostensibly public purpose, but actually have a

desire to discriminate against particular individuals.

And we do so by employing some kind of means-ends fit. So, we ask the government, tell us what you're legitimate end is, and we'll evaluate the means you've chosen to achieve that end, to see if there's a close enough relation that we can be confident that you're actually doing it for the reasons you say.

I do think if you look at the history of court expansions that Professor Braver did in the article I cite in my testimony, you see that virtually all of the early examples were ones that were associated with adding new states to the country, and the need to add more circuit court judges, or circuit courts of appeals, which justices staffed in those years.

So, you need to expand the number of justices to handle the court of appeals system, the circuit court of appeals as the rode circuit.

He does, of course, cite two examples, or three examples, of attempts at partisan court

packing. One was associated with the outgoing federalist contracting the number of justices, that was then expanded back to the original number by the Republicans who came in.

That he accounts as a failed examples of court packing. And the last one, most recently with President Roosevelt, was a failed one because his own party rejected this for the reasons I quoted in my opening remarks.

The one successful example was the Republicans who took seats away from, or constricted the number of seats to prevent President Johnson from obstructing reconstruction by appointing judges, and then that number was restored when President Grant became President.

That was the one example in our history where we can be pretty sure that this was motivated only by partisan advantage. But that one example does not make for a norm.

And for 150 years, we have not accepted expansion as a legitimate norm. And the only time that norm was really tested was with

FDR. And, as you say, he made it quite clear what his real motivations were.

And the agedness of the judges and the degree to which they could handle their workload were mere pretext.

And it is up to the courts. But at the very minimum, it's up to you, and it's up to this Congress, and it's up to the Senators in the Senate, to decide whether they think that the reasons that are being offered by, in this case, House Democrats, for court expansion, are legitimate, or are they pretextual.

COMMISSIONER GROVE: So, to follow up on that, I'm wondering how far your interpretation of the Necessary and Proper clause could take us in the world of court reform.

Most court reform depends on the Necessary and Proper clause. That's true, for example, of Congress's power over federal jurisdiction.

So, the Supreme Court's appellate jurisdiction under Article 3 is subject to such

regulations and such exceptions as the Congress shall make.

But Article 3 doesn't confer power on Congress. Instead, it comes from the Necessary and Proper clause, as many scholars, including many prominent originalists, have acknowledged.

Article 3 shapes that power, but it comes from the Necessary and Proper clause. I'm wondering, would you say the same thing about what might be called partisan jurisdiction stripping?

And I ask this because throughout our history, most jurisdiction-serving measures have split Congress along partisan lines.

One political party has predominantly favored the measures, the other political party has predominantly opposed them. Do you think those measures are unconstitutional on that basis alone?

MR. BARNETT: They might be. I haven't actually studied jurisdiction stripping enough to form an opinion, or the history of it.

I do know there have been Supreme Court opinions that have questioned whether in fact jurisdiction stripping is necessarily constitutional under all circumstances, or whether it might be improperly motivated.

I even note that Chief Justice John Marshall expressed a doubt about whether jurisdiction could be stripped from subject matters that the Constitution gives to courts, rather than come from Congress themselves.

But I don't have an opinion on that today. I do think that every exercise of the Necessary and Proper clause has to be channeled through an evaluation of whether it's a necessary means to a legitimate end, and whether in fact it's a proper type of law that is otherwise going to be in conflict with either the letter or the spirit of the Constitution.

So, it would all be subject to that kind of scrutiny.

COMMISSIONER GROVE: Thank you. Professor Levy, thank you so much for all your

information about the state courts.

One of the questions that I had for you is, what was motivating these efforts to, as you describe it, unpack or pack the state courts? In a couple of cases you mentioned, recent decisions by the state supreme court, was that the primary trigger? Was it something else? Or is that another thing we don't quite know yet.

MS. M. LEVY: Thank you. That's a terrific question. So, just going back to your colloquy with Professor Barnett, I think we don't always fully know the motivation. So, going off of what we can tell, certainly it seems like some of these attempts were meant to be in response to opinions handed down by the state supreme court.

In other instances, you can see lawmakers saying something to the effect of, this is going to be something of an insurance policy, so if we can swing the state court, a few justices to our particular side, that will just help us in the future.

I think Montana is an example, where

we have a hearing, and so you can hear a little bit more from the lawmakers who proposed it.

So, there was hope that a more conservative court would be more favorable to tort reform. And then also, there was more about redistricting efforts that might be taking place in that state in the future.

I would also say, again going back to your earlier exchange, part of what's difficult here is that oftentimes we have statements from the governor or from lawmakers that these measures are necessary in the name of case management.

That's a common refrain. This also, of course, goes back to FDR himself. But I think that there's enough evidence in these instances, that there's at least some kind of partisan motivation that really is prompting the particular measure.

COMMISSIONER GROVE: And one more question. You have noted that these efforts to either expand or contract the state courts seem

to be on the rise. There have been more of these.

But most of them have failed. I think you mentioned two out of twenty actually were enacted. I'm wondering, what effect do you think court expansion at the federal level might have on the states?

Do you think, for example, that if Congress were to expand the U.S. Supreme Court, that would make it easier for state lawmakers to enact similar measures at the state level?

MS. M. LEVY: So, I think that's entirely possible. And so, just to step back with the question, it's certainly true that it seems these efforts are on the rise.

So, this is a comment made by Bill Raftery, who's at the National Center for State Courts. He had noted that if we look over the last few years, there's just a significant uptick based on where we had been in the decades previously for these attempts.

And so, certainly if we were to see an

expansion of the Supreme Court, it's possible that that would be seen as some kind of green light or an encouragement on the state side.

That said, we may already be seeing that. So, as I mentioned, we should care very much about potential for retaliatory attempts to expand or contract courts in the future.

It's hard to know based on these examples if we will see that. But I would say if we expand our lens a little bit and look to the courts of appeals, there's already some evidence of this.

So, in North Carolina, for example, back in 2017 the General Assembly passed legislation to unpack the court of appeals to take away three seats.

And part of what was said at the time, in addition to the sort of lip service paid to key management, was that this was really in response to what Democrats had done in 2000, by expanding the court to begin with.

So, there are at least some data

points out there that there's appetite for retaliation. So, I think we may see that well on the state side anyway. But that may increase if we have expansion on the federal side.

COMMISSIONER GROVE: Thank you.

CHAIR BAUER: Thank you very much, Commissioner Grove. And our next Professor lined up to ask questions is Adam White. He's a Senior Fellow at the American Enterprise Institute, and he's currently the co-director of the George Mason University Gray Center for the Study of the Administrative State. So, the time is yours, Professor White.

COMMISSIONER WHITE: Thanks, Chairman Bauer. And thanks to all of our witnesses for their testimony today.

My questions are directed at Professor Epps and Professor Siegel. A lot of the questions that we've heard so far on this panel, much of it goes to just practical questions about the reform proposals, and also the work of the Commission, in evaluating the context surrounding

the proposals.

First, Professor Epps, you've proposed, among other things, the balanced bench approach of expanding the Court to ten sitting justices, five affiliated with the Republican Party, five affiliated with the Democratic Party. And then, those ten select five more.

And I'm just curious about the practicalities of that initial allotment of the ten justices, the process for adding the tenth, and also for affiliating those first ten justices with political parties. Could you elaborate on that a little bit?

MR. EPPS: Sure. Although I don't have my co-author with me present, and so I'm going to be limited in how much I commit to, in terms of the proposals.

I think in our writing about that, we kept some of those details a little vague in order to suggest a lot of different possibilities.

I think one thing to note is there are

arrangements like that that can emerge, that are not enshrined into law but are the subject of just political norm.

So, there are other countries that follow norms like that. So, one example -- I'm not a comparativist, but I've read a little bit about -- is the German Federal Constitutional Court, where for a long period of time there was an informal agreement, in terms of how the seats would be divvied up among governing political coalitions.

So, I think there's a lot of different possibilities for how to do that. In terms of the law, we have independent agencies where there are often rules that specify no more than X number of commissioners can be of the same political party.

I think a wide range of ways that could be accomplished. And I think that in terms of what I've written about for this hearing, I think the thing -- I want to put that in the larger context of what I call kind of power

sharing arrangements.

That's one approach we could have to the court is say, rather than treat this as a prize that one side can capture, treat this as something where this important source of power, we really need to figure out some way to divvy it up among the warring factions in our polity.

COMMISSIONER WHITE: Thanks, Professor. The first panel had a couple of witnesses representing the members of the Supreme Court bar, thinking through various aspects of the reform proposals.

And in their report, as noted this morning, they were critical of expanding the Court anyway. And in the report they do point to some practical issues. And I don't expect you or any of the witnesses to have read that report closely. I only looked through it last night.

But I'd be curious for your reactions. They do say on page 91 of the report, we see no institutional benefit to raising the number of justices above nine. Indeed, based on our

experience as practitioners, and some of us as judges, most of us believe that increasing the size of the Court above nine would be counterproductive.

For example, it'd make oral argument less orderly. It would likely harm deliberation within the Court, and might lead to more fragmented rulings with multiple rationales and less clarity in the law.

And I'm sorry to put you on the spot and I'm sure other witnesses might have thoughts on this if we circle back to it, but I'm just curious your reactions to those sorts of practical concerns about a court of more than nine members.

MR. EPPS: Sure. So, I have a lot of thoughts about that. And I think one thing I'd note is, serving Court practitioners are an important source of information and wisdom about the Court but they have a certain perspective that might limit their ability to candidly evaluate the institution.

I think that those were a number -- I haven't read that written statement but you identified a number of judicial concerns: oral arguments would be disorderly, deliberations would be hard, and you might have fragmented rulings.

I mean, I think that you would need to weigh those costs. First of all, you'd have to figure out the extent to which you agree with them.

It's possible. They seem quite speculative to me, and some of them seem pretty inconsequential. So, whether oral arguments are orderly or not strikes me as, I would say, kind of a third order of concern when we're thinking about the kind of basic structure of our government.

And also, there's lots of ways you could regulate oral argument. You can have rules about who speaks and seniority and so forth. That would take care of that problem.

But I think you'd have to think about

what are the other benefits, and why are we doing this. And I think that's one thing I've tried to do in my statement, but also tried to do elsewhere, is really emphasize that we need to be really specific in what we see as the problems, before we figure out what exactly a reform is and what we're trying to accomplish.

But I think that if it's true that you'd have more fragmented rulings, if that turns out to be true, that might well be a small cost compared to large benefits, depending on the specifics of the reform proposal that we're talking.

COMMISSIONER WHITE: Thanks, Professor. Professor Siegel, throughout this panel and in other conversations, we've heard a lot of conversation about norm violations, reciprocal norm violations.

Your written testimony, sort of in a very nuanced way, walks through reciprocal action and what it represents in unfair escalation.

For the Commission, or for anybody

studying these issues, it's a very practical difficulty in just trying to understand what the conventions are surrounding, say, the appointments process.

You write in your written testimony, that in 2016 Senate Republicans, quote, their conduct violated the constitutional convention, requiring good-faith consideration of Supreme Court nominees.

And just for the work of the Commission as we go about trying to understand the context surrounding these debates, how would you recommend working through the hard work of identifying what constitutes a convention in this context, and the argument surrounding whether there's just one convention, whether there's a different convention for election years, and so on?

MR. SIEGEL: Thank you for that question. Part of the difficulty is that when you're dealing with norms, or what I call constitutional conventions in the British

tradition, is that you often don't notice them until they're violated.

This is a general problem of customary norms, customary law. And so, it could have been going a certain way for a long time. It could have gone without saying. And then there's a violation, and then you look at the response.

And so, I think the predominant way in which to know a norm exists, is empirical, which is, how do members of the relevant community, how have they understood themselves? How have they behaved? Has there been stability in the practice.

I think there's a different way to try and go about this, which I think is more of a minority position, which is that you take more of a normative perspective and you say that certain kinds of behavior, certain kinds of actions, are so destructive of important values, that regardless of what people believe, say in the Senate, is a norm violation if people believe it.

I tend to be more of an empirical

bent. And I ask myself such questions as, how long has the practice existed? Has it been stable? Has there been bipartisan buy-in? Has there been some kind of self-understanding along the way that this is how we should conduct ourselves? Or, is it one of the things that simply went without saying?

And so, when I see holding a seat open for almost a year based upon the stated reason that the American people should have a say in who decides who the next President is, and then you see a few years later that stated principle being thrown overboard, and now the principle becomes, well, it's whoever has the political power, whoever controls the Senate, both the inclination initially to come up with a better reason than partisanship, as well as the past practice, suggests to me that we're not just talking about politics as usual. We're talking about something more significant and institutional, a constitutional norm.

COMMISSIONER WHITE: Thanks,

Professor. Maybe with just a minute-and-a-half left, I'll post to you the same question I posed at the start to Professor Epps. Just a practical question of adding justices to the Court.

Now, obviously, your written testimony emphasizes that you don't think this is the moment for that but you leave the door open for the possibility of it. Do you have any advice on how, if there were to be an expansion or a packing of the Court, how Congress ought to go about the process of actually adding justices?

Would it be all at once? Would it be seriatim in a very short period of time? Should it be in a series over a longer period of time?

MR. SIEGEL: I would need to know more about the context and the reasons that the action was being taken. If it was being taken for good government non-partisan reasons, then it seems to me a natural thing to do would be to put ourselves behind the veil of ignorance and to spread the number of seats out over time before we know who's in control of the Presidency and

the Senate.

If it's what I think we're talking about now, which is an attempt to influence the Court's decision-making going forward, then it seems to me the obvious way in which one would go about that is the way FDR attempted, which is trying to add a certain number of seats all at once with a guarantee of who the President is and who constitutes the Senate.

But I should say, this kind of question, I think, is secondary or tertiary to the fundamental question of, what are the circumstances in which fundamental reform of the most important legal institution in the country are justified. That, to me, is the question. Logistics can be worked out later.

COMMISSIONER WHITE: Thanks, Professor. Thanks again, Professor Epps.

CHAIR BAUER: Well, we have a few more minutes for very -- I call it lightning round at this point, because we can go to 4:45. So, we'll go back around for maybe one more question apiece

for a quick question-and-answer. And begin with Commissioner Rodriguez.

CHAIR RODRIGUEZ: So, I'd like to ask Professor Siegel a question that picks up where you just left off, so maybe your train of thought is already moving in this direction.

And I found very helpful in your testimony that you, as you suggested, laid out criteria for thinking about under what circumstances, steps that would affect this important institution should be taken, let alone change it fundamentally.

So, my question is, how would you assess the democracy crisis that Professor Klarman identified and calls existential? Why is that not reason enough to seriously consider court expansion under your extreme circumstances criterion? And if not, what would look like an extreme circumstance?

MR. SIEGEL: All right, so I lay down several criteria. One is proportionality. Another is restoring the Court's legitimacy after

it tore the fabric of constitutional law, and then a genuine national crisis.

And I think it has to be something separate and apart from mainstream, ordinary ideological, partisan disagreements, because if it's not, then it's always an opportunity to pack the court.

What one side views as a crisis, the other side's going to view something else as a crisis, and we're going to get into this back-and-forth in which the Court, and therefore the country, is going to be severely damaged.

And so, I share Professor Klarman's concerns about democratic backsliding, about a risk of authoritarianism.

I think if democracy dies in this country, it's not going to be primarily because of the Supreme Court -- the Supreme Court can facilitate it to different extents --it's going to be because not nearly enough Americans stood up and pushed back. I don't think it's because the Court has been leading the way.

And so, I don't think it's a crisis now, because if it's a crisis now, then it was a crisis in 2010 with Citizens United, there was a crisis in 2013 with Shelby County.

When did the crisis begin and why shouldn't the other side say, well, abortion is also a crisis and that justifies packing the Court?

What it would take? What would be sufficiently extreme? I gave some examples in my testimony: a court that aided and abetted a presidential candidate to try and steal a presidential election; perhaps controlling seats on the Court in the wake of an epic civil war in which we're trying to decide how savagely racist we're going to continue to be; what are the terms of reunion and reconstruction?

I think certain kinds of Court decisions -- invalidating paper money on originalist plans, could cause a genuine national crisis. But I think it has to be something beyond profound, passionate disagreements, about

the issues of the day.

And at this point at least, that's where I but debates about democracy and voting. I think Professor Klarman speaks ably about his point of view.

There are many, many other Americans who believe passionately that he is wrong, and there are many in between. And I worry that if there's a crisis now, then there's always a crisis. And that will degrade the Supreme Court.

CHAIR BAUER: Commissioner Grove.

COMMISSIONER GROVE: Thank you. Professor Barnett, one more question. I was struck by your argument that the spirit of the Constitution and, in this case, preserving the Supreme Court's role, should inform the way lawmakers do their jobs.

Now, you're focused on legislation. But I wonder if the same ideas could influence the way lawmakers, or should influence the way lawmakers, interact with the courts in lots of other ways.

And specifically, I'm thinking of the nomination and confirmation process. So, let's say sometime in the future, we have a President and a Senate from different political parties and there's a Supreme Court vacancy, and the Senate refuses to confirm any nominee. And so, the Supreme Court size goes from nine to eight.

And then there's another vacancy and the Senate, once again, refuses to confirm a nominee, and the size of the Supreme Court goes from eight to seven. And one could imagine this going on.

I know that you say that Senators are fully within their discretion to consider judicial nominations and judicial ideology, and to reject nominees. And I know that that can sometimes split on party lines.

What I'm wondering is, if at some point the partisanship in the nomination and confirmation process becomes so detrimental to the Supreme Court's role that it actually violates the spirit of the Constitution.

MR. BARNETT: I think the answer to that is yes. I think that all discretionary power can be abused.

That's one of the reasons why we have a due process clause, to protect police against federal and state abuse of otherwise discretionary -- in this case, the state's -- police powers. There's limits on how they can exercise their discretion.

I would say the same thing is true in Congress. I do think that with respect to people who think the Republicans or the Democrats have misbehaved in the Senate, reforming the rules of the Senate would be a step forward.

For example, there's no reason why the rules of the Senate couldn't guarantee a committee hearing and a vote, under the rules of the Senate.

That would be a way, in this case, for the Democrats who now control the Senate, to change the rules of the Senate to prevent what happened before from happening again.

On the other hand, Democrats did withhold hearings from many Republican nominees. To the court of appeals, in particular.

And so, there was a precedent for withholding hearings from people for a very long time. But that could violate -- I agree with you, Professor Grove -- that could violate the spirit of the Constitution.

And so, we always have to look at the letter. And then we have to enforce the letter according to its spirit. That doesn't mean the spirit of the Constitution overrides the letter. But it means that as you're pursuing the letter -- and in this case it's the letter of the Necessary and Proper clause -- the functions and purposes, and ends and objects, for which we have a written Constitution, need to be taken into account when discretion is being exercised.

COMMISSIONER GROVE: Thank you.

CHAIR BAUER: And Commissioner White.

COMMISSIONER WHITE: Thank you. Reading some of the testimony here and the

testimony around this Commission as a whole, I wonder if they try to brush off all the post-World War II gang theory memos from RANDS and the Wohlstetters and everybody, on gang theory.

But in recent history, things haven't been always so dark. I look at just 15 years ago we saw a robust debate surrounding the nuclear option of ending filibusters of judicial nominations in the Senate.

There was a debate about that in the early 2000s, and then a bipartisan compromise was struck.

Around the same time, there was a debate in favor of filibustering Supreme Court nominees, but no filibuster succeeded and the Republicans and Democrats went forward to a final vote on those nominations.

I'm just curious, Professor Klarman, shouldn't we at least look for opportunities for bipartisan reform in the short-term, given that it's happened in recent future? Or are those recent examples really exceptions to a broader

trend of unilateral escalation?

CHAIR BAUER: We're not able to hear you, Professor Klarman, I'm afraid. I think you're just muted.

MR. KLARMAN: The extent of partisan polarization is much greater today than it was even 15 years ago. If you look at factors that political scientists look at in evaluating the extent of partisan polarization, it's greater than it's been at any time in the United States since the civil war.

And I think it's very, very difficult to achieve bipartisan achievement when you believe that one of the two political parties is no longer committed to democracy.

I don't think you're going to get bipartisan agreement about whether the Republican Party has essentially become an authoritarian party which no longer is committed to excluding extremists from its rank, repudiating violence under any circumstances, and resisting efforts to suppress votes for political advantage.

Obviously, you're not going to get a consensus. Mitch McConnell thinks the Democrats trying to pass voting rights legislation is the most partisan thing he's ever seen. I think it's entrenching democracy.

So, I'd certainly like to believe that it's possible that we can recover the good old days when we didn't have this extent of partisan disagreement, and I'm aiming for that in the future. But I don't think it's possible right now. No.

COMMISSIONER WHITE: Thanks, Professor.

CHAIR BAUER: Well, thank you very much to the panelists and to the questioners. That concludes this panel. We're going to take a break now and we'll return at 5:00 p.m. for closing reflections on this topic of the Supreme Court and Constitutional Governance. Thank you very much.

(Whereupon the above-entitled matter went off the record at 4:46 p.m. and

resumed at 5:00 p.m.)

CHAIR BAUER: Welcome back to this public meeting of the Presidential Commission on the Supreme Court of the United States.

We now have a panel which is devoted here at the conclusion of the day to closing reflections on the Supreme Court and constitutional governance.

And so, at this time, I would like to ask all of our panelists to please turn on their cameras.

MR. KRAMER: Okay. Mine is not coming on for some reason.

CHAIR BAUER: I think yours is on.

MR. KRAMER: Here we go.

CHAIR BAUER: You're in good shape. Very good. Thank you very much.

So, as you know, we'll recognize the witnesses in turn for five-minute statements, and then, we'll proceed to have the Commissioners also do the questioning.

I would like to begin with Justice

Rosalie Abella of the Supreme Court of Canada. And we're very delighted to have you here. Thank you for joining us. And please take your five minutes to testify to the Commission on the topic at hand.

MS. ABELLA: Thank you so much, and thank you for the honor of inviting me to appear before the Commission to offer a perspective on the evolving role of the Canadian Supreme Court after Canada adopted the Canadian Charter of Rights and Freedoms in 1982.

In my five minutes, I can offer only a general sketch of the developmental arc of the Supreme Court's approach to the constitutional protection of rights, but I do look forward to answering any questions about the more granular aspects of how we function.

The addition of the Charter to our preexisting federalism-based constitutional architecture led to a Copernican revolution for the Supreme Court of Canada. It approached its new mandate in the eighties robustly. It was

innovative, it was bold, and it was transformative. It adopted a theory of living constitutionalism that saw the Charter's role as growing and expanding over time to meet new social, political, and historic realities.

This was to be a broad and generous approach, guided by the values and principles the Court designated as essential to a free and democratic society, including a commitment to social justice and equality, accommodation of a wide variety of beliefs, and respect for cultural and group identity. It made the Court hugely popular.

But it also generated some controversy in the nineties when we saw a brief backlash to constitutional supremacy and to the role of the Court as the guardian of the Constitution, assisted, I should say, by some supply-side rhetoric trickling up from south of the border. The critics called women and minorities seeking the right to be free from discrimination special interest groups seeking to jump the queue. They

called efforts to reverse discrimination "reverse discrimination."

They said courts should only interpret, not make law; thereby, ignoring the entire history of common law. They replaced ideas with ideology and substituted analysis with meaningless labels like "activist" or "anti-democratic" -- labels designed to presumptively dismiss the legitimacy of a decision they didn't agree with and labels they applied only to decisions that expanded rights, never to those that restricted them.

But the criticisms proved to be evanescent in Canada. It turned out that a majority of the Canadian public had confidence in the Court and understood that, by guaranteeing its values and constituent rights of freedoms, we were strengthening, not undermining, our democratic legitimacy.

So, we confidently endorsed a new justice consensus based on our constitutionalized human rights, which made compassion and respect

for human dignity, a tenacious belief in the transcendent importance of rights, and a commitment to their democratic centrality, the motivating core of our national values. And that is the national trajectory we've been on for most of the last 40 years.

But Canada and its judiciary are part of a global ecosystem. If democracy and human rights are at risk anywhere, they are at risk everywhere, and all over the world democracy and human rights are at risk -- a world where too many governments have interfered with the independence of their judges and media, where the vulnerable have become more vulnerable, where hate kills, truth is homeless, and lives don't matter.

We're in the midst of an intellectually sclerotic, rhetorically tempestuous, and ideologically polarized global discourse. That discourse includes an intense and distractive verbal whirlpool about judges and constitutions and democracy and rights -- a

conversation in which loaded phrases are perpetually spun and important concepts are conveniently disregarded.

The most basic of the central concepts we need back in the conversation is that democracy is not, and never was, just about the wishes of the majority. What pumps oxygen no less forcefully through its democratic veins is the protection of rights through courts, notwithstanding the wishes of the majority.

And that is why independent supreme courts in a democracy are indispensable national institutions. There can be no democracy without respect for rights, no respect for rights without respect for courts, and no respect for courts without respect for their demonstrably independent, impartial, nonpartisan, and fearless defense of democracy and rights. Independent judges who rigorously scrutinize state action for constitutional compliance are not anti-democratic; they are democracy at work.

A concluding thought: My life started

in a country where there had been no democracy, no rights, no justice. It created an unquenchable thirst in me for all three. I was born in a displaced persons camp in Stuttgart in 1946 to parents who survived the Holocaust.

My father was a lawyer. He taught himself English and was hired by the Americans as a legal counsel for southwest Germany. Those Americans restored his belief that justice was possible. My father died a month before I finished law school, but not before he taught me that democracies represent the best possibility of justice, and that those of us in the justice system have a particular duty to make that justice happen. That, I know, is the goal of this Commission, and that is why I feel so honored to be asked to participate.

Thank you.

CHAIR BAUER: Thank you very much, Justice.

Our next witness is Chief Justice Margaret Marshall, who served for 11 years as

Chief Justice of the Supreme Judicial Court of Massachusetts and is now a member of the firm Choate, Hall & Stewart.

Chief Justice Marshall, the floor is yours.

MS. MARSHALL: Thank you, Commissioner Bauer and the other Commissioners. It is a great honor for me to testify before you and, in particular, a great honor to follow in the footsteps of Justice Rosie Abella.

My testimony is focused narrowly, but the experience of state court judges, which you heard in the last panel on a wide range of issues from encounters in the courtroom to judicial ethics for judges, to appointment and reappointment processes, may be helpful to you. And, of course, I would be pleased to answer questions on any subjects.

Much of what I will say in some respects repeats that of others. What I can add is my own experience as State Chief Justice under one of the proposals, the constitutional revision

to set judicial tenure terms under consideration by this Commission.

At its adoption in 1780, the Massachusetts Constitution provided that judges would serve during good behavior, essentially, life tenures, we've come to understand it. And in 1972, Massachusetts changed its Constitution, and all judges must now retire at age 70.

The provision for a single, but limited tenure for judges has worked well in Massachusetts and has, in fact, worked extraordinarily well for almost 50 years. I stress, of course, that mandatory retirement at age 70, or 75, or older, or limited terms, have nothing whatsoever to do with mental acuity or physical disability of those serving. There are other mechanisms to deal with those cases.

But, in my experience, the benefits of limited judicial terms I have experienced are several, and here are just some:

We are living, as almost every witness has noted, for longer and longer and longer, and

a limited term for judges makes sure that we, quote, "make room for new generations of judges," as Judge David Tatel said in his recent letter of resignation to President Biden.

Several witnesses have noted -- and I agree -- that the Founders certainly did not anticipate judges serving for 30 or 40 or 50 years, and there's absolutely nothing inconsistent between limited terms for judges and the form of the government the Founders sought to establish. Indeed, I view limited terms as being entirely consistent with the founding vision for our democracy.

Next -- and I think this is important -- the known departure date of judges allows everyone engaged in the process to plan appropriately. Judges, Governors, Presidents, loyalists, citizens, all can anticipate and plan, and if a Governor or President knows that during his term in office there will be two or three departures of Supreme Court Judges, she can plan accordingly. Predictability removes the kind of

hurtful and, frankly, institutionally damaging comments that can surface when the continued tenure of a particular Justice is under scrutiny.

And third, in my view, limited terms will help undercut some of the strong reactions, very strong reactions, today when federal judges, in particular, are appointed at relatively young ages. Of course, there is now an expectation that, without limited terms, the judge will serve for 40 or even 50 years. The reaction to any one appointment is often extreme. This is not good for the judge; it is not good for the court, or for our nation.

It appears to me that the Supreme Court, and more globally, the judiciary in all forms, is losing its credibility as fair and impartial, independent branches of our government. And that is deeply troubling to me, as I know it is to many who have appeared before you. And I share Justice Abella's comments in saying that, because I came from a country where the rule of law was the rule of the powerful

against the powerless, this means a great deal to me.

There may, indeed, be statutory or other ways to achieve limited terms for Justices of the Supreme Court and other federal judges. Regardless, I am affirmatively in favor of a Constitutional Amendment to provide such tenure, whether it be by age or number of years.

Any change as fundamental as this to our democracy at this time should have the support of the widest spectrum of people of our nation, and Constitutional Amendments I know are difficult to achieve. But the process invites the public to learn anew the fundamentals of, the value of a constitutional democracy and the important role that independent judges play in that democracy.

The Constitution is not written in stone. Difficult to change, yes, but not impossible. And I have seen more impossible changes in my life than I care to mention. Changes to our Constitution can be made. The

people can and will understand why change is warranted, if it is.

Last -- and this is more in the nature of a plea to this Commission -- this is an opportunity for this Commission to make observations about the necessary, the absolute minimum necessary requirements for a fair, impartial, and independent judiciary, state or federal, in our nation. I hope you will do so, even as you make recommendations for any changes to the federal courts.

My main concern the past 25 years has focused on a subject not directly under review by this Commission, but worthy of note. It is this: To maintain the independence of judges in our form of constitutional democracy, the linchpin is not the length of tenure, but that judges serve a single tenure. In other words, that once appointed to a particular court, judges not be dependent for the continuance of their tenure on any review process, whether by reappointment or any other form of review.

Today, 47 states do have such a review process, and the politicization of those state courts, where almost all of the judicial business in the United States takes place, makes the politicization of the Supreme Court of the United States seem pale in comparison. Those states are facing crises that are fundamentally at odds with the Framers' intentions. It is all but destroying independent and impartial state judiciaries. And whatever recommendations this Commission makes to the President, that point should not be lost.

Thank you for this opportunity to testify, and I would be pleased to answer any questions.

CHAIR BAUER: Thank you very much, Justice Marshall.

Our next witness is Professor Jamal Greene. He's the Dwight Professor of Law at Columbia Law School.

Go ahead, sir.

MR. GREENE: Good afternoon, and thank

you for giving me the opportunity to share my views with the Commission.

I am the Dwight Professor of Law at Columbia Law School, and my scholarship has focused on U.S. and comparative constitutional rights adjudication, theories of constitutional interpretation, and the structure of constitutional argumentation.

As my written statement elaborates, among the many potential drivers of the need for reform of the Supreme Court, one stands out as nonpartisan, as undeniable, and as incompatible with constitutional democracy -- the disproportionate amount of power that each individual Justice wields. The Justices of the U.S. Supreme Court are too few; they hold office for too long; they are too easy to seek, and they exercise too much discretion over the cases they hear and the political identity of their replacements.

The most recent push for court reform has a genesis in a perceived political imbalance

on the Court, but my remarks don't focus directly on responses to that imbalance. Democrats and Republicans, progressives and conservatives can and do disagree about the degree to which the ideological makeup of the Court is a genuine problem. But the amount of power that individual Justices wield over American life should concern policymakers, lawyers, and citizens of all political and ideological perspectives.

The Supreme Court is one of the most powerful institutions in American public life. In just the last 11 years, the shift of a single vote would have led to radically different and enormously consequential outcomes over a wide range of areas. A shift of one vote would have meant the preservation of Section 5 of the Voting Rights Act. One vote would have meant the end of the Affordable Care Act's individual mandate. One vote would have meant state bans on same-sex marriage, the effective end of race-based affirmative action, and bans on corporate election year-end expenditures.

Americans hold disparate views on these questions, but whatever those views, a starkly different political and legal landscape in a nation of 330 million people should not consistently turn on the views of a single unelected person, one who is only one of nine, who can be confirmed by a bare and strictly partisan majority of the U.S. Senate, who plays a major role in deciding what cases they hear, who can potentially remain in office for 40 years or even 50 years, and who can, in effect, choose the ideology of their replacement, who may, in turn, hold office for another 40 or even 50 years under similar conditions.

No democracy of any character should tolerate a single person exercising this degree of power, discretion, longevity, and complete lack of accountability, and no other democracy does.

Four aspects of the Court's design, in particular, combine to personalize the Court's power in the way I've just described, to make it,

in effect, the Justices, rather than the Court.

One is life tenure.

Two is a small, absolute number of Justices.

Three, a partisan confirmation process.

And four, a nearly entirely discretionary docket.

Life tenure and a small number of Justices, in particular, combine to create an almost monarchical body that is quite unlike other courts in the world. Nearly all of the world's high courts have term limits or mandatory retirement, and all of the high courts of countries of at least 50 million people have more than nine judges.

A larger size and a shorter term diffuses power. So that, even if the Court itself can still make the momentous decisions that we have come to expect of it, its individual members are denied the ability to shape the law in their personal image.

In my statement, I offer a proposal for a statutory change to a Court with 16 Justices serving 16-year terms. I will not get deep into the weeds of that proposal in my oral statement, and the particular details are less important than the structure.

In brief, the proposal leverages Congress' ability to increase the size of the Court, along with its ability to shift the functions and jurisdiction of judges, to provide a framework through which both term limits and other reforms can be implemented without the need for a Constitutional Amendment.

The proposal is not for Court packing, which is partisan and which I do not support, for many of the reasons others have given. The proposal is for a bipartisan assessment of the costs and benefits of the Court at its current size. I believe the ubiquity of larger courts with shorter judicial tenures, among all remotely comparable countries in the world, reflects an American exceptionalism that we should not

celebrate.

I look forward to the Committee's questions.

CHAIR BAUER: Thank you very much, Professor Greene.

Our next witness is Larry Kramer, who is the President of the William and Flora Hewlett Foundation. Before joining the Foundation, he served from 2004 to 2012 as the Richard E. Lang Professor of Law and Dean of Stanford Law School.

Mr. Kramer, the floor is yours.

MR. KRAMER: Thank you. Can you hear me?

CHAIR BAUER: Yes.

MR. KRAMER: I'm grateful for the opportunity to speak today, and I know it's been a long day for everyone. So, I'll just touch on a couple of points from my written statement.

The question I think about on which we want to be clear is, what exactly is the problem that we're addressing? Why are we considering whether something needs to be done about a

Supreme Court that has operated in pretty much its current form since at least 1925?

So, the problem is not with the Supreme Court's rulings, though some of us may dislike some or a lot, or even all of them. Nor is it that the last several appointments were made in controversial circumstances that involved hypocrisy and political gamesmanship.

Standing alone, those things would not justify taking extraordinary action. But they can't be taken alone because they're just the latest in what has been a long process in decline in how Justices are chosen and confirmed. And that, in my view, justifies taking a moment to talk about whether something should be done and, if so, what?

This decline in the appointments process is an unanticipated product of two features of the modern Supreme Court. First, the spectacular growth in the Court's power since the 1950s, and second, the interaction of that newfound power and importance with life tenure.

The first feature, the growth in the Court's power, is the product of the widespread acceptance of judicial supremacy, a power the Court had never successfully asserted until Cooper v. Aaron, and one that achieved acceptance in the broader political culture only gradually in the years after Cooper.

As perceptions in the broader political culture settled that the Court is supreme in the interpretation of the Constitution, the power of the Court to extend and exercise authority expanded in what has been a steady and quite spectacular growth, touched on my some of the other speakers, for the past 50 years.

With supremacy settled, any appointment to the Court now entails giving someone enormous power they can exercise unchecked by any other branch or part of government for as long as they choose to remain on the Court. And that, in turn, has corrupted and debased the appointments process, encouraging

Presidents to engage in much more rigorous ideological vetting, looking to appoint people dedicated to the President's politics who are also young, and turning each new appointment into a moment of high political drama that contributes to further degrading American democracy broadly.

Who needs elections when you can pack the bench with ideologues to perpetuate your world view long after you've left office. And it's no wonder that Donald Trump and Mitch McConnell put remaking the federal bench, and especially the Supreme Court, at the top of their political agenda and consider it to have been their preeminent achievement.

What, then, can we do to restore the incentives of Presidents and Congresses to think more responsibly about appointments? Historically, what kept this under control was that the Supreme Court's power could be checked by action from Congress and the Executive. If the Court veered too far from the nation's political consensus, it could be reined in using

devices clearly and explicitly conferred in the Constitution. Presidents could ignore its mandates. Congress could change its composition or rules of proceeding or its jurisdiction or its budget, and so on.

And all of these devices were deployed at different times across American history. They were not easy to deploy. It took both a strong political consensus in the nation and the Court acting decisively to upset that consensus, but when that happened, the political branches could and did push back. And the mere existence of that possibility that this might happen sufficed to produce a workable equilibrium between the Court and the political branches.

In practical terms, the successful bid for supremacy entailed the delegitimation of exactly those control devices as a political matter, rendering them off-limits; shifted the equilibrium strongly in favor of judicial authority by limiting control to the appointments process.

Now one solution to that could be simply to recognize and acknowledge again that the devices historically used to rein in a runaway Court are, in fact, legitimate. The Administration and Congress might well want to consider deploying something like enlarging the size of the Court, if only to make clear that the kinds of games that dominated the last two appointments will not succeed. Tit for tat, it turns out, really is one way to drive a system back towards cooperation.

But the present political circumstances makes succeeding in that kind of effort a long shot. Still, I should say a report from this Commission acknowledging the constitutionality and legitimacy of the various control devices that have been deployed historically could go far toward restoring a better balance among the branches, especially if and when the circumstances arise again where there is a big gap, as could well happen.

In the meantime, there is, as I noted

in my written statement, a simpler, more direct, and more effective solution to the appointments problem. This is the proposal first developed by Deans Cramton and Carrington in 2005, and recently introduced into Congress as H.R. 8424. The bill would, in a nutshell, add a new Justice each Congress, with the nine most recent appointees deciding the merits cases on the Court's regular docket. The other Justices would remain on the bench with their full salaries and tenure, performing all the other duties of Article III judges, including deciding cases in the other courts.

This would -- and it could be adopted by statute since Constitutional Amendment is virtually impossible -- it would, in my view, address the problem in its entirety. By requiring regular appointments on a frequent basis, it reduces the stakes of any single appointment and ensures both parties regular opportunities to nominate. By having merits cases decided by the nine most recent appointees,

it assures that the cases are not being decided by Justices appointed decades earlier, when the issues facing the nation were different. And it eliminates the incentive to make age, that is, relative youth, a critical factor.

And lastly, it protects judicial independence fully, while the constant, steady renewal of members reduces the likelihood of a Court that's ideologically extreme or out of synch with the rest of society.

Thank you.

CHAIR BAUER: Thank you very much, Mr. Kramer.

Our next witness is Stephen Sachs. He is the Antonin Scalia Professor of Law at Harvard Law School.

Professor Sachs, you have the floor.

MR. SACHS: Thank you very much. I am honored to testify before the Commission today. I appreciate your work, as you now enter hour nine of testimony today, and I'm honored to be able to offer my reflections on the Supreme Court

and constitutional governance.

In considering potential reforms, the Commission should take care to do the following:

First, it should preserve judicial independence. The Court's fundamental job is to apply the law to the cases before them. We rely on courts not only to reach individual judgments of guilt or liability, but to enforce the limited powers of our different governments and different branches. Correcting for judges' errors, even serious errors, by shifting these powers to another department would not make their enforcement more reliable, but it would harm the Court's ability to act as neutral tribunals in particular cases. That is a crucial element of the rule of law, and for that reason, it's also a frequent target of autocracies the world over. America has a nearly unbroken tradition of judicial independence at the federal level, and your Commission should not break it today.

Second, put politics in its place. If you want a less political judiciary, you need a

more political amendment process. You need to move political fights out of judicial conference rooms and into statehouses and the Halls of Congress. A Court reform that ignores Article V will be reform only in name, because a Court that can get away with Constitutional Amendment on the cheap, one that evades the Constitution in the guise of interpreting it, is always going to be a target for partisan capture.

Third, beware unforeseen consequences. It is much harder to build than to destroy. Traditions of judicial independence that we've built up over time can be demolished much more quickly than one might expect. Many of the reforms you've heard proposed today would have extensive unforeseen consequences.

These might include measures that are likely unconstitutional, absent amendment, such as supermajority requirements or 18-year terms; measures that would be constitutional, but dangerous and irresponsible, such as Court packing or jurisdiction stripping, or measures

that would be entirely lawful, but would likely prove unwise, such as requiring cameras in the Court during oral argument.

The greatest contribution that this Commission could make would be to raise the profile of smaller-bore reforms that right now are easy for Congress to ignore, but that have consequences that could be better assessed and, if necessary, more easily reversed.

Finally, in considering potential reforms, the members of the Commission have to be honest with each other and with the public. In this process, euphemism is not your friend. The public is going to see through efforts to recast Court packing as Court expansion, jurisdiction stripping as jurisdiction channeling, and so on. It will see through efforts to pursue short-term, partisan payback under the guise of long-term reform. And because legitimacy is a two-way street, reforms that are not received by both sides as enhancing the Court's legitimacy are not going to work at doing so.

Whatever else might be wrong with today's Court -- and there is much to say on that score -- it has not shown itself overly resistant to public opinion. The Court is not getting in Congress' way. The main barrier to major legislation, whether on voting rights or climate or health care, or anything else, is cobbling together 50 votes in the Senate and not five votes in the Supreme Court.

The most controversial topic that might come up in the next term is whether to revisit Roe v. Wade. And whatever one's views on that topic, revisiting Roe would allow democratic majorities to make their own decisions, not prevent them.

The public's approval of the Supreme Court, at least as of last year's Gallup Poll, was higher than it has been for most of the last decade. So, the case that there is a major crisis requiring major reform seems to me rather weak.

To be clear, there is an awful lot

that could be fixed about the Supreme Court. Over the last century, in my view, the Justices have too often mistaken their own rulings for the law that they are charged to enforce. But these problems are not yet matters of universal agreement, and that means they can only be solved by the slow work of persuading others and not by some simple policy fix. There are no drastic policy changes that would avoid the need for that work, and no sudden crisis that calls out for attempting them.

If there were a single policy that could improve the Court's fidelity to law, I would happily recommend it, but many of the reforms proposed thus far would subject the Court to political pressure instead. Under these circumstances, the best that the Commission can do is to do no harm.

Thank you.

CHAIR BAUER: Thank you very much, Professor Sachs.

So now, we're going to turn to the

Commissioners who will be directing the questions to the witnesses. So, the Commissioners, please turn their cameras on. Very good. Thank you very much.

So, the questioning will begin with Judge Thomas Griffith. He's a former member of the U.S. Court of Appeals for the D.C. Circuit and now a Special Counsel to the firm of Hunton Andrews & Kurth and a lecturer on law at Harvard Law School.

Judge Griffith?

COMMISSIONER GRIFFITH: Thank you very much, Co-Chair Bauer.

And let me give a special thanks to all of the witnesses on this panel, not only for the substance of what you offer us, but may I also congratulate you on the tone of it. To participate in these discussions with civility and respect for the opposing points of view, as you have each demonstrated, I think is marvelous, and it is an example to all of us.

If I might, Justice Abella, may I

start with you? We are honored to have you with us and we congratulate you on your extraordinary life of service to the rule of law.

Having recently reached Canada's mandatory retirement age for Supreme Court Justices, what are your thoughts on this age limit and its impact on the work of the judiciary and how it's perceived by the public?

Justice Abella, you're on mute.

MS. ABELLA: That's the expression of the year, isn't it?

COMMISSIONER GRIFFITH: That's right.

MS. ABELLA: Well, it's a very timely question for somebody who retired at the age of 75 on July the 1st. I have always been a fan of mandatory retirement. I think it's important to have a "sell by date" when you embark on a judicial career; very difficult for judges to decide for themselves when they are no longer indispensable. And the idea that there is a moment when you are expected to depart and make room for someone else, so that there is renewal

of ideas, of institutional objectives, is a very healthy one for me and to me.

Now, most of my colleagues, I should tell you, in the 17 years I've been on the Supreme Court, even though 75 is the mandatory retirement age, most of them have left before the 75 years was up. But what there has never been is the perception that departures are based on anything partisan, so that one party or the other has an opportunity to replace you. That nonpartisan tradition in the appointment process I think helps as well.

I've been a judge since 1976 to various courts and have been appointed, as have most of my colleagues, by both major political parties. So, the fact that you leave when one party or the other is in power really doesn't project any possibility of a guaranteed judicial outcome.

So, to me, since most countries in the world, I think almost all countries in the world except the United States, have a term limit, it's

something I've always grown up thinking is a very healthy way to ensure that, when the time comes, we will be replaced by another qualified candidate.

COMMISSIONER GRIFFITH: Thank you.

If I might take advantage of your international perspective, as you know, the Commission has been tasked with hearing arguments about the role of the Supreme Court of the United States. From your international perspective, what is it about the Supreme Court of the United States internationally that you value most, and then, I'll invite you to say if there's need for change to the U.S. Supreme Court to enhance its role internationally, what might that be?

MS. ABELLA: I think it's fair to tell you that, when I was in law school from 1967 to '70, the court that we looked to as the beacon of how constitutionalism works in a vibrant way was the American Supreme Court. Our Constitution, the BNA Act, until we got the Charter rights and freedoms, was a federalism-based document, a

division of powers, which doesn't engender the same passion for the protection of rights, obviously, that your Bill of Rights did.

What happened once Canada got its own Bill of Rights was that it started to look not just to the United States, but all over the world for comparative and international guidance. We weren't bound by what we saw, but we found that most legal problems really are universal, and it's always interesting to see how other courts have addressed exactly the same problems.

In fact, our very first constitutional provision in the Charter says: All rights are guaranteed, subject only to those reasonable limits in a free and democratic society. So, essentially, a constitutional exhortation to look outside.

So, we learn from everyone. We learn from the things that we like about other jurisdictions. We learn from the things that we aren't particularly fond of.

Isaiah Berlin had a wonderful

expression, "There's no pearl without some irritation in the oyster." So, sometimes when you read something from another jurisdiction -- and we look at all of the democratic jurisdictions -- we find something that rankles a bit, and it helps us formulate something that we think works best for our own jurisdiction.

The limits on the American appeal, I think, is because, unlike most jurisdictions in the Western World, you do not have, obviously, a new Constitution. The rest of us have a post-World War II constitution which protects both individual and group rights, has a proportionality clause. So, we aren't restricted to absolutism in the interpretation of rights.

And so, the judicial international conversation tends to play out more, I think, among those countries that have similar philosophical bases to their constitutions rather than the United States, which is not to say we aren't guided by much of what we read in the United States, not just in constitutional law;

copyright law, criminal law. I mean, we get much from what the American Supreme Court does, but we have, I think, shifted focus mostly into a more international sphere to see what other modern constitutions are doing in their protection of rights.

COMMISSIONER GRIFFITH: Thank you. Thank you very much.

Chief Justice Marshall, can I start by thanking you for the reference in your written testimony to Robert F. Kennedy's 1966 Day of Affirmation speech in Cape Town? Unlike you, I wasn't there that day, but I lived in South Africa for several years not long thereafter, and Senator Kennedy's speech is, in my view, one of the most inspiring political speeches given by someone not named Lincoln or King. So, thank you for that. I urge the public to read your written testimony for many reasons, but for that.

If you could, could you describe a little bit more, then, for the public that's listening what you think the problem is in the

U.S. Supreme Court that would be solved by term limits?

MS. MARSHALL: I think the problem is the following, and Justice Abella sort of commented on it: All of us know at some point we have to give up power. And Justices on the United States Supreme Court exercise enormous power. Judges in our constitutional systems exercise enormous power.

It seems to me that I agree with so many people who've testified today that be careful of the consequences of when you make changes. I am very, very cautious about suggesting changes to our great constitutional system. Because, as I said in my written testimony, for me, my great discovery was of the merits of a constitutional democracy founded on a charter of rights, enforced by independent judges.

As I look to what has happened in the federal courts with the taking of senior status, I know that is not what we're contemplating here,

but, essentially, it's an extremely effective option for judges when they get to a certain age to begin to move off. We have seen how that revitalizes the federal courts and the circuit courts.

I have seen what happens in countries around the world, including South Africa. I take issue with, for example, Professor Dixon who suggested that we serve for too long. I don't think we serve for too long. I am less worried about length of tenure than, to use Justice Abella's term, a "sell by date."

I think that there is no other piece of our government where, as Professor Greene suggested, you can serve for 50 years, and then, make sure that you're appointing the next person for 50 years who's like you. We really don't like that in the United States.

I think the American people are open to a conversation about changes to its Constitution. I think they are more open to that than they are to legislative changes. I have no

basis, other than the fact that I talk all over the country all of the time. One of my great joys has been to explain to Americans how fabulous this Constitution is. And so, I think that people would understand. I don't think it is a revolutionary move at all. I think it is entirely consistent with courts around the globe who now newer than us.

I mean, I always say to people, you know, the poor Canadians were suffering under what Justice Abella mentioned, the federalist system, a kind of parliamentary system, no charter of rights. She couldn't protect anybody, if she tried, in the old days.

I mean, we have a fantastic Constitution, but there is a problem which has been solved for federal judges in your court, you know, when you sat. It's been largely solved in the state courts.

I emphasize what I said in my testimony. For me, the linchpin is always a single lengthy tenure. So that when a judge

issues a decision, they don't find themselves out of a job the next go-round. That's the linchpin for independence.

And as long as this Commission keeps that sense right at the center of its deliberations, I don't think that limiting terms is going to be as dramatically over some of the other suggestions, even though I understand the motivations for it.

COMMISSIONER GRIFFITH: Thank you very much.

CHAIR BAUER: Thank you very much, Judge Griffith.

The next Commissioner who will be questioning is Michelle Adams, who is Professor of Law at the Benjamin N. Cardozo School of Law.

Commissioner Adams?

COMMISSIONER ADAMS: Thank you, Co-Chair Bauer. I very much appreciate it.

And I thank everyone for their testimony, particularly at this late hour. And it's a delight to be here and to hear everyone's

views.

Let me start with Professor Greene. Thank you for your written testimony and your oral testimony. I want to focus in on something that you mentioned in both, which is the idea -- you said in your statement that the Supreme Court is structured as a monarchy. Others would argue, I think, that Congress and President, because they have political control over the Supreme Court through the appointments process, through the advice and consent process, that, in fact, the Supreme Court does not function as a monarchy. If there is political control, or that level of political control, over the Court, can you say more about how the Court could be viewed as a monarchy, as you have suggested?

MR. GREENE: Thank you for the question. Just to start, of course, I didn't mean a literal monarchy, right? So, yes, of course, there is political control over the Court. I think the features that concern me are life tenure and this very small number of

Justices, right? So, if there's political control at time A, and time B is A plus 40 years, that's highly diffused political control. Of course, that's a feature to some degree, and not just a bug, of the Court. But there's a limit to how much that's a feature, and as many countries around the world have demonstrated, a tenure of that length is not necessary for judicial independence and has lots of costs associated with it.

But the other aspect of this -- and this was touched on as well by Chief Justice Marshall -- is the fact that members of the Court time their own replacement strategically. Now that's not always possible; life catches up with people sometimes. But, often -- and we've come to expect them to do this -- they can choose the ideology of their replacement. And the nature of political polarization in the United States today is such that that can be done fairly reliably.

So that even if there is a degree of political control, one can reliably choose one's

political allies to choose one's replacement. That's not a system that we should want in a democracy. We've come to expect it, but there are alternatives around the world, and I think we should take a look at them.

COMMISSIONER ADAMS: Thank you, Professor Greene.

Let me ask as a followup something that I think you mentioned both in your written statement as well as in your oral testimony just now. And that is the emphasis on the idea that individual Justices have too much power. I think that's a big theme in your written statement, if I'm reading it correctly.

But, after you discussed the fact or your assertion that they had too much individual power, you gave a list of cases having to do with the ACA or the Voting Rights Act, which sound, of course, in partisan terms. And so, I wonder if you can say more about whether the problem is individual Justices having too much power or whether the issue really is one of partisanship

about how the Judges actually decide, once they're on the Court.

MR. GREENE: So, the problem that I identify in the statement is not strictly about partisanship. One can imagine -- and the examples I chose are examples in which the sides that won, so to speak, are different partisan sides -- the concern is, you know, I think about, as someone who teaches, you know, when I teach constitutional law, you think about who are the swing Justices on the Court. And that's a question that we tend to ask ourselves a lot, and we talk about the Court in those terms.

And you can identify Justice Kennedy for many years and Justice O'Connor for many years and Justice Powell for many years. That's three people going back about 50 years of tenure on the Court, where their own particular views of the law, whatever you think of them, are dominating the Court's decisionmaking.

And whatever you think the proper role for the Court should be within our system, the

idea that that role should be dominated by a small number of swing Justices, which is the result you get when you have a small number of judges sitting en banc for decades at a time, is, again, profoundly undemocratic. And this is not a statement about their performance, and it's not a statement about the Court's power, which we all have different views about. But it's hard to see how one could defend a system in which a small number of individuals have that much power for that long.

COMMISSIONER ADAMS: Let me ask you one more question, Professor Greene, before I shift over to Professor Sachs. In your written statement, you argue that fixed and non-renewal terms for Supreme Court Justices are consistent with, rather than a violation of, Article III's "hold their offices during good behavior" language. Can you say more about why that might be the case?

MR. GREENE: So, I don't think this is an obvious constitutional question. I think

there are good arguments on both sides. I think the expectations of the Framers were fairly straightforward that good behavior was the same thing as life tenure. So, it then becomes a question of constitutional interpretation. And I think that the purposes behind the good behavior provision are entirely consistent with non-renewable terms over a length of years. And as I mention in my statement, there are other instances in which we allow Article III judges to serve a term of years and consider that to be consistent with Article III, and that's in recess appointments. So, there are other constitutional ways in which we -- again, there are complications; there are good arguments on both sides, but, again, it's more of a purpose of argument on one side versus the specific intentions of the Framers on the other.

COMMISSIONER ADAMS: Thank you, Professor Greene.

Let me shift over to Professor Sachs for a few minutes now and ask you some questions.

And thank you, again, for both your written and oral testimony.

The gist, as I understand it, of your written testimony is that no major reform should be made to the Supreme Court. I think that sort of what you're pressing is the idea that, first, do no harm. And you state in your written testimony, "Weakening one branch of government usually means empowering another branch; typically, reducing the power of courts by increasing that of Congress."

But I wonder if you could address the ways in which, under the Constitution, Congress has significant control over the Supreme Court, both the Exceptions Clause in Article III, as well as what came up in one of the earlier discussions, I think in connection with Professor Barnett's testimony, the Necessary and Proper Clause which gives Congress a tremendous amount of authority in terms of creating rules for the function of our government.

MR. SACHS: Yes, under the

Constitution, Congress has a great deal of power over the Supreme Court's appellate jurisdiction and, also, over the structure of the Court. If it wanted to add 800 Justices tomorrow, it could do so. That doesn't mean that doing so would be consistent with our traditions of constitutional government or would be good for the separation of powers.

What I say there with respect to Court packing, in particular, is not that Congress sort of lacks this power, but, rather, that it would clearly weaken the Court in a substantive way for every President and Congress to be able to add enough Justices to do whatever they hope to do without it being struck down by the Court; and that that kind of weakening would empower other branches, not necessarily in terms of their legal powers -- you know, Congress would still be limited by all the limits of the Constitution. It's just that, substantively, they would be able to get away with whatever they wanted, the Constitution notwithstanding. So, my concern

there is less that Congress lacks tools altogether, but more that the misuse of those tools could undermine the constitutional structures that we have.

COMMISSIONER ADAMS: Thank you.

Let me follow up by asking a question in connection with individual rights. In your written testimony, you discuss individual rights, and you suggest that Congress might not do as well as the Court at protecting individual rights. So, I've got two questions on this.

No. 1, can you say more about why you think that's the case? And No. 2, if you could talk a little bit about the ability to be able to reverse decisions. If Congress gets it wrong, is it easier for the people to be able to correct Congress versus the Supreme Court in terms of underprotection of individual rights? And so, I'd like you to sort of speak to that issue.

MR. SACHS: Sure. So, under our system, if someone's life, liberty, or property is going to be taken away, you need Congress to

enact a statute; you need the President to enforce that statute, and you need the Court to uphold the statute. So, you've got sort of three checks, each of which can say: You know what? This statute's unconstitutional. We're not going to enact it; we're not going to enforce, or we're not going to uphold it.

The danger, if you have a system where Congress sort of always has the last word on the question of individual rights, is that you have reduced the number of steps from three to two. And so, it's a lot easier for individual rights violations to go forward. Congress decides that, you know, this particular type of expression of speech or press is not as worthwhile, and so, we're fine getting rid of it. Or this other particular right is inconvenient to the achievement of our particular policy goals. Then, it may very well vote that way.

On the other hand, if Congress thinks this particular individual right is not being enforced by the Court as much as we would like,

at least within the scope of federal law -- and sort of setting aside issues involving the Bernie case -- at least with respect to federal law, Congress can always say, look, we're not going to try infringing this right, even if we think the Court is not protecting it.

Indeed, that's what happened in the Religious Freedom Restoration Act. The Congress said, not only do we think the Court got the scope of the First Amendment wrong, but, even if they're right, we're not going to push the envelope; we're not going to go right up to the line. And so, if the Court is underprotecting rights, Congress can choose to protect them instead.

COMMISSIONER ADAMS: I believe my time is up.

CHAIR BAUER: Thank you very much, Commissioner Adams.

And we now turn to the Commission Co-Chair, the Leighton Homer Surbeck Professor of Law at Yale, Cristina Rodriguez.

CHAIR RODRIGUEZ: Thank you, Commissioner Bauer.

So, Professor Kramer, I'm going to come to you. You say in your testimony, after noting that the judiciary is absent from Madison's Federalist 51, that the judiciary was necessary, of course, but you don't elaborate. And so, I would like to invite you to say why it was necessary, not just in historical perspective. In fact, I'm more interested in what you think the contemporary role of the Court should be.

Because we've heard a lot today and in our previous day of testimony about reform proposals and the potential consequences, and why they might be constitutional or not. And also heard a lot about the problems that might be driving this push for reform. But from that has not yet emerged a conception of what it is precisely that the courts are supposed to do. And both Justice Abella and Chief Justice Marshall gave us their conceptions of that, but

I'm really interested in what that role should be, because I think we need to have some conception in order to decide about how these reform proposals should be put in perspective.

MR. KRAMER: Thanks for the question. Of course, I wish I had about a week to think about how exactly to answer that because that's a big question.

But what I would say is the following: So, just to touch briefly on the founding, and the difference between the founding and today really undergirds the answer I want to give. At the time of the founding, the courts were obviously deemed necessary. They created a third branch. It was part of the standard talk in broad terms around separation of powers. And the conception, though, was they needed independent courts to enforce justice in individual cases. They were not thinking about the court as having the kind of broad policymaking role that has emerged with constitutional adjudication.

So, law and politics are often

separate, but when you get to constitutional law, they're inseparable and there's an inherently political dimension, and that wasn't really part of the thinking. But, of course, it has emerged.

And so, my thinking about the role of the court is there's no inherent or abstract right answer to that. It is actually different in different countries and at different times. It's different in Massachusetts than it is at the federal level. It's certainly different in Canada than it is in the United States and in most of the other countries of the world.

In our country, the court's role has evolved over time, but one thing that's clear is it clearly has a role in constitutional politics. We are not, and shouldn't want, to get rid of judicial review. It's really important for all the reasons that people have talked about.

As I say, my focus has been on, the way I'm thinking about it is, taking up from where we are now in which the Court has this role, but in which some things have gone wrong

that are damaging both its ability to play that role well and the rest of American politics, because the way in which these judicial appointments are playing out has implications beyond the Supreme Court. We're still living with the Bork hearings. Decades later, you know, it's still a sore spot that continues to pay out.

So, it's more, how do we adjust the process to sustain the role of the Court, as a constitutional interpreter with independent authority, but in a way that reduces the likelihood for these sort of bad consequences that are happening? And so, that's at least the way I've thought about it.

In other words, it's the pragmatist approach, looking at what's gone wrong. That's why I think it's so important to start by identifying what the actual problem is. Looking at what's gone wrong, how can we adjust that without wrenching the system into some potentially -- because, in fact, as others have noted, the consequences are hard to judge --

potentially bad space?

CHAIR RODRIGUEZ: So, that feeds into the next question I wanted to ask you. And also in your testimony, you say that the "risk of wounding the Court is far smaller than the alternative danger." And so, that's a really interesting risk assessment that you've offered, and it suggests that the Court is resilient and, also, savvy in knowing when to back off and preserve what autonomy and independence that it has.

And so, the question is, how do we know to judge when we're in danger of wounding the Court or undermining its role as an independent interpreter of the law in our system?

MR. KRAMER: Yes, thank you. That's also a good question. So, what I would say is there's, again, no scientific assessment there. You could look at any of the past instances where there was some kind of serious pushback on the Court, and people might disagree about whether, in fact, there was some long-term harm done to

its role or not. My own assessment, looking across American history, is where that comes from.

So, it's really hard to look at any of the major controversies and not see the Court as having actually sustained itself quite well and resumed roughly the same kind of role it had, although with some adjustments, typically, because of what happened, you know, in a fairly robust way. But it's not a scientific assessment.

What I find interesting, though, is what has definitely changed. It is now -- and you've heard it; I've seen some of the statements -- this hypersensitivity that, no, actually, we must do nothing. Even things that have been done over and over in American history have to all be off bounds because the Court is so delicate that, if we do any of those things, it's going to be the end of judicial independence.

So, all I would say is, you know, you can't tell within a limited range there will

clearly be changes, but there is zero basis -- zero basis, from lots of experience -- to think that any of the kind of significant claims that are made about what will happen will happen. There's just nothing in experience to support that, and lots of experience to the contrary.

CHAIR RODRIGUEZ: Yes, so it's helpful for you to refer to these checking devices and to make the point that they've been used frequently throughout our history in probably different combinations and to different extents. And in your testimony, you say, you posit that, even if using them could lead to a tit for tat, it won't be endless, that the parties will learn to cooperate. And you also make the point that others have made in their testimony, too, that having and using checking devices can reduce conflict because it can lead the Court to adjust its behaviors as just suggested.

But, in your oral statement, you seem to express a little bit more reservation about that in our current political moment. An idea

that the tit for tat will eventually resolve into cooperation seems discordant with our current political motivation. And so, how do we think about the way that politics around nominations in the Court have played out, as we've tried to think through what risks are worth considering and what risks are too great and threaten the Court?

MR. KRAMER: Yes, I'm sorry, I didn't mean to suggest the way you interpreted it. What I was suggesting is that the likelihood of actually getting that kind of political action seems nearly impossible to me. And that's part of, it kind of takes me back to your first question, which is to say, even in the era in which these kinds of tools, which are clearly constitutional, were being used, two things happened. One is they almost never need to be used because you get the kind of political equilibrium. And part of that is they're so hard to use because, in fact, as others have noted, the American public, generally, really can and

does appreciate the importance of an independent judiciary. So, it takes a lot.

Typically, if you look, the Presidents who have done this -- Jefferson, Jackson, Lincoln, the Reconstruction Congress, Franklin Roosevelt; Teddy Roosevelt came close, you know, hardly a rogues' gallery, I think as I noted in my statement -- they all did it at times when they had huge popularity, both Houses of Congress firmly in control, and a strong national consensus around an agenda that the Court was working really hard to undermine. And it takes that kind of thing. So, we're not there.

But the mere possibility of it in all those periods between has been something that has prevented the need to use it in the first place. And so, I think what I'm saying is, although I don't recommend doing that now, partly because it's not politically feasible, partly because I think there's simpler solutions, the simple relegitimation of the possibilities will actually have a positive corrective.

So, I think a report by the Commission that acknowledged that the last 50 years of scholarship, which for reasons I've never understood other than I think I suggested in my testimony kind of a political flip on the left, devices that are both clearly constitutional were used, and we've said, "No, no, you can never use them." Just restoring the sense of, actually, they're not illegitimate itself would be helpful, but it's not an action that I would recommend at this time, both because it's not necessary and it's not realistic.

CHAIR RODRIGUEZ: Thank you. I appreciate that perspective a lot.

If I may, in the last minute, this is a big question to ask in one minute, but I wanted to pose a question to Justice Abella. We've heard a lot, both today and in prior testimony, about the legitimacy of the Court, and either that it's threatened today or that it's important to preserve it by maintaining its independence and other features of it.

And I'm wondering how in the Canadian context you conceptualize legitimacy, and is that something that weighs on you and other judges when you're making decisions on what you think constitutes your legitimacy as a court within a democratic system?

MS. ABELLA: That's an excellent question, and, of course, we think about it all the time. But that's a very different question from, to what extent do we take public opinion into account? And the answer is, of course, we're aware of what public opinion may or may not be, as expressed in different newspapers. I think most of us are not on social media. But public opinion isn't evidence and we don't cross-examine as the basis of its belief. And I think our job as independent judges is to make decisions, notwithstanding what public opinion is or what the majority thinks, especially when you're talking about the constitutional protection of rights, which tend to be protections of minority interests, which are the

opposite of what the majority wants.

But I think one of the interesting components of what the Canadians have been worried about over the years is we have understood that it is not just what we do that affects our legitimacy, although that is the most important thing. It's the public perception of who we are and what we're supposed to do.

And when you have a culture where there's a consensus about what the role of the Supreme Court is, then it's easier for that public to accept a decision they may not agree with as part of the natural flow of things. We don't, for example, have swing judges, on the theory that, if you're open-minded, you don't come into a case with a cerebral basket that dictates the outcome. You have to be open to the arguments, even if you have views, and, of course, everybody over 10 has views. But are you prepared to listen to the evidence with an open mind, notwithstanding what your views are?

So, I always find it amazing that I

will walk into court on a given morning and not always know what the result is going to be. It's not going to be this group and that group in most cases. And that's one of the things that keeps us legitimate, as is the appointment process, which is non-partisan, but, of course, small "p" political, as is the removal process, as is the fact that we're very visible -- our hearings are televised -- as is the fact that we tend to be, we practice enormous judicial humility.

People in Canada tend not to know who the judges on the Supreme Court are. I'll bet you anything they could name all nine judges on your Supreme Court, but none of the nine on ours. So, it's a polycentric attempt to preserve public confidence, not by going along with what they want, but by doing everything we can to help them understand what it is we do, so that we are transparent to them.

But our media helps. We have a good relationship with the media. They tend not to be polarized, although they have different

perspectives.

But every judge understands that in 100 percent of the cases 50 percent of the people, those who lost, think you got it wrong. So, we don't strive to avoid controversy. We strive for the legitimacy of the analysis and the opinion that we give.

And I think, again, that's because of who the Canadian public thinks we are as an institution and the efforts we've made to try to keep confidence, public confidence, in that institution strong.

CHAIR RODRIGUEZ: Thank you very much.

CHAIR BAUER: Approximately I'm going to invite the Commissioners in the same order they began the questioning in what we will consider a lightning round here with very quick questions and very quick answers. So, we'll close at 6:15.

So, Commissioner Griffith?

COMMISSIONER GRIFFITH: Yes, Dean Kramer, just quickly, some critics of the

Commission, of this Commission, argue that calls for change from progressives wouldn't exist at all, or certainly wouldn't be as loud, if Mrs. Clinton had won in 2016, and that she had been able to appoint as many as three Justices to the Supreme Court. What do you make of that criticism?

MR. KRAMER: Yes, they probably wouldn't. Instead, we'd be hearing them from people on the right. I mean, the bizarrest thing is some notion that people are not going to be acting from their political interests. That's not even a question. The question is, okay, taking that as a given, do they have a legitimate claim or not? Is there a real problem? So, maybe they wouldn't have raised this problem unless something, this or that were true in terms of their political interests, but here it is.

And so, from my perspective, as I say, what I look at is a system that has been steadily in decline. We're looking at not something that just happened in the last three years, but that's

been happening since the early 1970s or early 1980s, growing progressively worse. And this is an opportunity to address it, and we should think about it, with a solution, though, that is -- that's one of the issues with a Court packing solution. I think it could work, but it also is, in fact, straight-up partisan; whereas, something like my proposal or Professor Greene's proposal actually avoid that. They work equally for both parties, while addressing the systemic problem.

COMMISSIONER GRIFFITH: Just a quick followup. What do you make of -- Justice Breyer has been quite emphatic of late that judges are not partisans. It seems to me that much of the proposals for packing expansion assumes that they are in some degree. But what do you make of Justice Breyer's insistence that they're not?

MR. KRAMER: So, many judges aren't. I wouldn't want to speak for all judges, either as me or as him. What I would say is it doesn't actually matter. So, first, whether they're partisan or not, they are certainly ideological.

Some of them are ideological in a strong sense, some in a weaker sense, but that's just inherent to who we are as individuals, which is why it can be problematic to have cases being decided by people who were appointed 30-35 years earlier, as opposed to a system like almost every other country in the world has where you've assured the kind of regular turnover.

So that, whatever you're getting on the Court that you can't help because people are people is itself still likely to be within the general consensus of the time. And I think that's really important for a court whose decisions are unavoidably political, whether they see them that way or not, certainly in terms of their consequences.

COMMISSIONER GRIFFITH: Okay. Thank you.

CHAIR BAUER: Commissioner Adams?

COMMISSIONER ADAMS: Thank you.

This is for Chief Justice Marshall. You have called for a Constitutional Amendment to

provide the Justices serve for a limited time. As you know, many of the reform proposals that the Commission has heard about are statutory rather than constitutional in nature. We had a discussion about that earlier today. Professor Akhil Amar presented one, for instance.

As you recognize, it's very difficult to amend the Constitution. I wonder if you could say more about going the Article V route versus using a statutory mechanism to effect the change that you are putting forward.

MS. MARSHALL: Thank you for the question.

I would say this: I have agreed with many of the -- let me start this again. I do not disagree with many of the proposals that can be accomplished by statute. So, I listened to Professor Kramer, and I think that there are lots of ways that we've sort of pushed the Court when it's out in the extreme end.

My sense is that there is in one respect where we, as the United States, and only

one Court in the United States named the Supreme Court, are a little bit out of whack. And to the extent that people are looking at solutions, that's one solution to look at.

I also feel very strongly that -- I think somebody on this panel said, you know, people are very informed about the United States; they know who the United States Justices are. I think it may have been Justice Abella. They don't. I mean, I spend a great deal of time talking to non-lawyers, and I mean educated people, the League of Women Voters, the Chambers. They have very little idea of how our government works.

And so, one of the other pleas that I would make to this Commission, if it has the opportunity to do so, is bring back civic education. I sound a little bit like Justice O'Connor.

That doesn't answer your question, but there's plenty that we can do to make sure that people understand what is at risk here. I know

you haven't asked me this question. Massachusetts has a pretty extreme form -- a pretty extreme form -- of judicial independence. I think that I would disagree with Professor Kramer; we're very close to the federal Constitution.

We have a very tough system of judicial ethics. Judges in Massachusetts can't go to fundraisers for the Federalist Society or for the American Constitutional Society. You would be hauled before the Commission on Judicial Conduct and there would be discipline imposed, because we think it is essential that people know that, when the people know and perceive that when we come to issue a decision, it has not been influenced by people who are trying to, you know, we're on one side of the other.

Naive? Possibly. But we've had some pretty controversial decisions in Massachusetts. And when you talk about what's legitimacy, I would say the very first way I would judge that is, are people going to obey your orders? Do not

take that for granted in the United States.

If I meet with judges from all over the world, the first question I get asked, how do you get people to follow your orders? That's where your legitimacy is. And when people think that you're just getting the biased individual opinion of individual judges, that is not good for our system.

It's not an answer to your question, Professor, but at least it gives me an opportunity to say a little bit more about what is at risk here. And as I repeat, I'm pretty conservative when I want to do fundamental changes.

I suppose, when the chips are down, I would say I would agree with Professor Kramer's far more sweeping and nuanced and subtle look at American history. There are ways that each branch pushes back. They don't all have to occur. My view is the one piece that is really getting in the way, and is inconsistent with what the Framers had in mind, was life tenure, because

the age was 48 or something, and not what it is now, which is 75-80, 85-90, 95-100.

COMMISSIONER ADAMS: Thank you, Chief Justice. I have another question, but I just will yield to --

MS. MARSHALL: I took all your time.

COMMISSIONER ADAMS: No. I will yield to Co-Chair Rodriguez.

CHAIR RODRIGUEZ: Just one final question. It actually follows from that. And if you could say final words, both Professor Sachs and Professor Greene, on this exchange that Chief Justice Marshall is having. It relates to what I asked Professor Kramer before, which is, how resilient do you think the Court is, such that we can contemplate even semi-radical forms of checking or restructuring of power?

Professor Sachs, I think you're much more cautious. And, Professor Greene, I'm curious how you think we should think about this particular question. So, maybe, Professor Sachs, you could address it first, and then, Professor

Greene. And we'll go a minute over. I think that's fine.

MR. SACHS: Sure thing. Thank you very much.

I would say that a lot of the dangers are reduced by getting broader buy-in at the start. So, if the proposal is for an 18-year term limit done by Constitutional Amendment, it might not be my favorite, but I'm not really worried about it. Because I think that if you have two-thirds of each House and three-fourths of the states, you're going to be okay.

I am much more worried about the statutory changes, both because some of them I think would be unconstitutional, absent amendment, and even the ones that are constitutional might be dangerous to the Court, because I think that the support for democratic norms is a lot more fragile than we thought it was perhaps seven months ago.

And I think that there is a real danger, if Congress is seen as sort of making big

changes to the only institution capable of resisting it, of people just not following Supreme Court orders. I think there's a real danger, if a supermajority rule, for instance, were put in and someone had a majority of the Court behind them, but lost anyway, of a Governor or other official saying no. And I think that we don't want to risk that.

Moreover, we don't want to risk the Supreme Court striking down a statutory change, and then, having, essentially, a constitutional crisis of who are the actual judges, and where does the Supreme Court believe its loyalties lie?

I think that it is much better for the country to proceed with longer-term changes through broader-based means, and to proceed through smaller changes through statutory means.

CHAIR RODRIGUEZ: Thank you, Professor Sachs.

Professor Greene?

MR. GREENE: So, I entirely agree with Professor Sachs that, in process terms, if I'm

getting buy-in on the front end in bipartisan ways, it is extremely important to sustaining Court reform. And I think that can happen in statutory ways in addition to Constitutional Amendment ways. I think, ideally, a Constitutional Amendment is better, as I say in my written statement as well. But I think bipartisan statutory changes can actually effect what you might call the constitutional common sense.

I think the constitutional questions around a lot of the proposed Court reforms are unsettled. And part of the way they get settled is through bipartisanship and through careful reflection in ways that don't reflect a partisan agenda. And so, I think that can happen statutorily.

And just substantively, I'll just go back to saying we can look abroad in thinking about whether the Court falls apart. I think we too often confuse judicial review with this Supreme Court and the way it's particularly

structured, when things like term limits and much larger courts and different selection processes happen everywhere else in the world, and have done so without judicial independence or integrity falling apart.

CHAIR BAUER: Thank you very much. Thank you very much, Commissioner Rodriguez.

And that does conclude the panel. I want to thank all of the panelists. It was an excellent panel and a very strong conversation, and it definitely will inform our deliberation on these issues.

So, that concludes it for today. I'm just going to make a few concluding remarks here on behalf of myself and the Co-Chair about the coming schedule.

First of all, once again, we want to thank all of the witnesses for today and all of those who have submitted written statements, and members of the public who have submitted comments, and experts who have responded to our requests for their export support. We're very

grateful for that.

Please keep in mind that the written testimony, as well as the public comments, are posted to the Commission website at whitehouse.gov/pcscotus.

We have made some adjustments to the tentative meeting schedule that we announced at our June 30 public meeting. We now expect to have our next public meeting on October 15th from 1:00 p.m. to 5:00 p.m. Eastern Time. And we'll confirm all of the relevant details in an appropriate Federal Register notice and on our website. The material before the Commission for deliberation at that meeting will be posted, of course, prior to the meeting deliberations.

We also now expect that a second and last public meeting will be on November 10th from 3:30 to 5:00 p.m., when we will conclude our deliberations.

We will submit our report to the President on November 14th, at which time it will also be made public.

Once again, keep in mind that further information on these meetings and the Commission's work, such as written testimony and public comments, and the draft materials that the Commission will deliberate on, will be posted regularly, as it becomes available, on the Commission's website.

The Commission will continue to accept public comment until November 10th. However, as Commissioner Rodriguez, Co-Chair Rodriguez said earlier today, this comment is most helpful to the Commission if it is submitted before the deliberative meetings scheduled for October and November. And so, preferably, we'd like to see those comments on or before November 1st.

So, with that, thank you very much for joining us. We look forward to having you at our next public meeting.

And have a good evening.

(Whereupon, the above-entitled matter went off the record at 6:20 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: 3rd Public Meeting

Before: President's Commission on SCOTUS

Date: 07-20-21

Place: teleconference

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

Neal R Gross

Court Reporter