Meeting Minutes

Presidential Commission of the Supreme Court of the United States
Public Meeting #5 (Virtual)
November 19, 2021

Call to Order

Dana Fowler, Commission Designated Federal Officer
The fifth public meeting of the Presidential Commission on the Supreme Court of the United States was called to order by Dana Fowler, the Commission's Designated Federal Officer (DFO). The DFO advised viewers that discussion materials and a recording of the meeting could be found on the Commission's website at https://www.whitehouse.gov/pcscotus/. The DFO provided brief remarks on her role and the Commission's status as a Federal Advisory Committee under the Federal Advisory Committee Act (FACA).

Vote on Amended Bylaws
The Commission voted on an amendment to the Commission's bylaws, which can be found on the Commission's website. The amendment replaced the "Purpose" language of the bylaws adopted by the Commission during its May 19th, 2021, public meeting. The edits reflect that the Commission's deliberations required more time to complete than the 180 days originally provided in Executive Order Executive Order 14023. Commissioner Rodriguez called a vote and the DFO established that a quorum of Commissioners was present (see Appendix A for a list of Commissioners that joined throughout the meeting).

- Commissioner Kate Andrias moved to adopt the amended bylaws.
- The Commission voted unanimously in favor of adopting the amended bylaws.

Welcome and Opening Remarks

Commission Co-chairs Cristina M. Rodríguez and Bob Bauer
The fifth public meeting was the Commission's second opportunity to engage in deliberations on a revised set of discussion materials. Revisions were made to reflect and incorporate the numerous comments and perspectives raised during the October 15th, 2021, deliberative meeting. The materials were designed to be inclusive in their discussion of issues with respect for disagreement. The Commission engaged in deliberations in order to produce a report for the president that would fairly represent and ultimately advance reform debates. Commission co-chairs emphasized that the discussion materials were still under revision and did not represent the views of the Commission as a whole nor those of any particular Commissioner.

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

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

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

The Commission gathered testimony from 44 witnesses and consulted 23 additional experts over the course of two summer 2021 hearings, which can be viewed on the Commission's website. Public engagement was encouraged throughout the process as well, resulting in over 7,000 comments from Congress and other public officials, advocacy organizations, subject matter experts, and members of the general public. These comments supported a variety of reform proposals, as well as supported retaining the status quo. The Commission received a number of comments on matters that fell outside of the Commission's charge, such as reforming the confirmation process or addressing the role of private spending in influencing the confirmation process. While the Commission did not confront these topics directly, it did cover aspects of these issues in its analysis. The public was advised that while comments would be accepted until December 15th, 2021, they would be most valuable as input into the report if provided before December 3rd. Comments can be viewed and submitted at https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003.

Overview of materials:

- Introduction: Sets the stage for the reform debates and provides an account of why reform debates have emerged.
- Chapter 1: Presents the history of efforts to reform the Supreme Court from the outset of the republic.
- Chapter 2: Addresses the question of whether to expand the Supreme Court or otherwise reform the structure of the Court.
- Chapter 3: Discusses whether to adopt term limits for Justices of the Supreme Court.

- Chapter 4: Explores ways of reducing the power of the Supreme Court in relation to the other branches.
- Chapter 5: Discusses issues involving the Supreme Court’s internal operations.

Introduction: The Genesis of the Reform Debate and the Commission's Mission

Discussion Materials

Opening Remarks

Commissioner Morrison: Commissioner Morrison advised viewers that the discussion materials for the introduction had been structurally adjusted since the October 15th deliberative meeting, with the extensive history section split-off into its own chapter. The revised introduction focused on the genesis of modern reform debates and outlined guiding considerations that the Commission used when evaluating reform proposals. The materials noted that there is a long history of conflict around the Supreme Court that often is manifested in the nomination process, and that the controversies around the most recent nominations provided significant motivation for current reform debates. The draft did not propose a single way to understand these controversies but noted that individual Commissioners had different views of the processes around these episodes. The materials also suggested that the stakes of the reform debates were high because the Supreme Court was at the center of escalating partisan conflict. The draft materials noted consensus among Commissioners that acute political polarization was likely to continue to affect debates over the Court's role in the U.S.' constitutional system, as well as perpetuate partisan conflict over nominees to the Court.

The materials raised three key themes that are frequently invoked in reform discussions: legitimacy, judicial independence, and democracy. While these key themes were addressed in the October 15th discussion materials, the revised materials expanded the analysis of each and attempted to clarify the different ways in which they are used in debates for and against reforms. The materials concluded with a short discussion on the value of transparency and its relationship to the work of the Court.

Deliberations

Commissioner Griffith: Commissioner Griffith was concerned that the discussion materials insufficiently acknowledged the remarkable achievements of the Supreme Court and may unintentionally damage the Court as an institution by too often assuming that Justices are mere partisans. While Commissioner Griffith supported discussions on the proper role of the Supreme Court, he felt that those discussions should take place in the context of the monumental success the U.S. Supreme Court has had in following and preserving the rule of law over time. Commissioner Griffith argued that many of the calls for change presented in the materials, including those that advocate for Court expansion and term limits, are based on a notion that judges are politicians in robes. Commissioner Griffith cautioned that the toxic political culture in the U.S. is doing great

harm to democratic institutions. Commissioner Griffith suggested that the Commission use its report to inspire confidence in U.S. democratic institutions.

Commissioner Huang: Commissioner Huang praised the introduction's elegant and precise conceptualization of legitimacy, and judicial independence, and democracy as they relate to current reform debates. Commissioner Huang suggested one minor improvement to the introduction, which would be to fold the last section of the introductory section into an earlier part of the introduction that is largely the same.

Commissioner Lemos: Commissioner Lemos noted that the updated materials went a long way in addressing the comments she raised on the discussion of judicial independence during the first deliberative meeting. In particular, Commissioner Lemos appreciated the materials' attempt to address questions on the extent to which the federal judiciary may be independent from or dependent on the political branches from the perspective of checks and balances, as well as its clarification of the distinction between institutional vs decisional independence.

Commissioner Dellinger: Commissioner Dellinger disagreed with Commissioner Griffith's view that the materials read as undercutting the significance of the Supreme Court as an independent check on the political branches.

Commissioner Morrison: Commissioner Morrison noted appreciation for the comments that have been provided on the introduction's discussion on legitimacy and judicial independence. Like Commissioner Dellinger, Commissioner Morrison did not feel that the introduction embraced the view that judges are politicians in robes but did note that view in its account of debates around the Court's relationship to democracy.

Chapter 1: The History of Reforms and Reform Debates

Discussion Materials

Opening Remarks

Commissioner LaCroix: The main purpose of the chapter 1 discussion materials was to give historical background and context under which Supreme Court reform debates could be understood. The Supreme Court began operating in 1790 and in the time since the Supreme Court has undergone many changes; the discussion materials sought to explore why the Supreme Court has evolved the way it has, and how constitutional requirements, Congressional action, political factors, and other elements have impacted the Court.

Commissioner LaCroix identified four main themes that the chapter 1 discussion materials present:

1 - **The persistence of reform debates.** Debates over reforming or restructuring the Supreme Court have been occurring since the moment the Constitution was drafted. However, the content of reform efforts has varied over time, so it would be a mistake to disregard the complexity of current concerns.
2 - **The Supreme Court's dual role.** The Supreme Court is an important check on the other branches of government, but over time it has also taken on the role of arbiter overseeing the entire system that determines the meaning of the Constitution.
3 - **The connection between the Supreme Court's role and the way it is organized.** There is variability in matters such as the number of seats, circuits, whether or not Justices ride circuit, etc. that have important consequences for the Supreme Court's role.
4 - **The relationship between the Supreme Court and politics in a broad sense.** The materials' touched on how the Court is and is not interconnected to political debates and broader discussions of the moment.

Commissioner LaCroix also highlighted three main additions that were made in response to October 15th deliberations:

1 - Expanded discussion on the criticisms of the Court and calls for reform in the context of controversial nominations to the Court, such as the nominations of Louis Brandeis and John J. Parker.
2 - More historical and political context of President Franklin Delano Roosevelt's Court expansion plan and its consequences, how it affected the New Deal, and an emphasis that there is significant disagreement among scholars on those consequences.

3 – Material on the Warren Court as a subject of public debate and criticism. Starting with the Warren Court, some see the Supreme Court as too willing to confront social and political issues, and by others as engaging in overdue protection of civil rights.

In response to suggestions during the October 15th deliberative meeting that the historical account continue past the Warren Court, Commissioner LaCroix noted that more recent developments would be covered in other sections of the report.

Deliberations

Commissioner Tribe: Commissioner Tribe remained concerned that the chapter 1 discussion materials ended too soon, as he did not feel that it was enough to handle the disputes over controversial issues, such as the nomination of Robert Bork, purely in a subject matter context in later parts of the report. Commissioner Tribe was encouraged by the quality of the materials' analysis of covered topics and competing views.

Commissioner Grove: Commissioner Grove noted that the chapter 1 discussion materials did a good job complementing the discussion in other chapters, and that she was particularly impressed with its discussion of the Judiciary Act of 1789, which sets the stage for many of the arguments throughout the report.

Commissioner Grove had initially agreed with Commissioner Tribe's suggestion that the historical account ended too soon, as there have been debates over jurisdiction stripping from the 1960's into the 21st century. However, Commissioner Grove agreed with Commissioner LaCroix's point that the history section needed to stop somewhere, and that the discussion materials for subsequent chapters served as the logical place for some of more modern controversies.

Commissioner Ifill: Commissioner Ifill agreed with Commissioner Tribe's argument that the ongoing struggles that emanated from the failed Robert Bork confirmation should be confronted in the final report's historical account.

Commissioner Ramsey: Commissioner Ramsey appreciated that the updated draft reflected his October 15th feedback. With regard to suggestions that the historical account extend further toward the present, Commissioner Ramsey agreed that it might have been beneficial to touch on the continuing controversies over nominations but noted concern that taking up a substantial effort to extend the historical account at a late point in the Commission's deliberations might be problematic. Commissioner Ramsey agreed that the Robert Bork nomination was instructive and important in the history of the Supreme Court, but he doubted that the Commission could reach consensus on the conclusions to be drawn from Robert Bork's failed confirmation.

Commissioner Boddie: Commissioner Boddie agreed with Commissioners Tribe and Ifill in saying that the historical account ended prematurely. Commissioner Boddie suggested that people might read modern controversies around the Supreme Court differently if they had a better understanding of the failed confirmation of Robert Bork.

Commissioner Waldman: Commissioner Waldman noted that if further revisions of the historical account were to include more recent controversial nominations, that the revisions should acknowledge that nominations have become increasingly partisan and that nominations that are not controversial are now narrowly passed along party lines.

Chapter 2: Membership and Size of the Court

Discussion Materials

Opening Remarks

Commissioner Grove: The chapter 2 discussion materials focus on proposals to change the membership and structure of the Supreme Court. The discussion materials first explore the scope of Congress' power to modify the size of the Court, as well as prudential arguments for doing so. The Constitution does not specify how many judges should be on the Supreme Court, and instead gives Congress considerable discretion to shape the Supreme Court. In 1789 the Supreme Court had six members, and in subsequent decades Congress changed the size of the Court seven more times, with the number of Justices settling at nine in 1869. While the size of the Court has not changed in the years since, it has remained a subject of interest. In 1937 there was a prominent effort by President Franklin Delano Roosevelt to add six additional Justices in response to unfavorable rulings by sitting Justices. While his efforts were supported by some, Congress ultimately rejected the proposal. Congress also rejected an effort in the 1950s to constitutionally fix the number of Justices at nine members. These efforts and the constant of nine Justices have resulted in a strong norm against modifying the size of the Court, yet Congress has the power to determine the Court's size. Today this issue has become salient again, with proponents of expansion arguing that the Supreme Court faces a legitimacy crisis due to a breakdown of norms in the judicial confirmation process that can only be resolved by Court expansion. Opponents of expansion argue that it would significantly diminish the Court's independence and legitimacy, as well as launch a cycle of "tit-for-tat" Court reform efforts.

The chapter 2 discussion materials also analyze the legal and policy questions surrounding alternative structural reform proposals as well, such as ensuring partisan balance on the Court, a rotation system under which judges would rotate between service on the Supreme Court and lower federal courts, and a panel system under which Justices would decide some cases by panel.

Deliberations

Commissioner Fallon: Commissioner Fallon noted that the materials did a remarkable job of summarizing matters upon which people deeply disagree.

Commissioner Fallon provided one suggestion, which was to more thoroughly define the "other structural reforms" discussed toward the end of the chapter, such as rotation and panel systems. Commissioner Fallon stated that the November 19th discussion materials dove directly into a discussion on constitutionality without giving a clear summary of the proposals.

Commissioner Baude: Commissioner Baude stated that the chapter 2 discussion materials were as balanced as they could be in light of different views among Commissioners. Commissioner Baude stressed that a fruitful way of approaching questions of Supreme Court reform among a diverse set of perspectives would be to consider changes that both sides agree would help improve the functioning of the Supreme Court, rather than focus on reforms influenced by agreement or disagreement with Court decisions.

Commissioner Pildes: Commissioner Pildes noted concern with the materials' suggestion that there may be long term advantages to allowing the Supreme Court to gradually expand over time. The materials state that one benefit of expanding would be that the Supreme Court would be able to decide more cases than it currently does. Commissioner Pildes argued that the reason the Court is not deciding more cases has nothing to do with the fact that it has nine Justices. The Court has shown that it can easily increase the number of cases that it hears, and Commissioner Pildes suggested that the draft was misleading in indicating that the decline in the number of cases the Court decides was related to the number of Justices. While there may be other reasons to expand the Court, Commissioner Pildes suggested that the Commission reconsider including that specific point in the final report.

Commissioner Gertner: Commissioner Gertner was encouraged by the quality of the discussions that the Commission had engaged in and felt that the diverse perspectives of Commissioners were a valuable contribution to reform debates. Commissioner Gertner noted that at the outset she was hesitant to support substantial reforms due to the potential risks; however, as noted in her comments during the October 15th deliberative meeting, Commissioner Gertner had come to see the moment as unique and the Supreme Court as in need of structural change. Commissioner Gertner welcomed the changes made to the updated draft, as they now reflected concern among some that the Supreme Court is at risk of becoming permanently entrenched in reflecting one party's ideologies through manipulation of the confirmation process.

In response to Commissioner Griffith's concern that the draft suggested that Justices are too much partisan actors, Commissioner Gertner believed that the materials needed to convey the argument that one judicial philosophy has become entrenched on the Supreme Court.

Commissioner Gertner objected to the use of the term "Court packing" to describe attempts to expand the Court as it suggests that those proponents seek to expand out of disagreement with the Court's decisions. Commissioner Gertner stated that the term skirted the view that the Court should be expanded to prevent permanent entrenchment of one philosophy over another. Commissioner Gertner acknowledged that there are

risks to making structural changes to the Court but felt that the final report should flesh out the view that the risk of inaction is greater than the risk posed by reform.

Commissioner White: Commissioner White pointed out that the new version of Chapter 2 differs significantly from the draft materials released weeks ago. The new draft, he felt, sets out both the arguments in favor of court expansion and the arguments against court expansion in a way that suggests two ships passing in the night. Each side is presenting its own affirmative arguments without responding to the other side's arguments. Still, Commissioner White expressed support for this draft as it accurately describes and accurately represents the arguments of both sides and would be reporting them accurately to the president.

However, Commissioner White stated that he fundamentally disagrees with arguments made in favor of court expansion, including advocates' view of recent history of the Supreme Court and Senate and with the suggestion that anything in recent history would justify breaking with the long-standing norm against tactical court expansion. Commissioner White also expressed disagreement with the advocates' view that the present state of the Supreme Court and its approach to the rule of law would justify court expansion. Finally, he disagrees with advocates' view of the future, in particular the suggestion that they can narrowly tailor an argument of court expansion that wouldn't be used not just to pack the court now but also in the future.

Commissioner White expressed the view that when the process ends, the Commissioners owe it to themselves and the public to be very clear and forthright on their views of court expansion in general and in this present moment in time specifically. Commissioner White hopes that the president, Congress, and the public call upon us to offer our views. He also hopes that the submission of a final report is not the end of a conversation but the beginning. He agrees with Commissioner Gertner that we are at a unique moment, but it is a dangerous moment in which to consider court expansion.

Commissioner Grove: Commissioner Grove noted that it is extremely valuable to have this discussion when, in our society today, people who fundamentally disagree on issues simply do not discuss them. Not only have the Commission members discussed and debated these issues, but Commissioner Grove also believes that they have done so while maintaining respect for one another

Commissioner Rodriguez. Commissioner Rodriguez stated that this chapter succeeds in making clear the stakes of this debate. Commissioner Rodriguez pointed out that the Commission is not charged with making recommendations or coming down on one side, but this chapter does an effective job of laying out the worldview of the arguments for and against court expansion. Those worldviews consist of both predictive judgments

and values. Commissioner Rodriguez stated her hope that by rigorously describing worldviews and arguments on both sides of the debate, people who have power to alter the structure of the Supreme Court will make good decisions informed by a certain amount of epistemic humility.

Commissioner Ifill: Commissioner Ifill stated that this chapter draft did a really excellent job of laying out the different arguments and provided the underpinning for what is going to be an ongoing conversation.

Commissioner Ifill agrees with Judge Gertner about the use of the term "court packing," that it is a drafting and consistency issue, similar to how Chapter Five initially used the term "shadow docket" but now uses the term "emergency orders" instead. Commissioner Ifill stated the term "court expansion" is more appropriate except when one is talking about how it was used in a historical period.

Commissioner Tribe: Commissioner Tribe associated himself with Commissioners White, Ifill and others who have said that the process itself has been illuminating and educational at a moment when people find it difficult to talk to one another about matters on which they differ deeply.

However, Commissioner Tribe indicated that if one were simply being a hard-headedly political, one could say that no matter how careful, informative, thoughtful, elegant, exquisite this report is, the likelihood of political movement in response to any of its appraisals is not high. Commissioner Tribe expressed the view that the nation's agenda is filled with pressing matters and the likelihood that anyone will take up the cause of any changes to the Supreme Court even if that person is persuaded by the arguments in favor of change, is not great.

But Commissioner Tribe stated that this did not lead him to believe that this extraordinarily time-consuming enterprise has been in any way wasted. As a teacher, Commissioner Tribe stated, he not only focuses on the likely short-term impact of what we produce and present to the president and the public, but on what the world will look like when his students have assumed positions of influence.

Twenty years from now, 50 years from now, debates about the role of the Court, its importance in preserving the role of law and preserving the values that Judge Griffith mentioned, will still be with us. And the question about its direction will remain. And debates about structure reform will arise. And when that happens, Commissioner Tribe stated, it will be the case that nothing else available comes close to what this report will do in laying out calmly and thoughtfully the arguments for and against various changes.

Commissioner Griffith: Commissioner Griffith agrees with Commissioner Gertner about the gravity of the moment in which we find ourselves. For that reason, he is perhaps much more optimistic about the present state of the Supreme Court and the role he hopes it will play in getting us through the difficult times. Commissioner Griffith believes that if we aren't careful and reduce the stature of the court in the eyes of the American public, we would have inhibited its ability to perform this role.

Commissioner Griffith agreed with the comments about the quality of the Commission's deliberations. However, Commissioner Griffith does have a fundamental concern with any premise that that change is necessary. As a Burkean, Commissioner Griffith worries about change and the unintended consequences of change. We have something that is precious and good in the Supreme Court that has been created over the years with difficulty.

Chapter 3: Term Limits

Discussion Materials

Opening Remarks

Commissioner Pildes: The main term limits proposal that the chapter 3 discussion materials address was one in which Justices would be appointed to 18-year terms of office. Under this proposal, each presidential term would provide the president with the opportunity to nominate two Justices to the Court. Most proposals suggest that the president's nominations occur in years one and three of each term to avoid nominations arising during election years. Proposals for term limits have garnered considerable bipartisan support, and the discussion materials point out that the U.S. is the only major constitutional democracy in the world that operates without either a retirement age or a fixed term for its highest court judges.

During the October 15th deliberative meeting Commissioners raised significant concerns that would need to be confronted when considering term limits, and the updated materials reflect more thorough analysis of arguments against term limits. Proponents argue that term limits would regularize the appointments process, give each president equal opportunity to shape the Court, boost public confidence in the Court by preventing strategic retirements, and remove the incentive to nominate young Justices. Opponents argue that term limits would compromise judicial independence, impact electoral politics and public perceptions of the Court, and give presidents too much power over the Court.

Deliberations

Commissioner Ramsey: As one of those that had criticized the October 15th draft of the chapter 3 discussion materials, Commissioner Ramsey noted that the updated materials had been significantly improved and were much more balanced.

Commissioner Ramsey raised one small concern with the section that discussed the difficulties with implementing a system of term limits. The draft stated that "a statute might provide that if the Senate fails to confirm one or both of a President's scheduled appointments, the next President of a different party would lose a corresponding number of appointments." The draft then suggests that while this proposal raised some practical concerns, it would seem to be constitutional. Commissioner Ramsey doubted that such a proposal would be constitutional; the Constitution gives the president the power of nomination and appointment, and he did not believe that a statute could remove that power. Commissioner Ramsey suggested that the suggestion be omitted from the final report.

Commissioner Levi: Commissioner Levi raised several concerns and suggestions with the intention of increasing the clarity of the report:

1 - Commissioner Levi felt that the discussion materials gave the impression that there was widespread support within the Commission for term limits. Commissioner Levi pointed out that there was no explicit consensus among Commissioners, and that the Commission should not take sides on the debate.
2 - There were some places where the text seemed to convey arguments as being made in the voice of the Commission, rather than the voice of proponents/opponents.
3 - Reliance on state supreme court analogues needed clarification and qualification, as there are no non-renewable term limits for state supreme court judges. In the state systems, supreme court justices can hold renewable terms generally without limit and may either be re-elected or re-appointed. Due to these differences, Commissioner Levi did not feel that the state system could be pointed to as a model for term limits.
4 - The opposition section should address statements by proponents that life tenure causes Justices to become out-of-step with the times.
5 - The discussion materials presented 12-year term limits as a plausible alternative to 18-year term limits. Commissioner Levi did not feel that the draft sufficiently acknowledged the obvious danger of 12-year term limits, which would allow a two-term president to appoint a majority of the Justices.
6 - There was a summary at the end of the opposition section that Commissioner Levi felt erroneously characterized opposition to term limits as mostly based on a fear of unintended consequences.

7 - There seemed to be a suggestion that by providing for nomination and confirmation by the political branches, the Constitution implicitly provides for an equal number of appointments by the president during each presidential term. Commissioner Levi suggested that this point be challenged in the opposition section.
9 - The final report should give greater salience to the negatives in limiting post-employment opportunities for Justices who leave the Court under a system of term limits. These limitations could trap Justices in place who are unsuited for the job, dislike the work, or are no longer up to the task.
10 - The opposition arguments should include consideration of the extent to which imposing term limits on Supreme Court Justices might open the door to extending the term limit proposals to the entire federal judiciary.
11 - Commissioner Levi was concerned about sending a message to the public that the Commission as a whole views the Supreme Court as either partisan political actors or the spoils of political office.

Commissioner Balkin: Commissioner Balkin was optimistic that Commissioner Levi's comments could be incorporated into the final draft, as they were largely minor. Commissioner Balkin suggested that rotation matters more where there are a relatively small number of people that are holding a position. Because there are a large number of Article 3 judges, Commissioner Balkin noted that the federal judiciary as a whole already enjoys the benefits of rotation, as there are many appointments made during each presidential term. On the other hand, due to the small number of Justices on the Supreme Court, Commissioner Balkin pointed out that random turnover cannot provide the benefits of regular rotation.

Commissioner Johnson: Commissioner Johnson expressed the view that the chapter 3 discussion materials exhaustively analyzed debates on both sides of the issue and would be valuable for thinking through complex design considerations, not only in terms of the choice between constitutional vs. statutory change but also in the consideration of potential unintended consequences.

Commissioner Johnson agreed with arguments that the Supreme Court cannot be compared to the state courts in all dimensions as they are largely different, but she believed that the November 19th discussion materials set out to draw these comparisons in order to provide data points and perspective.

On concerns that the report might suggest a Commission view that judges are all political partisans, Commissioner Johnson argued that there are real political stakes to appointments that lead to partisan conflict over seats, and that the November 19th discussion materials were careful to describe that phenomenon without asserting that judges function as mere partisans.

Commissioner Ross: Commissioner Ross stated that judges have their own philosophies that lead to different views and decisions in cases involving democracy, individual rights, federalism, the separation of powers, and other important matters. Commissioner Ross stated that these views are what cause political actors to care so intensely about who gets placed on the courts. Commissioner Ross argued that what made the current moment different was interference with the randomness of turnover due to strategic manipulation. While it may or may not be true that Justices engage in strategic retirement, Commissioner Ross stated that the Senate has opened the door to strategic manipulation of turnover processes, and that urgent action is needed to restore the randomness of the process and prevent an entrenchment of a specific judicial philosophy on the Court.

Commissioner Boddie: Commissioner Boddie suggested that in some cases, the discussion materials presented opposition arguments that did not take into account what proponents were trying to convey. For example, Commissioner Boddie

recommended removing opposition language that suggested that proponents sought to make individual judges responsive to political decisions, when proponents were instead arguing that over time, the composition of the judiciary as a whole should take account of electoral outcomes.

Commissioner Morrison: Commissioner Morrison was optimistic that the report could acknowledge that judicial philosophies, ideologies, and substantive value sets exist without making the suggestion that judges are politicians in robes. Commissioner Morrison argued that the goal should be to ensure that arguments on behalf of term limits are not misunderstood as suggesting that regular turnover and a responsiveness to democracy lead to judges operating as politicians. Commissioner Morrison did not believe that the November 19th chapter 3 discussion materials made such suggestion but was open to making changes that would provide clarity by distinguishing between partisanship and ideology.

Commissioner Griffith: Commissioner Griffith agreed that judges have judicial philosophies, and that the report should strive to distinguish between party affiliation and judicial philosophy.

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

Discussion Materials

Opening Remarks

Commissioner Fredrickson: The chapter 4 discussion materials analyze proposals that would reduce the power of the Supreme Court, or the judiciary as a whole, in part as a means of shifting power to address social, political, and cultural issues from the Court to the political branches. Proponents argued that the Supreme Court has too much power, plays too large a role in the U.S.' system of constitutional governance, is not sufficiently representative of the population as a whole, and is too difficult to challenge due to judicial supremacy and the notorious difficulty of constitutional amendment. Under these views, the Court has emerged as an obstacle to the realization of important social goals. The chapter 4 discussion materials specifically analyzed jurisdiction stripping, supermajority requirements and other rules that would require greater deference to the political branches, and legislative overrides of court decisions. The materials did not purport to resolve fundamental questions of democratic and political theory that disempowerment would raise, but instead analyzed how proposals might affect the Supreme Court, the potential benefits and costs of proposals, and whether proposals could be achieved without constitutional amendment. The considered proposals generally rested on two assumptions:

> 1 - A determination that a statute violates the Constitution requires exercising judgment about what the Constitution means, which is something many people (including Justices) disagree about.
> 2 - The principles of democracy require opportunities for Congress and the executive branch to check the decisions of an unelected judiciary and advance their own views of the constitutionality of legislation and executive action.

Those who criticize disempowerment proposals worried that such reforms might undermine the protection of individual rights, particularly minority rights, or that competing interpretations of the Constitution could lead to unsettled or poorly reasoned decision making. Critics also cautioned that reforms could undermine the rule of law by eliminating the Court's role in ensuring accountability of government officials.

Deliberations

Commissioner Grove: Commissioner Grove noted an inclination to be deferential to those that worked on the chapter 4 discussion materials, as they had worked very closely on issues related to Supreme Court disempowerment, which are rooted in a vast literature. Commissioner Grove also praised the deft transition of the chapter 1 materials to the chapter 4 materials, as it shows that there has been a lot of late 20th century and early 21st century debate over Court reform.

Commissioner Andrias: Commissioner Andrias noted appreciation for the constructive comments that were raised during the October 15th deliberative meeting, which helped bring the chapter 4 materials greater clarity on an important complex topic. Commissioner Andrias pointed out that the Commission had received considerable testimony from experts and organizations across the political spectrum expressing concern that the Supreme Court had exercised too much power over decisions that ought to be made democratically. Commissioner Andrias highlighted two specific changes that were made in response to October 15th deliberations:

1 - Greater detail on how legislative overrides work, and clarification that most proponents seemed to agree that a formal override mechanism in the U.S. would require constitutional amendment.

2 - An effort to highlight the recognized powers that Congress has to engage in constitutional interpretation and enforcement, even without statutory or constitutional reform.

Commissioner Andrias stated that some of the important technical points made during the October 15th deliberative meeting may not have been included in the updated discussion materials in an attempt to leave issues open for future elaboration and discussion.

Commissioner Rodriguez: Commissioner Rodriguez agreed with Commissioner Fredrickson's point that the chapter 4 discussion materials did not purport to take a position on questions of democratic theory and the proper role of the Supreme Court that are implicated in the discussions but believed that the materials did an effective job of exploring how disempowerment reforms would actually work and the complexities associated with reform proposals. Commissioner Rodriguez also found the materials valuable in their potential to open new conversations about ways to reshape the Supreme Court's role in U.S. democratic governance.

Chapter 5: The Supreme Court's Procedures and Practices

Discussion Materials

Opening Remarks

Commissioner Huang: The chapter 5 discussion materials focused on three issues of high salience in public debates on Supreme Court reform.

1 - **Emergency Orders:** The draft discussed current debates on the Court's use of emergency rulings, including high impact orders that either allow or do not allow laws to take effect while legal challenges play out in the courts. Public debates often focus on how emergency rulings differ from the way the Court usually decides cases; emergency rulings are informed by less briefing, do not involve oral arguments by lawyers, and often do not give much explanation of the Court's reasoning. While there has been general agreement that emergency procedures are necessary, commentators have raised concerns about recent emergency rulings and have proposed ways to address these concerns.

2 - **Judicial Ethics:** There has been much public discussion, including in bills put forth by Congress, about the fact that Justices are not bound by a formal code of conduct, although they may informally consult the code that applies to other federal judges. Unlike other federal judges, Justices are also not governed by the federal statute that governs judicial discipline. The discussion materials also discussed the recusal practices of Justices.

3 - **Courtroom Transparency:** The discussion materials explored ways to help the public observe the Supreme Court's proceedings in real time through live audio streaming and potentially live video streaming.

The final report will also include an appendix that highlights witness testimony related to advocacy and information received by the Supreme Court. Commissioner Huang thanked those that provided testimony on this point during the October 15th deliberative meeting and noted that the revised discussion materials had been improved to be more tightly structured, more sharply focused on salient issues, and more digestible.

Deliberations

Commissioner Baude: Commissioner Baude praised the updates that had been made since the October 15th draft, as he felt it had been much improved.

Commissioner Baude noted a concern on the section on Courtroom transparency, as it was one-sided in its assumption that transparency is always good for the functioning of government organizations, and therefore that the Supreme Court should be encouraged to move toward more and more transparency in real time. Commissioner Baude stated that the Commission did not have enough information to make a recommendation on

whether the Supreme Court should be more or less transparent, and that the Court itself should be left to make those decisions.

Commissioner Morrison: Commissioner Morrison thanked co-chairs Bob Bauer and Cristina Rodriguez, as well as Rapporteur Kate Andrias, for their guidance and leadership on the Commission.

Commissioner Bauer: Commissioner Bauer responded with appreciation and noted that Commissioners had done a remarkable job working through disagreements to develop thoughtful materials that would be helpful to the president.

Commissioner Rodriguez: Commissioner Rodriguez agreed and praised the diversity of perspectives on the Commission.

Commissioner Fallon: Commissioner Fallon echoed Commissioner Morrison's comments and extended appreciation to General Services Administration staff for actively working with Commissioners to resolve technical and other issues.

Adjourn

Commissioner Bauer adjourned the meeting, with thanks to Commissioners and members of the public that contributed to the Commission's work. Commissioner Bauer also noted appreciation for the support provided by the General Services Administration.

The Commission will reconvene on December 7th, 2021, to consider the final report and vote on whether or not to submit that report to President Joseph Biden. While the Commission accepts public comments until December 15th, 2021, comments would be most useful if submitted by COB December 3rd, 2021. Public comments and other information can be posted or viewed on the Commission's website (https://www.whitehouse.gov/pcscotus/) and on regulations.gov.

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

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

Bob Bauer and Cristina M. Rodríguez, January 11, 2022

Appendix A: Commissioners in Attendance

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

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

Commissioners Absent:
Kermit Roosevelt
David A. Strauss