

*Written Testimony to the Presidential Commission on the Supreme Court of the United States*

## **Introduction**

Today's U.S. Supreme Court possesses outsized power while being significantly disconnected from everyday Americans. The justices continue to serve lengthier and lengthier terms and have near-total control over a docket focused on blockbuster political issues. As a result, the near-constant speculation on the health of the sitting justices echoes what occurred in regard to kings in medieval Europe, a troublesome reality for our democratic systems.

The following explores some key reforms the Center for American Progress (CAP) believes are essential to consider in order to address this situation. First, we explore possible changes to the justices' tenure on the Court and their implementation and discuss the idea of returning to the practice of justices' riding circuit. After that, we raise two reforms that could ensure the Court's work is focused on suits with critical legal—as opposed to political—issues that need resolving. In that vein, we explore the possible effects of a supermajority requirement to overturn federal legislation or executive acts before turning to the possible effects of changing the number of votes needed to take up suits presented to the Court.

## **Today's Supreme Court**

While diversity on the Court has increased over the past several decades, overall, negative trends have dominated the Court's recent trajectory.

To start, the average tenure of current and recent Supreme Court justices is longer than it has ever been in history.<sup>i</sup> As CAP previously summarized:

The average age at which a justice is appointed to the Supreme Court has remained relatively static throughout history, falling between the early- to mid-50s—meaning that as life expectancy has grown, so too have the terms of Supreme Court justices. ... In addition, because the ease of the position has grown and the workload has decreased—long gone are the days of large dockets, circuit riding, and working without clerks—justices are more likely to stay on the bench for long periods of time.<sup>ii</sup>

Of course, longer lifespans among the justices are not a negative on their own. Rather, the central issue is that this lack of turnover has resulted in a decrease in new philosophies and fresh perspectives on the Court.

Further, unlike with the legislative or executive branches, Supreme Court justices are appointed and confirmed for life. In contrast to the other branches, where the voters (and, in the case of the president, the Constitution) determine the duration of officials' service, vacancies on the Court are left to chance—in the case of an unexpected death—or to individual career preferences. And this time without a “check” on the service of a justice is only lengthening as more and more are increasingly likely to serve three decades or even longer.

As a result, there is a deepening disconnect between the makeup of the Court and the interests of the Americans reflected in their chosen governmental representatives. Regardless of what one thinks about President Trump and his appointees to the bench, for example, it should be common sense that a one-term president should not be able to appoint more justices than any of the three two-term presidents who preceded him—but that is precisely the current state of affairs.

Perhaps reflecting this stagnation, studies have shown that the Court is likely now the furthest ideologically from the two elected branches of government and, as a result, the American people than it has been in modern history.<sup>iii</sup>

In addition, the Court's docket has transformed in past decades to be one largely focused on blockbuster political issues, with narrow decisions issued far too often along ideological lines. The recent growth, for example, of the Court's so-called shadow docket makes this trend clear.<sup>iv</sup> Over the past several years, we have seen an unprecedented willingness among the justices to rule on federal and state legislation through the use of their emergency powers.<sup>v</sup> In a 5–4 decision issued in 2016 along ideological lines, the Court temporarily blocked the enforcement of the Obama administration's Clean Power Plan—the first time the Court had ever agreed to take such action before the circuit court had ruled. Scholars called the move “stunning.”<sup>vi</sup>

Over the past year alone, such rulings have had huge repercussions on public safety, election administration, and constitutional law writ large.<sup>vii</sup>

These trends combine to further politicize the Court, in addition to inviting ghoulish speculation on the health and well-being of the sitting justices. Faced with uncertainty when a new vacancy may open as sitting justices continue to serve longer and longer and an awareness that the Court will continue to issue decisions of huge political import, elected leaders have overwhelming incentives to engage in all-out legislative war to take advantage of any vacancy.

Given this transformation of the Court's role in politics and American life, it is unsurprising that the levels of public confidence in the Court have undergone rapid fluctuations over the past several decades while recently declining precipitously. Over the past year alone, Gallup found that confidence dropped nine percentage points overall with significant declines among Republicans and Democrats alike.<sup>viii</sup>

It is clear that the dynamics described above are detrimental to the Court as a whole, no matter one's ideological leanings.

## Changes to Justices' Tenure and Duties on the Court

Key to strengthening the Court is updating the standards that define a justice's tenure. CAP has previously written on the need for greater, more regular turnover on the Court and our belief that enacting this reform through legislation would be pass constitutional muster.<sup>ix</sup> Below, we explore what we see as priorities in their implementation. Then, we discuss circuit riding as an additional reform to the Court. Both reforms are viable avenues to help keep the justices in touch with the needs of the American people.

### Tenure Changes for Justices

The Commission has heard a great deal of testimony in support of reforms aimed at changing the justices' tenure on the Court that we feel is unnecessary to repeat at length, as we agree with many of the arguments put forward.<sup>x</sup> At the offset, we'd like to note our agreement with Professor Amar's discussion on the potentially misleading nature of the phrase "term limits." While CAP has previously used the phrase, it does risk suggesting that individuals will be removed from the office of Supreme Court justice after a certain time period. Under the type of statutory reforms we support, justices wouldn't be removed from their offices—rather, their duties would be modified after a certain period of service.

Briefly, however, we believe that (1) limiting the amount of time each justice spends sitting *en banc* on the Court and (2) regularizing appointments across presidential terms are likely to benefit the American public in two key ways. First, this will ensure those on the Supreme Court are better aligned with the American people. In addition, it would do much to cool the partisan gamesmanship that dominates the nominations process today. Further, we also believe that enacting this change through statute would be constitutional if justices were allowed to retain their confirmed position as a Supreme Court justice and full pay, even as they are directed to serve the judiciary in other critical ways after nearly two decades of sitting *en banc*.<sup>xi</sup>

That said, significant questions remain regarding what Congress should prioritize in setting new standards for the tenure and role of justices.

### *Possible Statutory Reforms*

As a threshold matter, it is important to underscore that Congress possesses broad powers to set rules and structure for the other two branches of federal government.

For example, Congress has set basic governance rules for the Court such as mandating the number of justices required to constitute a quorum.<sup>xii</sup> Congress has also created entirely new categories of service for Supreme Court justices. In 1937, Congress opened senior status—which Congress had created for lower court judges in 1919—for Supreme Court justices.<sup>xiii</sup>

In light of these facts, many scholars have supported the idea of a statutory change that simply converts the office of an active justice to that of a senior status justice after 18 years.<sup>xiv</sup>

While other time limits have been proposed, including by the Chief Justice himself, the 18-year limit has strong logic behind it.<sup>xv</sup> 18 years is the amount of time that would ensure that each presidential term would go hand-in-hand with two Supreme Court appointments. If the former presidents had been living under this system, the unrepresentative nature of the current bench would have been eased. Two-term President W. Bush would have appointed four justices (two more than he appointed in reality) while one-term President Trump would have appointed two (one less than he appointed in reality).

We continue to see this approach as a viable one.

At the same time, a different approach could be undertaken by statute that would explicitly define changes to the terms of a justice's service after 18 years. In testimony to this Commission, Professor Amar detailed one way this approach could be accomplished that we find worthy of consideration.<sup>xvi</sup>

Essentially, after 18 years, a justice's work would shift from sitting full-time en banc on the Court to service focused on duties such as circuit riding, filling in when another justice must recuse themselves from a case or a vacancy exists that has yet to be filled, civic engagement activities, or other related duties that the Chief Justice may identify.

Such a system would ensure justices continued to be engaged with the business of the Courts, and judiciary as a whole, in a more direct way than senior status is understood to allow. And of course, if the justice is tired at any point of their new duties and/or wanted more flexibility, it seems logical that Congress could continue to make senior status an option for any justice to elect in order to go into semi-retirement.

### *The Need for Swift Implementation*

Regardless of the approach taken in the statute, it is important to ensure that any reforms take effect as swiftly as practically possible. The harms to the administration of justice described at the start of this comment are likely only to grow with time. Some proposals, because they would only go into effect after the last currently sitting justice left the bench, would likely take a generation to go into effect.<sup>xvii</sup> Waiting this amount of time to put in force such a critical reform would risk irreversible deepening of the politicization of the Court and distrust in its operations by the American people.

Understandably, many experts have raised political and fairness concerns in regard to the idea of applying changes to the current justices—the way in which the reform would be most quickly made effective—due to the change in expectations that would bring.<sup>xviii</sup> This is an important consideration, though we agree with those who have point out that any loose concept of “fairness” to the justices shouldn't be determinative in designing a statute.<sup>xix</sup> Rather, the primary goal should be finding the best way to strengthen the Court.

In our view, any scheme that would begin immediately shifting the duties of the current justices who had served more than 18 years and do not voluntarily seek such a move is inappropriate and unnecessary. At the same time, Americans should not have to wait for the benefits of regularized appointments. One way to thread this needle, as Amar detailed in his testimony, would be to commence new appointments immediately and allow those appointees to serve alongside the current justices.<sup>xx</sup> This may result in a Court with more than nine members for a period of time, but the number would stabilize as more current justices left the bench in years to come.<sup>xxi</sup>

Finally, it may be worth considering if tenure changes *could* be applied to the current justices if structured in a way that would avoid immediate repercussions for the sitting justices.

If a “new” 18-year clock began running at enactment of any statute for all the sitting justices, for example, the more-senior justices may not be impacted on a practical level. And such a system would still allow the most-junior justice, Barrett, to serve for approximately two decades until she was nearly 70—but would also avoid a two-tiered Supreme Court with two sets of justices that operate under separate tenure rules.

### Circuit Riding

While mentioned above in the context of changing the duties of justices after 18 years, a return to circuit riding is worth exploring in its own right. Reinstating the practice would ensure the justices are in regular contact with a broad set of Americans and their legal concerns, bringing more depth to the jurisprudence they develop on the Supreme Court.<sup>xxii</sup> Briefly below, we discuss the constitutionality of the practice and considerations for reinstating this duty for the justices.

### *The Constitutionality of Circuit Riding*

While reinstating circuit riding would be a significant change, it appears quite plausible that such a reform would be considered constitutional. Congress required justices to ride circuit early in our country’s history with legislators changing the standards for how circuit riding duties would be carried out several times. In the late 1793, for example, Congress changed the number of justices required to ride circuit.<sup>xxiii</sup> The practice was also briefly repealed in 1801 before being reenacted in 1802—with a considerable amount of controversy that nonetheless resulted in a Supreme Court case that ultimately upheld circuit riding, and its reenactment, as constitutional.<sup>xxiv</sup>

Further, both active and senior justices are still authorized to sit on the lower courts and the chief justice is still required by law to assign the associate justices to the various circuits. Most commonly today, however, the justice’s service to the lower courts comes in the form of ruling on emergency petitions.<sup>xxv</sup>

### *Implementing Circuit Riding*

Generally, in determining how often the justices would have to ride circuit, we believe it is appropriate to take a balanced approach. Prior suggestions that would likely result in the justices riding circuit for a time equal to roughly half of the justices' summer vacation seem reasonable.<sup>xxvi</sup> Longer terms of service on the lower courts could also be viable, particularly if they occurred more sporadically.

The service could be spent on the district court level within their assigned circuit, which would expose the justices to the widest variety of legal matters. But service on the circuit courts themselves would also be a beneficial change.

Finally, we also acknowledge that the idea of circuit riding may not be popular among the justices. John Jay, the country's first chief justice, made it clear he was not a fan of the practice when he described circuit riding as "a kind of life, on which we cannot reflect, without experiencing sensations and emotions, more easy to conceive than proper for us to express."<sup>xxvii</sup> This opposition may be understandable given the state of America's infrastructure at the time. Today, however, the justices could travel in comfort and also use modern technology to appear remotely when needed.

Still, any personal opposition is worth considering. If term limit legislation was ever struck down as unconstitutional, increased duties such as circuit riding could perhaps help encourage more regular retirements and turnover on the Court. If such an approach to incentivizing retirements<sup>xxviii</sup> is ever considered necessary, reforms such as circuit riding could also be paired with changes such as generally applied reductions in clerk budgets for justices who continue in active service after a set period of years.

### **Changes to the Voting Rules on the Court**

We believe changes to the tenure and duties of justices are critical to update the Court's operations and put it in better touch with the realities of modern life and the needs of Americans. Such changes are very likely to inform how the justices consider cases as well as what issues they find worthy of taking up on the Supreme Court. Next, however, we turn to reforms that have the possibility of more directly rolling back the Court's focus on blockbuster political issues and ensure that the Court acts only when there are clear legal or constitutional reasons to do so.

### *Constitutionality of Regulations over the Court Generally*

Though this has been debated at length before the Commission and we acknowledge important arguments in regard to separation of powers, we believe there is strong reason to believe Congress is empowered to set voting rule standards for the Court to at least a certain degree.

Again, Article III generally gives Congress significant power to make "regulations" to the Court's appellate jurisdiction. Reflecting this, jurisdiction stripping—as long as not done to achieve a

specific result in a specific case—has been found to be constitutional.<sup>xxxix</sup> And, as mentioned above, Congress also set the number of justices needed to constitute a quorum at six.<sup>xxx</sup> Further, Congress also sets the procedure for how a case is to be handled when a quorum doesn't exist.<sup>xxxi</sup>

We are aware, however, that constitutional objections to the validity of changes to administration of the Court's original docket may be stronger than those that would apply purely to the appellate docket. In a 2009 concurrence, in fact, the Chief Justice appears to make his thoughts on the matter clear when he wrote: "Our appellate jurisdiction is, under the Constitution, subject to 'such Exceptions, and... such Regulations as the Congress shall make.' Art. III, §2. Our original jurisdiction is not. ... It is accordingly our responsibility to determine matters related to our original jurisdiction."<sup>xxxii</sup>

Therefore, it may be important to consider what unintended repercussions may come from any statute that severely restricts the Court's ability to decide or hear cases through its appellate jurisdiction. While the Court's original jurisdiction is generally considered quite narrow and makes up a small fraction of the Court's current docket, the Court through its original jurisdiction has heard lawsuits brought by a state against a citizen of another state.<sup>xxxiii</sup> The 1966 original jurisdiction case *South Carolina v. Katzenbach*, for example, was a landmark decision that upheld the Voting Rights Act. To get before the Court on original jurisdiction, South Carolina challenged the law's constitutionality by suing a citizen of another state—the U.S. Attorney General at the time, Nicholas Katzenbach.<sup>xxxiv</sup>

Of course, any growth in the Court's original jurisdiction docket from modifications to its appellate docket could result in the Supreme Court operating much more like a trial court engaged in fact finding than an appellate body, which many of its justices may not find preferable or practically feasible on a larger scale. At the same time, if the justices were to see their appellate docket dramatically reduced, the justices may find themselves with enough "free time" that such trial level-like work may be embraced to ensure the Court could continue to rule on certain high-profile matters.

### *Supermajority Voting Requirements to Overturn Federal Legislation and Executive Acts*

As with tenure changes, we are aware that proposals to require supermajority voting requirements to overturn federal legislation and executive acts have received significant attention during Commission meetings. To avoid repetition of those points, we will highlight what we find the most important considerations.

First, as a threshold matter, we find much merit in the idea that the Court be checked in its ability to overturn laws enacted by the two elected branches which are naturally more accountable to ordinary people. Such a change compliments our desire generally for Court that is more responsive to the interests of the American people.

But there are two important issues to consider. The first is constitutional. While we argue above for the general ability of Congress to regulate the Court's operations, this scheme could be seen

as making each justice’s vote on federal legislation carry more weight than that on purely constitutional matters in tension with the Article VI’s Supremacy Clause.<sup>xxxv</sup>

The second question is how to draft a statute that clearly defines when the Supreme Court is voting to “overturn” a piece of law as opposed to simply “interpreting” that piece of law. To make this proposal effective, it seems plausible that any statute would need to also set complex standards for how Supreme Court opinions are drafted overall to bring clarity on this point. This task is a formidable one likely to result in standards that raise additional constitutional concerns—though an avenue that should be explored nonetheless.

### *Changing Voting Requirements to Take Up Suits*

While there are several ways a case can arrive before the Court,<sup>xxxvi</sup> the overwhelmingly majority of cases heard by the justices are on appeal from the lower courts. Granting or denying these writs of certiorari is entirely within the discretion of the Court. Internal Court convention, though not an established rule, requires four justices to vote to “grant cert” for a case to be heard.<sup>xxxvii</sup> The “Rule of Four” does not apply to all appeals presented to the Court. Five justices, for example, are required to grant most stays. And, of course, in some circumstances a single justice may grant a stay pending review by the entire Court.<sup>xxxviii</sup>

As an alternative to enacting a supermajority requirement for federal legislation and executive acts to avoid the logical and constitutional issues raised above, a bright line rule could be enacted that would require a majority or even supermajority to take up many suits presented to the Court.<sup>xxxix</sup> The late Justice Stevens, for example, once suggested that five votes should be required to grant cert.<sup>xl</sup>

Under this scheme, in the absence of the justices meeting that threshold, the lower courts would be the final word on the matter within that circuit as currently occurs when *cert* is denied. And if a supermajority requirement was extended to filings such as those regarding nationwide injunctions, given the prevalence of those actions in the lower courts, it seems logical that any injunction should be lifted if the justices cannot come to broad agreement to rule on the matter.

There may be administrative benefits to this approach when compared to enacting a supermajority requirement to overturn federal law. A bright line rule such as this could be more difficult for the justices to maneuver around. Further, such a change could require more collaboration among the justices as well as direct their attention to the cases that raise the most serious legal issues that cut across ideological lines.

At the same time, the Rule of Four has generally been seen to protect the interests of those in the Court’s ideological minority and an important way to ensure important cases aren’t overlooked.<sup>xli</sup> And in matters of life or death, such as when the Court reviews death sentences, there may be very compelling reasons not to make it more difficult for the Court to hear certain petitions. Such dynamics suggest that, in the event broad changes to voting thresholds impacting most cases are considered desirable, at least some carve-outs should be considered.



In addition, the Court's already historically small docket has brought heavy criticism from many legal experts as a dereliction of duty as it has left important legal questions unresolved amidst the circuits.<sup>xliii</sup> Given this fact, it is important to continue exploring the extent to which the Court's docket is likely to be further reduced under this reform. Essentially, would the change truly refocus the Court's work on pressing legal (as opposed to political) matters—or would it result in a Court unable to agree to take up nearly any case at all?

Another consideration, as indicated above, is the deepening of circuit splits across the country if the Court's docket was dramatically reduced. CAP has previously explained how significant disparities in the law from circuit-to-circuit could have a damaging impact on the stability of the rule of law.<sup>xliii</sup> At the same time, given the very small fraction of cases the Court takes up now and existing variances in law, it may be important not to overstate this concern.

Circuit splits on important issues could be somewhat alleviated by either directing cases of certain import—such as federal laws and regulations or those seeking a nationwide injunction—to either the D.C. federal courts and/or give any party to certain suits the ability to right to waive into the D.C. federal courts at filing. Congress has typically given the D.C. federal courts robust jurisdiction, making those courts a natural place to be heard if desired by either party. If needed, the D.C. district and circuit courts could be expanded to meet the increased workload.<sup>xliiv</sup>

As an alternative, Congress could also establish new courts made up of judges with subject-matter expertise that certain cases could be appealed to. For example, Congress could establish a court for employment law matters or for voting rights. Legislative language would need to be exact, and could even require some sort of partisan balance, but Congress's ability to establish such courts of limited jurisdiction is well established.

Under either system, at least some homogeneity in the law across the country could be assured.

Finally, however, it should be considered that such a proposal—unless it were applied and upheld as constitutional for original jurisdiction cases as well—is perhaps at most risk of incentivizing a growth of original jurisdiction cases focused on blockbuster issues due to the proposal's possible impact on the size of the Court's appellate docket.

Overall, both voting proposals raise complex dynamics that strongly merit further study.

## **Conclusion**

We believe the reforms we have discussed in this comment are some of those most essential to consider; we do not purport to have provided an offer a comprehensive list of all possible Court reforms. We have previously voiced support for ethics reform and changes to the clerking process to encourage more cross-ideological debate during the behind-the-scenes work at the Court. We are also concerned with the lack of transparency in the operation of the shadow docket more generally.

Tenure on the Court today appears distinct from previous generations, with significant repercussions for the Court's relationship to the American people. To strengthen the Court, it is of critical importance to both ensure that the tenure and duties of the justices put them in touch with the needs of everyday Americans and to ensure the Court is engaged in the business of judicial, as opposed to policy, decision-making.

## Endnotes

---

- <sup>i</sup> Maggie Jo Buchanan, “The Need for Supreme Court Term Limits,” Center for American Progress, August 3, 2020, available at <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/>.
- <sup>ii</sup> Buchanan, “The Need for Supreme Court Term Limits.”
- <sup>iii</sup> Michael A. Bailey, “If Trump appoints a third justice, the Supreme Court would be the most conservative it’s been since 1950,” The Washington Post, September 22, 2020, available at <https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/>.
- <sup>iv</sup> Testimony of Stephen I. Vladeck, “The Supreme Court’s Shadow Docket,” Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary, February 18, 2021, available at <https://www.justsecurity.org/wp-content/uploads/2021/02/Vladeck-Shadow-Docket-Testimony-02-18-2021.pdf>.
- <sup>v</sup> Testimony of Stephen I. Vladeck, “The Supreme Court’s Shadow Docket.”
- <sup>vi</sup> Adam Liptak and Coral Davenport, Supreme Court Deals Blow to Obama’s Efforts to Regulate Coal Emissions, The New York Times, February 9, 2016, available at <https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html>.
- <sup>vii</sup> Testimony of Loren L. AliKhan, “OAG’s Testimony on the Supreme Court’s ‘Shadow Docket,’” Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary, February 18, 2021, available at <https://oag.dc.gov/release/oags-testimony-supreme-courts-shadow-docket>
- <sup>viii</sup> Jeffrey M. Jones, “Supreme Court Job Approval Dips Below 50%, Gallup, July 28, 2021, available at <https://news.gallup.com/poll/352895/supreme-court-job-approval-dips-below.aspx>.
- <sup>ix</sup> Buchanan, “The Need for Supreme Court Term Limits.”
- <sup>x</sup> We have attached our previous brief on this topic to this comment as an appendix for reference.
- <sup>xi</sup> Buchanan, “The Need for Supreme Court Term Limits.”
- <sup>xii</sup> 28 U.S. Code § 1.
- <sup>xiii</sup> The Federal Judicial Center, “The Evolution of Judicial Retirement,” available at <https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement>.
- <sup>xiv</sup> Fix the Court, “Term Limits,” available at <https://fixthecourt.com/fix/term-limits/>.
- <sup>xv</sup> Akhil Reed Amar, “In Support of a Congressional Statute Establishing an Eighteen-Year Limit of Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In,” Testimony Before the Presidential Commission on the Supreme Court of the United States, July 20, 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf>.
- <sup>xvi</sup> Amar, “In Support of a Congressional Statute Establishing an Eighteen-Year Limit of Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In.”
- <sup>xvii</sup> Adam Chilton, Daniel Epps, Kyle Rozema, Maya Sen, “Designing Supreme Court Term Limits,” Forthcoming in Southern California Law Review, July 19, 2021 (last revised), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3788497](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788497).
- <sup>xviii</sup> Chilton, et. al., “Designing Supreme Court Term Limits.”
- <sup>xix</sup> Chilton, et. al., “Designing Supreme Court Term Limits.”
- <sup>xx</sup> Amar, “In Support of a Congressional Statute Establishing an Eighteen-Year Limit of Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In.”
- <sup>xxi</sup> Amar, “In Support of a Congressional Statute Establishing an Eighteen-Year Limit of Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In.”
- <sup>xxii</sup> Steven G. Calabresi and David C. Presser, “Reintroducing Circuit Riding: A Timely Proposal,” Minnesota Law Review, May 1, 2006, available at [https://www.minnesotalawreview.org/wp-content/uploads/2011/11/CalabresiPresser\\_Final.pdf](https://www.minnesotalawreview.org/wp-content/uploads/2011/11/CalabresiPresser_Final.pdf).
- <sup>xxiii</sup> The Federal Judicial Center, “A Brief History of Circuit Riding,” available at <https://www.fjc.gov/history/spotlight-judicial-history/circuit-riding>.
- <sup>xxiv</sup> Stuart v. Laird, 5 U.S. 299 (1803).

- 
- <sup>xxv</sup> The Federal Judicial Center, “A Brief History of Circuit Riding,” available at <https://www.fjc.gov/history/spotlight-judicial-history/circuit-riding>.
- <sup>xxvi</sup> Craig Lerner and Nelson Lund, “Judicial Duty and the Supreme Court’s Cult of Celebrity,” *George Washington Law Review*, September 2010, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518046](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518046).
- <sup>xxvii</sup> As quoted in Steven G. Calabresi and David C. Presser, “Reintroducing Circuit Riding: A Timely Proposal.”
- <sup>xxviii</sup> Jamal Greene, Testimony to the Presidential Commission on the Supreme Court of the United States, July 20, 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf>.
- <sup>xxix</sup> Sarah Herman Peck, “Congress’s Power over Courts: Jurisdiction Stripping and the Rule of Klein,” Congressional Research Service, August 9, 2018, available at <https://fas.org/sgp/crs/misc/R44967.pdf>.
- <sup>xxx</sup> 28 U.S. Code § 1.
- <sup>xxxi</sup> 28 U.S. Code § 2109.
- <sup>xxxii</sup> *Kansas v. Colorado*, 556 U.S. 98 (2009), (C. J. Roberts, concurring in judgment).
- <sup>xxxiii</sup> Stephen Wermiel, “SCOTUS for Law Students,” SCOTUSblog, October 13, 2014, available at <https://www.scotusblog.com/2014/10/scotus-for-law-students-original-cases/>.
- <sup>xxxiv</sup> 383 US 301 (1966).
- <sup>xxxv</sup> Amar, “In Support of a Congressional Statute Establishing an Eighteen-Year Limit of Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In.”
- <sup>xxxvi</sup> Ryan J. Owens and David A. Simon, “Explaining the Supreme Court’s Shrinking Docket,” *William & Mary Law Review*, March 2012, available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3424&context=wmlr>.
- <sup>xxxvii</sup> M. Patrick Yingling, “Judicial Conventions: An Examination of the United States Supreme Court’s Rule of Four,” *Dublin University Law Journal*, June 21, 2015, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621066](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621066).
- <sup>xxxviii</sup> United States Courts, “Supreme Court Procedures,” available at <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>.
- <sup>xxxix</sup> CAP would like to thank Noah Purcell, who raised several of the potential policies mentioned below with us in early 2021.
- <sup>xl</sup> Benjamin Johnson, “The Supreme Court’s Political Docket: How Ideology and the Chief Justice Control the Court’s Agenda and Shape Law,” *Connecticut Law Review*, 2018, available at [https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1378&context=law\\_review](https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1378&context=law_review).
- <sup>xli</sup> Benjamin Johnson, “The Supreme Court’s Political Docket: How Ideology and the Chief Justice Control the Court’s Agenda and Shape Law.”
- <sup>xlii</sup> Ryan J. Owens and David A. Simon, “Explaining the Supreme Court’s Shrinking Docket.”
- <sup>xliii</sup> Danielle Root and Sam Berger, “Structural Reforms to the Federal Judiciary,” *Center for American Progress*, May 8, 2019, available at <https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/>.
- <sup>xliiv</sup> While outside the scope of this comment, CAP strongly supports lower court expansion as a whole: Maggie Jo Buchanan and Stephanie Wylie, “It is Past Time for Congress to Expand the Lower Courts,” *Center for American Progress*, July 27, 2021, available at <https://www.americanprogress.org/issues/courts/news/2021/07/27/501738/past-time-congress-expand-lower-courts/>.