TO: Interested Parties

FR: Take Back The Court

RE: Presidential Commission on the Supreme Court heard testimony from dozens of expert witnesses that establishes the urgent need for Supreme Court expansion

DATE: December 9, 2021

For nearly a year, members of Congress have been waiting for the Presidential Commission on the Supreme Court to finish its work in order to inform congressional consideration of Court expansion. The Commission has now concluded its work, after hearing from dozens of expert witnesses. The combined weight of this witness testimony makes clear the urgent need for Supreme Court expansion to rebalance the Court and strengthen American democracy.

Professor Amanda Hollis Brusky, Chair of the Politics Department at Pomona College
Introducing four or six new, term-limited seats on the Supreme Court via constitutional statute could achieve the long-term goals [of preventing constitutional rot] while in the short term providing restitution or restorative justice for those on the left who believe the Republicans effectively stole two seats from them. [...] Maintaining the status quo is not an option, in my opinion. It will only lead to more escalation, more hardball, and exacerbate our current condition of political and constitutional rot. President Biden and the Democratic majority in Congress have the power and, I would add, the responsibility to put our constitutional democracy on a different path.

Wade Henderson, Interim President & CEO, The Leadership Conference on Civil and Human Rights
The discussion about the future of the Supreme Court [...] is not an academic or theoretical one. Rather, it is fundamentally about humanity and dignity. It is about who our courts serve and recognize as worthy of having their rights protected. [...] That is why institutions like the judiciary that we entrust to safeguard our democracy must work for everyone. We are now at an inflection point. Our nation must reconcile what we say we are as a democracy, and what we actually are.

Professor Michael J. Klarman, Harvard Law School
[I]f Democrats do not expand the Court while they have the political power to do so, they — and the nation as a whole — will likely rue the day they squandered that opportunity. [...] Today's Republican Justices can easily contrive constitutional rationales to invalidate most Democratic reform legislation, including measures that entrench democracy. [...] For Democrats to fail to undertake Court reform now may be tantamount to committing political suicide and guaranteeing the further degradation of American democracy.

Larry Kramer, President, William & Flora Hewlett Foundation & Former Dean, Stanford Law School
Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. This is a lesson we learned decades ago from psychologists and game theorists: if cooperation breaks down, the best way to restore it is tit-for-tat. Played with conviction, it's the most effective way for both sides to learn that neither wins over time unless they cooperate. Ironically, then, tit-for-tat, hard ball for hard ball, could actually set the stage for an improved selection process and a fairer, more balanced judiciary.

Professor Christopher Jon Sprigman, New York University
[T]he "rule of law" is of little value if law does not rest on a foundation of democracy.

Introduction

Since its formation in April, the Presidential Commission on the Supreme Court of the United States has received testimony from dozens of distinguished law professors, historians, public policy experts, and advocates for everyday Americans making clear the urgent need for Supreme Court reform – and the simple truth that only Court expansion would immediately rebalance the Court and remedy the disconnect between the illegitimate Court and the public it governs.

It is puzzling that, in light of the powerful testimony and evidence presented to it, the Commission has chosen not to embrace any meaningful reform. Notably, the Commission has absolutely no authority to do anything in any case. It has, however, generated a large volume of evidence of the critical need for reform – evidence that should inform the efforts of lawmakers who, unlike ceremonial commissions, actually *do* have both the power and the responsibility to ensure the Supreme Court is consistent with basic principles of democracy and justice.

The need for Court expansion is so strong and so urgent, even experts who do not support expansion have submitted testimony that reinforces the case for it. Indeed, even conservatives who explicitly *oppose* Court expansion and defend the Republican Party's unprecedented and illegitimate stacking of the Court with a right-wing majority have inadvertently explained why the Court must be expanded.

For example, Michael McConnell, a conservative law professor at Stanford and senior fellow at the right-wing Hoover Institution, submitted deeply disingenuous testimony in which he opposed Court expansion that would rebalance the Court after his ideological allies illegitimately seized a right-wing supermajority. In describing an alternate reform, McConnell argued a "salutary effect" of term limits would be that "The political balance of the Court would reflect the opinions of the people over time as expressed in their choice of presidents and senators." By stressing the importance of the Court reflecting public opinion as expressed by votes cast for President and Senate, McConnell inadvertently makes the case for Court expansion. Without question, the Court's 6-3 right-wing supermajority is deeply out of alignment with public sentiment, as demonstrated by the fact that the Democratic candidate has won the most popular votes in seven of the last eight presidential elections which has contributed to the Court's current imbalance. And Court expansion is the only reform that would immediately rebalance the Court and put it in alignment with the expressed will of the people after more than 50 years of Republican Court dominance.

Similarly, conservative Georgetown Professor Randy Barnett argues in his testimony opposing Court expansion that "if people are unhappy with the judicial philosophy of the Supreme Court, our system requires that they organize in one of our two major political parties to affect this selection process. This is what happened in the Republican Party. [...] This is how change is supposed to be done under our Constitution. A politically-elected President nominates justices to be confirmed by a politically-elected Senate." Even Senate Republicans, led by Mitch McConnell, have made clear that the composition of the Supreme Court should reflect the will of the people it governs: In 2016, their *ad hoc* argument for blocking any Obama nominee was that the American people should have a chance to determine who would fill a Supreme Court vacancy.

Like Professor McConnell, Professor Barnett and Senator McConnell have committed an "own goal" by reinforcing the importance of the composition of the Supreme Court reflecting the political preferences of citizens it governs. This is a principle with which nearly everyone agrees. And the fact that the Supreme Court is badly out of alignment with the public is something nobody can seriously contest: The Court has had a

Republican-appointed majority for more than 50 years; Republicans have appointed 15 of the last 19 Justices though they have lost the popular vote in 7 of the last 8 presidential elections. Two-thirds of the American people have lived their entire lives under a Supreme Court with a Republican-appointed majority. The only question that remains is whether to fix this undeniable imbalance that nearly everyone agrees is incompatible with basic principles of democracy and justice.

The following excerpts from expert testimony solicited by the Presidential Commission reinforce the necessity of Supreme Court expansion by detailing the threat the Court poses to democracy, the illegitimate way in which right-wing conservatives have seized a 6-3 supermajority on the Court, the importance of a Court that is representative of the public, and the threat the Court poses to the rights and well-being of everyday Americans. Many of the experts quoted below have not taken a position on expansion; some explicitly oppose it. But all have submitted testimony that highlights problems with the Supreme Court that can be fixed best and fastest by adding four seats to the Supreme Court to be filled by a Democratic president, to rebalance the Court, make it representative of America, and protect American democracy.

Testimony excerpts are presented in alphabetical order, without further commentary.

Nan Aron, Founder, Alliance for Justice

> [T]he persistent focus on the abstract norms and traditions surrounding the Court misses the mark entirely and is quite frankly out of touch. It ignores the real-world harm that the Supreme Court in its current state is doing to people across the country. Whatever you think of the norms governing the Court, the reality is that the state of our judiciary is harmful and untenable, and reforms must be made.
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> The fact is, as many witnesses have made clear, there have been few times in our nation’s history that we have witnessed an assault on our democracy and our justice system like the one we are currently living through. Unfortunately, the Supreme Court is central to that assault, and unless there are real reforms to the Court, our system of government and our core rights and legal protections will be eroded for generations.
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> I understand the gravity of the reforms that I am advocating for, and I do so with great reluctance, not zeal. During my 42-year tenure as President of the Alliance for Justice, conservative justices have always commanded a majority on the Supreme Court. Nevertheless, no matter how contentious a nomination fight, we have always opposed expanding the Supreme Court.
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> In fact, for years, people on the left, dear friends of mine, pushed to reform the Court. I pushed back. I resisted. I have dedicated my entire career to fighting for a fair and independent judiciary, and I have often made the same arguments against court expansion that are so frequently cited today. I had always believed that expanding the Court would damage the institution and further politicize the judiciary. I also feared that such an act would lead to an untenable arms race.
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> Nevertheless, I have come to the conclusion that reform is the only option, and I have come to this conclusion because the risks that I have feared and contemplated for so long are simply outweighed by the reality of our current crisis. What sense does it make to fear damaging an institution that is already so skewed by partisan considerations and anti-democratic tendencies that it no longer serves as the protector of the Constitution that the Framers designed it to be? What sense does it make to feign

regret over further politicizing a judiciary that is simply not concerned with advancing the rule of law, but is instead interested in solidifying power for an anti-majoritarian movement through undemocratic means? What could possibly outweigh the systematic erosion of our critical rights and protections, and most serious of all, undermining our electoral system itself? I genuinely believe that these reforms are necessary, that there is no other choice if we wish to preserve our democracy and the ability of the American people, through their elected officials, to collectively address issues of public policy.
[...]
Alliance for Justice also supports any and all reforms that would return our laws and our Courts to the American people. Of course, at a minimum, we need a Code of Ethics that applies to the Supreme Court, just like lower court judges. The Court's legitimacy would also be improved by implementing a set of term limits for Justices. The average tenure of a Supreme Court Justice has significantly lengthened since the Constitution was adopted, giving outsize power to nine individuals in a way the framers of the Constitution could never have imagined.

But we believe the most effective way to restore balance to our Court is through expansion, something that has been done time and time again in the past. Through a simple act of Congress, the Court can be made to actually reflect America and to adhere to our nation's past practice of having one Supreme Court Justice per judicial circuit. Polling shows that a majority of Americans support expanding the Court, perhaps because doing so would remedy the institution's clear partisanship and favoritism of corporate interests. And to be clear, expansion is not a tool to simply swing the Court the other way, but instead to eliminate its existing bias and help preserve democratic institutions by allowing the American people to self-govern and participate in fair and open elections. The need for reform is not about the judicial philosophy of the Justices, but about the growing and clear antagonism to democracy coming from Republican politicians and the jurists they put on the bench.

Randy E. Barnett, Patrick Hotung Professor of Constitutional Law Georgetown University Law Center

The lesson here is if people are unhappy with the judicial philosophy of the Supreme Court, our system requires that they organize in one of our two major political parties to affect this selection process. This is what happened in the Republican Party. Members of that party's coalition organized to change the direction of the Court by making judicial philosophy a plank of that party's platform. This is how such change was accomplished by political progressives in the 1930s and into the 1940s. Supreme Court justices nominated by Republican Hebert Hoover—a political progressive—and Democrat FDR began to change the Court's approach to the Constitution even before the court-packing scheme of 1937.

This is how change is supposed to be done under our Constitution. A politically-elected President nominates justices to be confirmed by a politically-elected Senate. But when the parties become polarized on the issue of judicial philosophy, so too will be the political process that the Constitution designates for selecting judges.

Craig Becker, General Counsel, American Federation of Labor & Congress of Industrial Organizations

I must inform you that the labor movement – its leaders, its lawyers, and its members – no longer believe labor organizations and working people seeking to act together to improve their wages, hours and working conditions can obtain a fair hearing before the Court. The situation is different in kind in the last several decades than at any time since Justices appointed by Republican presidents assumed their continuing majority on the Court half a century ago (a majority that has persisted throughout the four decades I have practiced labor law).

In consequential decision after consequential decision, the Court has ruled against the interests of working people and the labor movement. To cite just a few recent examples, see Cedar Point v. Hassid; Epic Systems v. Lewis; Janus v. AFSCME Council 31; Harris v. Quinn; and Lechmere v. NLRB.

It cannot be that we are wrong in every labor case that comes before the Court. And if we are receiving a fair and unbiased hearing from the Justices, how can it be that the division among the Justices is identical each time we appear before the Court? I regret to say that only political predisposition can explain that pattern.

Aaron Belkin, Founder, Take Back The Court and Professor, San Francisco State University

People whose rights, health, and lives are threatened by the current extremist Supreme Court majority need their representatives to take action now, before the Court harms them. Supreme Court rulings are not mere abstractions to be studied and debated; they have direct impact on the lives of the American people. And we know that the current Court majority is likely to use its illegitimate power to issue rulings that the majority of Americans oppose, and that will hurt the American people in real and immediate ways. If policymakers fail to act to prevent this outcome, they will bear responsibility for it. Every Supreme Court decision that tramples the rights or imperils the health of the American people will be, in part, a result of policymakers' choice to leave in place this illegitimate and extremist Supreme Court majority.

[...]

The broader Republican assault on our democracy is essential context for understanding the urgency of Court reform, because the Court's current majority is an active participant in that assault. The Court is undemocratic in its composition, and in its actions. If left in place, it will continue to aid and accelerate the Republican Party's attempts to destroy democracy and govern via minority rule.

[...]

The Republican Party is actively trying to destroy American democracy and entrench itself as a permanent governing minority party, and the Supreme Court's right-wing majority is an active and enthusiastic participant in this effort. Ignoring this reality won't make it go away. Wishing it wasn't so won't make it go away. Worrying that we can't find the votes to fix it won't make it go away.

As President Biden said just a few weeks ago: "We're facing the most significant test of our democracy since the Civil War. That's not hyperbole. Since the Civil War. The Confederates back then never

breached the Capitol as insurrectionists did on January the 6th. I'm not saying this to alarm you; I'm saying this because you should be alarmed."

We should be alarmed. And we must act.
[...]
Immediate expansion of the Supreme Court by at least four seats is the only reform that meets the urgency of the moment. No other proposal would immediately wrest control of the Supreme Court from the extremist political minority that is using it to assail our democracy and impose minority rule. Along with adding seats, there are a number of additional steps that would help reinforce the Court's independence and integrity. Several of my colleagues have advanced such ideas to reform the Supreme Court that are worthy of consideration. Among these reformation proposals are voting rule modifications, a code of ethics for Justices, jurisdiction reforms, partisan balancing, and term limits.

But because of the political realities of our present Court, expansion is a necessary precursor to other reforms. None of the alternatives would immediately rebalance the Court, ending the illegitimate conservative majority that threatens to derail urgently needed democratic reforms and policy solutions. Without expanding the Court immediately to correct its extremity, other reforms may be struck down by the current Court or take too long to have a meaningful impact on its composition.
[...]
American democracy is in grave danger of collapsing under sustained, desperate assault from a political faction that seeks to impose minority rule on the nation. This faction's illegitimate, undemocratic vice grip on the Supreme Court is among its most powerful weapons, and one it wields ruthlessly. Like it or not, those who value democracy are in a race against those who are trying to dismantle it.

The Judiciary Act of 2021, introduced earlier this year in both chambers of Congress, would immediately rebalance the Supreme Court and diffuse the threat the Court poses to American democracy and to the rights and wellbeing of its citizens. Expanding the Court is essential to protecting other pro-democracy efforts, and opens the door to other worthy Court reforms.

In 1787, the Constitutional Convention drafted the entire constitution creating our government in 116 days. As I submit this testimony on August 15, it has been 128 days since President Biden issued the executive order forming this Commission. With all due respect to the members of this Commission, all of whom have other obligations, and to members of Congress, all of whom are grappling with many complicated issues: We do not have time to waste, and we need not spend any more of it on an academic exercise. The fundamental reality is well-known to all who are willing to acknowledge it: Our democracy is under attack, the Supreme Court is participating in that attack, and there exists a narrow window in which it is possible to beat back that attack before our democracy falls.

Of course adding four seats to the Supreme Court and immediately filling them, wresting control of the Court from the narrow political faction that has dominated it for decades, would be a bold and controversial move. That is exactly what our current crisis demands. We would all prefer democracy reforms be implemented with bipartisan support in Congress. But it is absurd to expect that a political party that has made the destruction of democracy in order to govern via minority rule its central project will join us in protecting and expanding democracy. Banks don't expect bank robbers to help them design an impenetrable safe, and we shouldn't expect Republicans to help thwart the Republican assault on democracy. Nor should we refuse to do it without them. We must instead play what Syracuse

University professor Thomas Keck describes as “constitutional hardball in service of democratic preservation.”

We can do big things. We just have to be *willing* to do them. If we aren’t, our fellow Americans will have to live with the consequences.

Nikolas Bowie, Assistant Professor of Law, Harvard Law School

The cause of the current public debate over reforming the Supreme Court is longstanding: Americans rightfully hold democracy as our highest political ideal, yet the Supreme Court is an antidemocratic institution. [...] as a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status. Second, as a matter of political theory, the Court’s exercise of judicial review undermines the value that distinguishes democracy as an ideal form of government: its pursuit of political equality.
[...]
I believe you should evaluate the proposals for reforming the Supreme Court by asking whether they will make the United States more democratic. That is, you should ask whether the reforms will extend or protect the political equality of all Americans, so that each one of us possesses equal political and social standing to share in controlling our national community. You should advocate for reforms that will help bring democracy to our workplaces, our legislatures, and our fundamental law before we lose what democracy we have.
[...]
[I]f you look at the history of the judicial review of federal legislation, the principal “minority” most often protected by the Court is the wealthy. In contrast with electoral politics—where all citizens are formally equal in their possession of a single vote—wealthy litigants can muster the skills, time, money, influence, and capacity to challenge the same piece of legislation over and over again in court.
[...]
By contrast, in cases in which Congress has harmed racial, religious, or ideological minorities, the Court has almost exclusively adopted a posture of deference. There is no question that Congress has adopted horrific legislation over the past 250 years. But there are few examples of the Supreme Court intervening in a timely fashion, as widespread popular prejudices against minorities are likely to be shared by a significant proportion of judges as well.
[...]
What this means for those of us not in Congress is that the political choices available to us as a country depend not on our collective will, but on the will of people who hold their offices until they resign or die. This is precisely what the Declaration of Independence protested. As absurd as it was then for a continent to be perpetually governed by an island, it is equally absurd now for a nation of 300 million to be perpetually governed by five Harvard and Yale alumni. As we debate new legislation to expand the franchise and protect the right to vote, the threat of judicial invalidation has forced our elected representatives to lower their expectations about how democratic our nation can become. At the same time, the knowledge that the Court will step in encourages legislators to feel no responsibility for evaluating the constitutionality of their proposals on their own merits. In this respect, judicial review makes each of us less than equal and, therefore, less than free.
[...]
In short, as you consider reforms, I urge you advocate for those that will help make America more democratic. The ideal of democracy requires you to ask whether the reforms will extend or protect the

political equality of all Americans, so that each one of us possesses equal political and social standing to share in controlling our national community. Democracy is being threatened at home and abroad. This commission should demand that we live up to our democratic ideals.

Professor Amanda Hollis Brusky, Chair of the Politics Department at Pomona College

As this written testimony has illustrated, our polarized politics have led to ideologically-motivated and partisan appointments to the federal courts, invited minority capture of the policymaking process by a small group of unelected lawyers and judges, aggravated some of the more pernicious features of our constitutional design and encouraged — even rewarded — more partisan decision making by the judges and Justices on the federal bench. Political science warns us that the politicization of the federal courts has grave consequences for judicial independence. The mere perception that courts are partisan and captured — whether or not we are convinced that this is an empirical reality — can cause "we the people" to question the very legitimacy of the federal courts and their rulings. When we couple these problematic perceptions of the judiciary with the very real fact that the word of the courts is increasingly final and increasingly supreme on account of polarization and gridlock in Congress, then it is no overstatement to say we are at an inflection point in our constitutional democracy.

It is worthwhile to recall Thomas Jefferson's warnings in 1819 about the unique threat judicial supremacy poses for our entire constitutional system. In his letter to Spencer Roane, Jefferson warned that making the judiciary — an unelected, unaccountable branch of government — too powerful would constitute, in his words, a "*felo de se*" (suicide) of our constitutional system.
[…]
Jefferson is reminding us of the dark side of judicial independence — the possibility of an unaccountable and unchecked rule by a few over the many. And, as Brutus warns, "Men," and I'll add women, "placed in this situation will generally soon feel themselves independent of heaven itself."

This is why we are talking seriously about court reform. Americans are seeing the dark, dangerous, and even destructive side of judicial independence. The fevered push by Senate Republicans and President Trump to fill Ginsburg's seat over the late Justice's own dying wish and the desire of millions of Americans to wait until after the presidential election is exactly the kind of episode of "constitutional hardball" that has and continues to characterize our period of constitutional rot.
[…]
This brazen and seemingly hypocritical political move by the Republicans in power — a move that has solidified a super-majority conservative voting bloc on the Supreme Court for the GOP into the foreseeable future — was, as it turns out, an inflection point for the left. This dramatic episode has catapulted the issue of court reform onto the political agenda for Democrats.
[…]
The Balkin approach […] seems illustrative of the Democrats' tendency toward unilateral disarmament, especially when it concerns the courts. On the other hand, those advocating for immediate and dramatic escalation proportional to the Garland and Ginsburg episodes, are likely to see this as another concession from Democrats to a long-gone aspiration of civility that the Republicans have decisively abandoned in the name of constitutional hardball.

I believe this Commission could and should take a slightly different approach — one that satisfies the calls from the left for a more proportional response to the Republican Party's escalating constitutional warfare but that would still put us on the path towards de-escalation and the regularizing of Supreme Court appointments. Introducing four or six new, term-limited seats on the Supreme Court via constitutional statute could achieve the long-term goals outlined by Balkin in *The Cycles of Constitutional Time* while in the short term providing restitution or restorative justice for those on the left who believe the Republicans effectively stole two seats from them. Other scholars have provided testimony as to what this might look like operationally, so I will not rehash their recommendations here. I'll simply close by saying that maintaining the status quo is not an option, in my opinion. It will only lead to more escalation, more hardball, and exacerbate our current condition of political and constitutional rot. President Biden and the Democratic majority in Congress have the power and, I would add, the *responsibility* to put our constitutional democracy on a different path.

Center for American Progress

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.
[...]
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.
[...]
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. 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.

Constitutional Accountability Center

The federal judiciary, with the Supreme Court at its head, provides in our constitutional democracy the promise of access to justice, in aid of establishing a government that is both accountable to the people and protective of their rights and liberties. But the Court has far too often fallen short of that promise.

At too many moments in history, the Court has tried to bend our constitutional arc of progress back toward oppression rather than freedom, as it did when it thwarted the promise of the Fourteenth Amendment in ruling after ruling that doomed the project of Reconstruction and set back the cause of

equality and racial justice for generations. The Court has taken essential legislation aimed at establishing a truly free and fair, multi-racial democracy and, without legal justification, stripped the law of its unmistakable meaning and opened the door to voter suppression. The Court has erected arcane and nearly impenetrable doctrines that prevent people from accessing the courts, betraying the fundamental right to come to the courts to remedy wrongdoing and hold the powerful to account through our justice system.

CAC urges the Commission to view its remit through the lens of justice: what are the problems of justice that court reform can and should solve in this moment? Can these problems of justice be solved by adding more seats on the Supreme Court or instituting some form of term limits? Perhaps. There is nothing sacred about the number nine when it comes to the Supreme Court, and the Constitution gives substantial discretion on how the Court is structured. What is sacred is the Court's duty to equitably and fairly apply the law, manifesting the promise of our Constitution's text and history and ensuring meaningful access to courts—and public faith in the Court's ability to administer equal justice under law. Whether the Court has ever lived up to this duty, or earned this faith, are legitimate questions; whether any reforms can be instituted to help make it so should be the primary goal of this commission.

Daniel Epps, Treiman Professor of Law, Washington University in St. Louis

My remarks will revolve around what I see as a structural defect with "the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court." A combination of factors means that individual appointments to the Supreme Court are highly consequential, yet the way in which opportunities to appoint justices are distributed bears an imperfect and unpredictable relationship to the results of democratic elections.

This problem is distinct from several other democratic problems posed by the Supreme Court that are not my testimony's primary object of concern. One is the classic countermajoritarian difficulty—the fact that unelected, life-tenured justices have the power to strike down legislation enacted by democratically elected officials. Another is the fact that the political system which shapes the selection of justices permits minoritarian rule due to the structure of the Electoral College and the Senate. And finally, there is the argument that the current Court itself presents a challenge to American democracy through its substantive decisions.

I share concerns about those other problems. The democracy deficit I note exacerbates these problems, in my view. But, importantly, one need not agree with all or any of the other democracy-based critiques of the Court to agree with the critique I will develop here—or to agree that some solution to this problem is necessary.
[...]
[I]n our system the composition of the Court bears only an imperfect relationship to the results of democratic elections. Accordingly, some presidents have much more influence on the Court's membership than others. Donald Trump was able to appoint three justices to the Court in his one term as President, whereas Barack Obama appointed only two justices in two terms as president and Jimmy Carter appointed none in his single term. Even though Democrats controlled the White House for 20 of the 52 years between 1968 and 2020, happenstance and other factors meant that Democrats

appointed only four justices during that time while Republicans appointed 15 (in addition to elevating William Rehnquist from Associate Justice to Chief Justice).
[...]
At this moment in history, however, there appears to be decreasing willingness among those on the losing side of the disputes that the Supreme Court is called upon to resolve to simply accept results with which they disagree. This, I think, is why we are suddenly seeing increased willingness to consider court expansion and other structural reforms recently seen as unthinkable. And, I submit, that is at least in part a product of the various factors I've identified. We have a system that distributes control over a powerful institution in a way that is extremely hard to justify in terms of fairness, or even using the argument that the system's benefits and burdens are likely to be roughly evenly distributed over time.

Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School

[P]erhaps counterintuitively, the background possibility that Congress and the president could pack the Court or strip it of jurisdiction over certain subjects helps preserve the institutional legitimacy of the Court. The implicit possibility of losing their role serves to remind the justices that, if they interpret the Constitution in ways that go too much against the beliefs of the great majority of Americans, their efforts can ultimately be reversed through court-packing or curtailed through jurisdiction-stripping. These possibilities serve as an indirect check on the Court's power – and therefore protect the Court's legitimacy against the possibility of its being squandered by justices who exercise their power without reference to the beliefs about the Constitution held by the great majority of the people.
[...]
In an environment where the justices have lost their institutional legitimacy, there would be relatively little reason for Congress and the president not to pack the court. They could do so either in the hopes of restoring the courts [*sic*] legitimacy or, more likely, under circumstances where they accept that the Court's legitimacy is gone for good but want the Court to adopt interpretations of the Constitution that conform with their political preferences.

Jamal Greene, Dwight Professor of Law, Columbia Law School

In brief, a starkly different political and legal landscape in a nation of 330 million has the potential to turn on the views of a single person. That single person is unelected, is one of only nine, can be confirmed by a bare and strictly partisan majority of the U.S. Senate, plays a major role in deciding what cases they hear, can potentially remain in office for 40 or 50 years, and can, in effect, choose the ideology of their replacement, who may in turn hold office for another 40 or 50 years under like conditions. In constitutional cases, the decisions the Court reaches are effectively unreviewable except by the Court itself, amendment of the federal Constitution having become effectively defunct. 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. A judiciary empowered to enforce the guarantees of the Constitution has been and remains a vital ingredient of American democracy. But it does not serve that democracy for its Supreme Court to be structured as a monarchy.
[...]
There is little question that increasing the size of the Supreme Court is statutorily available, having occurred six times in the past, but it has a bad rap. The fact that President Franklin Delano Roosevelt's 1937 proposal to "pack" the Court failed at the height of his power, when his party held 334 seats in the House of Representatives and 76 seats in the Senate, is sometimes said to have established a

convention that the Court's size should remain at nine. To the extent this is so, it is unfortunate. There are good reasons to resist the partisan Court-packing President Roosevelt was (winkingly) proposing. But a bipartisan effort to assess the Court's needs and ideal structure, up to and including its size, should be encouraged.

A glance around the world reveals the size of the Supreme Court to be a serious anomaly. Of the 30 most populous countries in the world, the United States is the only one whose highest court hears both ordinary and constitutional cases and has fewer than 11 judges. Even among the many courts around the world that hear solely constitutional cases, most have more than nine members. Germany's Constitutional Court has 16 judges, Italy's 15, the South African Constitutional Court 11. And as noted, the high court and constitutional court judges of nearly every other country in the world, large and small, are term- or age-limited.
[...]
Reasonable minds can differ as to the best mode of selection for Supreme Court justices, but at least three principles of a well-functioning appointment process should be relatively uncontroversial. First, political actors should play some role in determining who sits on the Supreme Court. This principle might seem subversive at first blush. It is important, of course, for the Court to be insulated from partisan politics. The perception of subversiveness dissipates on reflection. It is for good reason that the Founders created a process of judicial selection that involves some influence by elected officials, and that every U.S. state and most foreign countries do the same. Linking political decisionmaking to the will of the governed is how democratic (or, if you prefer, republican) polities arrange their affairs. The question is not whether there should be political input into judicial selection but rather how much, and through what levers. In a nation whose Supreme Court exercises an especially strong form of judicial review under a Constitution that is rarely amended, it is appropriate that (at least) long-term political trends have some bearing upon the Court's membership.

Deepak Gupta, Founding Principal, Gupta Wessler PLLC, Washington, DC

These disparities in race and gender not only exist among Supreme Court advocates, but also permeate the Court and its coverage. Of the 115 Justices that have served on the Court, 93.9% have been white men, 4.3% have been women, and 2.6% have been people of color. All seventeen Chief Justices have been white men. Despite the growing diversity of law schools, one study found that from 2005 to 2017, 85% of Supreme Court clerks were white, 4.1% were Black, and one third were women. Even in the media, all five of the top journalists dedicated to covering the Supreme Court are white men.

In other words, the entire ecosystem surrounding the Court looks a lot less like the American public than we might hope. For the development of the law, this limited diversity can make the Court "woefully inattentive to its impact on underrepresented groups." And on the most basic level, as this small and elite institution makes laws for a large and diverse country, many Americans do not see people like them regularly participate in the process.
[...]
It is also worth briefly mentioning that the corporate tilt of the Supreme Court bar aligns with the backgrounds of the Justices themselves. Not since Thurgood Marshall has a Justice had significant experience representing indigent defendants, and no other member of the Court in recent history built a career on representing plaintiffs, in civil rights cases or otherwise. On the other hand, numerous

Justices have themselves been members of the elite group of lawyers most trusted by the Court, and most likely to represent corporate defendants in their advocacy. At least in civil cases, the corporate defense bar's presence at the Supreme Court is unmatched in front of and behind the bench.

Wade Henderson, Interim President and CEO, The Leadership Conference on Civil and Human Rights

However, the federal courts have also done tremendous harm by denying people their humanity, equal voice in democracy, and civil rights. In both Plessy v. Ferguson and Korematsu v. United States, the Supreme Court chose to maintain racial apartheid systems 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. Democratic National Committee, the Supreme Court eviscerated key provisions of the Voting Rights Act, the landmark civil rights law that prohibits racial discrimination in voting. In 2018, five justices diminished the power and freedom of working people to come together to form strong unions.

The Supreme Court also created the doctrine of qualified immunity, which has shielded police from being sued for misconduct that disproportionately impacts Black and Brown people in America and makes it nearly impossible to hold officers accountable for brutality, violence, and other violations of our constitutional rights. It is particularly cruel how so many of the Court's decisions have significant consequences for people of color and other communities who have historically been excluded from the ranks of power and decision-making.

Some of the Supreme Court's decisions like Plessy and Korematsu are now universally accepted as stains on our nation's history. Yet, threats to a free and fair democracy via our judiciary continue. During the last administration, the White House and Senate majority viewed the judiciary as a tool to unravel civil and human rights and democratic safeguards. The well-funded and long-term strategy to roll back and curb future progress on civil and human rights was two-pronged: pursue litigation against civil rights protections and stack the courts with ideologues. Decisions like Trump v. Hawaii, which upheld President Trump's Muslim ban, are products of this intentional strategy to reverse progress toward a more perfect America and deny communities of color equal power. Today, we see the results of President Trump, Senator Mitch McConnell, and others' attacks on the independence of the judiciary, as ideological extremists go to court to undermine civil rights and are met with sympathetic judges, even at our nation's highest court.

The discussion about the future of the Supreme Court — and all our federal courts — is not an academic or theoretical one. Rather, it is fundamentally about humanity and dignity. It is about who our courts serve and recognize as worthy of having their rights protected. And it is imperative that members of this commission approach their inquiry by centering the people whose lives and civil rights are most impacted by the Supreme Court, and by considering the very real consequences that Court decisions have in people's lives. Federal judges and justices are the final arbiters of our laws and Constitution, and the decisions they make tell us who can vote; receive equal pay; marry the person they love; access affordable health care, education, and housing; obtain an abortion; breathe clean air and drink clean water; hold police officers accountable for using excessive force and other constitutional violations; and so much more.

That is why institutions like the judiciary that we entrust to safeguard our democracy must work for everyone. We are now at an inflection point. Our nation must reconcile what we say we are as a democracy, and what we actually are. In this perilous moment, we must acknowledge that the Supreme Court has a long way to go to fulfill the promise of equal justice under law. The Supreme Court is regarded as an important, and often last, check on the other two branches of government. The Court's ideal independence and integrity stand in stark contrast to how many view the divisive branches of government where bitter political divides have caused impasses to progress. But now, the process for selecting and confirming nominees to serve on the Court has become so rancorous as to further erode the public's faith in the very independence and integrity that set the Court apart. Our elected leaders must decide how this institution can be made more fair, more just, and serve more people today and in future generations. This is a time not just for serious reflection, but serious action to make our Court work for all of us. How much more evidence do we need? How many more voices must be silenced, dreams dampened, and lives lost before our elected leaders address the crises facing our nation?
[...]
To understand the Senate's advice and consent role, it is important to ground the conversation in both why and how the confirmation process has changed for all judicial nominees, including nominees for district and circuit court seats. Over the past decade, Senate Republicans changed the once-bipartisan process. This calculation was part of a larger strategy developed decades ago to change the composition of the Supreme Court — and the lower courts — to short-circuit other democratic methods of change, largely in response to progress made by the civil rights movement. And their reasons for rigging the system are clear: The American public widely supports issues like police accountability, racial justice, access to reproductive health care and bodily autonomy, LGBTQ equality, gun control, environmental protections, making the right to vote fair and accessible, and humane immigration laws, among others. Much of the Republican Party's agenda can't survive in the arena of popular opinion, so they devised a way to rig the system by stacking the courts.

Importantly, even when there has been bipartisan support for popular civil rights policies and legislation, the Court has been used to dismantle such policies. For example, the Voting Rights Act and subsequent reauthorizations were passed with bipartisan support, including an overwhelming vote in the House of Representatives and a unanimous vote in the Senate in 2006. Yet, in 2013, five justices of the Court gutted a key provision of the Voting Rights Act. And only a few weeks ago, six justices of the Court weakened the landmark civil rights legislation again. Further, as demographics shift in the United States, this right- wing campaign to reshape the federal courts has sought to shrink the electorate, silence the voices of Black people and other communities of color, and secure Republicans' hold on the levers of power.
[...]
There is no dispute that the Republican Party, led in the Senate by Senator McConnell, has focused on the Supreme Court and dramatically changed the process to ensure nominees selected by a Republican president would be confirmed. For traditions and norms to exist, there must be a mutual understanding and even-handed application. This is no longer the case, and will not be for the foreseeable future as Senator McConnell forecasts what we already know: He will use any means necessary to stack the Court with justices who he believes will serve the interests of the wealthy and powerful. So while the process has now changed, parties cannot operate using different rules.
[...]
Our democracy — including our federal judiciary — is in peril. It is crucial that this commission, the public, and our elected leaders discuss all avenues to make our courts fair for all people. Beyond

obvious and common-sense changes like extending the Code of Conduct to apply to Supreme Court justices, all options to potential structural changes to the Court should be thoroughly explored. And they must be examined by understanding how the current institution — and the process for selecting those who serve on our highest court — fails to serve all of us, especially communities historically excluded from protection of the rule of law.

Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School

As noted above, the Senate refused even to consider President Obama's nomination of Merrick Garland in March 2016, shortly after the death of Justice Scalia in February, on the ground that it was within 8 months of a presidential election and the Senate should wait and "give the people a voice" in the selection of a new member of the Court.61 However, in the Fall of 2020, when Justice Ruth Bader Ginsburg died, the Senate rushed to confirm the President's nominee just weeks before the presidential election. The proffer of a quite novel reason not to consider the Garland nomination, combined with a complete failure to apply the reasoning to a situation in which logically it would apply a fortiori, has created widespread concern that the confirmation process was abused. Moreover, as noted above, President Trump – who won the presidency with fewer popular votes than his opponent and who lost the November 2020 election in both the popular and Electoral College vote – was able to make three appointments to the Court; President Jimmy Carter, who won a substantial popular majority in 1976, was able to make no appointments to the Court.
[...]
It is an unstable situation for a party supported by a minority of the population to be able to control the Senate, frequently the Presidency, and the Supreme Court. The constitutional amending process may also be blocked by the combination of the voting rules and the partisan skew to the national demography by state. If citizens cannot look to elections, nor to the Courts, nor to the amending process, to achieve a federal government that is in broad terms responsive to democratic views, what remains are methods that should trouble all who believe in the rule of law. Thus, even if reforms will only help at the margins, I do think the time has come for trying to adjust the Supreme Court so that it may bear somewhat more of an imprint of recently elected presidents and has some greater finitude to the terms in office, while at the same time preserving the judicial independence that it has achieved.

Chris Kang, Co-Founder and Chief Counsel, Demand Justice

I had always considered myself an institutionalist. I wanted to advance change from the inside and work through the system, willing to find compromise and progress from within. For nearly 14 years, I served on the Senate Judiciary Committee, Senate floor, White House Office of Legislative Affairs and finally the White House Counsel's Office, where I oversaw the selection, vetting, and confirmation of judicial nominations for a majority of the Obama administration. And I know that many of my colleagues then would be surprised to see me here today, testifying in support of Supreme Court expansion.

But the preservation of an institution—any institution, even the Supreme Court—cannot be an end in itself. And this Court has proved it is not worth preserving in its present form. Instead, the end, as Harvard Law School Professor Nikolas Bowie eloquently stated before this commission last month, must be to make the United States of America more democratic. At this moment in our nation's history,

the Supreme Court reform necessary to advance democracy, justice, and equality is enactment of the Judiciary Act of 2021, in order to expand the Supreme Court to 13 justices.
[...]
The net effect of this one-sided politicization of the judiciary is a Republican supermajority on the Supreme Court that is hostile to our democracy, to the rights of working people, and to civil rights for millions of Americans. Because Republicans have politicized our Supreme Court, we have a supermajority that does not reflect the values of most Americans and as a result, that supermajority is taking the country in an increasingly anti-democratic direction. The court's most consistent victim is democracy itself.
[...]
To break this cycle of Republican power and politicization, those assessing ideas to reform our courts need to stop buying the fiction of an apolitical judiciary.

The conventional wisdom has long been that Republicans simply care about the courts while Democrats do not–-that Republicans somehow understand the stakes better. But that is not the problem. The problem is not that Democrats are unable to understand the impact of the courts on reproductive rights, LGBTQ+ equality, voting rights, gun violence prevention, labor, the environment, racial justice, immigration, and more. We hold our collective breath every June to see what rights the Republican justices will allow to survive another year.

The problem is not that Democrats are incapable of organizing around the courts. It's that we're actively told we shouldn't organize around them. That our judiciary is apolitical and, therefore, we should not treat it as a political issue. That the courts and their rulings should be beyond criticism. That, even when an 82-year-old justice refuses to retire and risks the Court falling into deeper imbalance because he is enjoying his new power, his decision should be beyond reproach.

If progressives are disproportionately buying this fiction, it is because of who is selling it: legal elites, the media, and the Court itself.
[...]
We cannot preserve an apolitical Supreme Court because we cannot preserve something that does not exist; unilaterally working toward an apolitical judiciary unfortunately is insufficient to make it so.

Understanding this reality is critical to understanding what Supreme Court reform is necessary today. The goal is not to depoliticize the Court—because we can't. Instead, the goal should be to advance democracy, and through this lens, reform must start with expansion.

Michael J. Klarman, Charles Warren Professor of Legal History at Harvard Law School and Take Back the Court Advisory Board Member

I believe that there is both a long-term problem in the way we constitute our Supreme Court and an immediate existential threat to democracy, attributable largely to today's Republican Party and exacerbated by the way in which the current Republican Justices have used their power to both to further their party's assault on democracy and to advance its plutocratic economic agenda.

The long-term problem is both easy to identify and relatively simple to fix. The immediate crisis will resist a bipartisan diagnosis because it has a mostly partisan cause — which is the same reason that molding a bipartisan solution to it will be almost impossible to achieve.

Because you have already heard much testimony on the long-term problem, I shall only briefly address that topic, after which I will focus my remarks on the immediate crisis confronting American democracy, the Court's contributions to it, and one possible remedy — Court expansion.
[…]
Democrats today should expand the Court to provide a center-left country with a center-left Court that will defend democracy, resist voter suppression, permit reasonable regulation of campaign finance, and cease furthering a neo-Ayn Randian policy agenda that exacerbates economic inequality and fosters democratic degradation.

The principle argument against Democrats' expanding the Court is that Republicans will simply respond in kind the next time they have the opportunity to do so, inciting a never-ending retaliatory spiral. However, there are three powerful responses to this argument.

First, Republicans initiated this arms race by stealing the Court vacancy that was rightfully President Obama's to fill in 2016. For Democrats to refrain from responding in kind to Senator McConnell's shrinking of the Court for one year would be to unilaterally disarm. As game theorists have taught us, the quickest way to restore a stable equilibrium after one party in a reiterative game has repudiated a norm of cooperation is to reciprocate in kind. Failing to do so only incentivizes more of the norm-breaking behavior.
[…]
Yet if Democrats do not expand the Court while they have the political power to do so, they — and the nation as a whole — will likely rue the day they squandered that opportunity. In contrast to the Republicans antidemocratic norm violations, Democratic reform of the Court is critical to the preservation of American democracy. Today's Republican Justices can easily contrive constitutional rationales to invalidate most Democratic reform legislation, including measures that entrench democracy. Moreover, should Democrats choose to refrain from expanding the Court now, after Republicans contracted it in 2016-17, it will have no effect on whether Republicans later expand the Court when they have the power and perceive the need to do so. For Democrats to fail to undertake Court reform now may be tantamount to committing political suicide and guaranteeing the further degradation of American democracy.

Larry Kramer, President, William & Flora Hewlett Foundation and Former Dean, Stanford Law School

Many progressives nevertheless are urging President Biden and the Democrats to answer the Republicans' ideological Court packing with some Court packing of their own — enlarging the Court with as many as four new positions. Conservatives are opposed, of course, but so are many liberals and Democrats, who worry that it will politicize the judiciary. Yet it seems a little late for that worry. Republicans have already politicized the judiciary by brazenly and unapologetically discarding longstanding cooperative rules to make their appointments happen. So if politicization is the concern, the germane question would seem to be whether only one side is going to play that game.
[...]

Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. This is a lesson we learned decades ago from psychologists and game theorists: if cooperation breaks down, the best way to restore it is tit-for-tat. Played with conviction, it's the most effective way for both sides to learn that neither wins over time unless they cooperate. Ironically, then, tit-for-tat, hard ball for hard ball, could actually set the stage for an improved selection process and a fairer, more balanced judiciary.

[…]

[If] history is any guide, this risk of wounding the Court is far smaller than the alternative danger—which is that excessive concern for injuring our supposedly fragile Court becomes an excuse for doing nothing.

Marin K. Levy, Professor of Law, Duke University School of Law

Given the collective understanding of the norm against court packing, it is surprising that there have been numerous recent attempts to change the size of different courts of last resort at the state level. Indeed, over roughly the past decade, lawmakers in eleven states have introduced at least twenty bills to expand or contract the size of their supreme courts—and two of those attempts were successful. With the majority of these attempts and successes, there is at least a colorable claim that the intention was to affect the ideological composition of the court.

[...]

Only five years ago, the Arizona Supreme Court was expanded from five to seven justices. This change in Court structure came after several failed attempts by lawmakers, and over the objection of two different Chief Justices.

[...]

Court expansion was again proposed by a Republican lawmaker in January 2016 via Arizona House Bill 2537. The Republican-controlled Legislature approved the measure, despite no support from Democrats. Nor was it supported by any of the Court's five justices, with the Chief Justice writing to the Governor that additional seats were "not required by the Court's caseload" and in fact would be "unwarranted" given how costly such a proposal would be at a time when other court-related needs were "underfunded." Several news outlets called the Republican-sponsored bill an attempt to "Bring Back Court-Packing," noting that the Republican Governor, Doug Ducey, would himself select the new justices from a list created by the Arizona Commission on Appellate Court Appointments (a commission the Governor populates). Over these objections, the Governor signed the bill into law and the two new justices took their seats in December 2016, tilting the Court further to the right.

[...]

The Georgia Supreme Court was also expanded in this timeframe, and also after a few unsuccessful attempts by lawmakers.

[...]

Just as in Arizona, lawmakers in Georgia persisted and ultimately succeeded in enlarging their state supreme court. Specifically, in 2016, the Republican-controlled Georgia General Assembly considered a sweeping reform bill, intended not only to expand the Supreme Court from seven to nine justices, but also to restructure appellate jurisdiction and procedures for the high court and the newly-enlarged court of appeals. There was speculation that the Republican Governor was interested in expanding the Court for political reasons; at the time, Georgia had four Democratic, and only three Republican, appointees on the bench. The General Assembly passed the bill in the spring of 2016 and the Governor promptly

signed it. By the next calendar year, the Governor had filled the two new seats, resulting in a "more conservative-leaning court."

Michael W. McConnell, Richard & Frances Mallery Professor, Stanford Law School and Senior Fellow, Hoover Institution

In 2020, the National Constitution Center commissioned three groups of constitutional scholars–conservative, progressive, and libertarian–to draft new constitutions. Interestingly, both the conservative and the progressive constitutions called for eighteen-year terms for Supreme Court Justices.
[...]
This proposal, if adopted, would have several salutary effects. It would make the power of the president to name Supreme Court justices regular, fair, and consistent, and thus likely would lower the political stakes of each nomination. The political balance of the Court would reflect the opinions of the people over time as expressed in their choice of presidents and senators, rather than the happenstance of health or accident or the strategic timing of the justices.

Sharon M. McGowan, Chief Strategy Officer and Legal Director, Lambda Legal

The public's confidence in the Supreme Court as the ultimate arbiter of the rule of law in our country stems from a belief – or at least the ability to believe on most days – that the Court itself is invested in acting as though, and cultivating a public perception that, it is committed to administering equal justice under law. The hyper-partisan manipulation of the Court's membership and the brazen actions of some of the Court's current members over the last five years have made it difficult, if not impossible, to maintain these beliefs.
[...]
It is hard to think about how we restore the credibility of our Supreme Court – and of our justice system more broadly – without acknowledging the deeper political dysfunction plaguing our country right now. But what is politically possible in this moment is a different question than whether various proposals are legally sound. For example, of the many proposals to restore faith in the Supreme Court, the most clearly constitutional proposal probably is to expand the number of justices. It only requires the political will on the part of Congress (and the Executive) to accomplish.
[...]
If expansion is on the table, what might the right number be? Some have referred to a need to correct for two "stolen" seats; other proposals suggest that the addition of four justices is needed to bring the Court back to something closer to equilibrium, which would inspire more confidence that civil rights will be protected appropriately. Of course, whether that is true would depend on how these new justices were chosen and what their jurisprudence turned out to be. But it is certainly reasonable to propose expanding the Court to thirteen, a number that would reflect the number of federal circuit courts of appeals in our country.

Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History Yale University and Take Back the Court Advisory Board Member

The problem to solve is not that the Supreme Court has lost legitimacy, understood as the current trust of enough observers, but that it thwarts the democratic authority that alone justifies our political arrangements. It is one thing to insulate and protect interpreters of our Constitution and laws from certain kinds of short-term democratic control. It is quite another to cede the last word over large parts of our national political conversation — not to mention the power to edit and throw out major laws — to less accountable powers and, to add insult to injury, to pretend that doing so is either mandated by our Constitution or essential to democracy.
[...]
The assertion of judicial supremacy, and the invalidation of Congressional acts that goes with it, presents the enormous challenge of controlling essentially limitless authority, so that it does not become a political tool that factions seek — especially when they cannot win electorally. As Thomas Jefferson observed, to the extent judiciaries are empowered to make political choices for the people under the cover of constitutional interpretation, it will incentivize political actors to "retreat[] into the judiciary as into a stronghold," including by making it a bastion of minority rule against majority power to make laws.

Along with judicial review, this tradition, too, continues today. In our time, this power has deprived Americans of gun regulation, health care, religious freedom, and voting rights. It has also transformed or "weaponized" many precious rights, as during the earlier gilded age, from shields for the vulnerable and weak into swords for the powerful and wealthy.
[...]
In spite of the elite currency of the framework of "institutional legitimacy," as much among those for as against reform, democratic authority is the criterion to place at the top of the list of political goals that Supreme Court reform should pursue.

Dennis Parker, Executive Director, National Center for Law and Economic Justice, et al

Of the current sitting Supreme Court justices, none spent a substantial part of their pre- judicial career working as a legal aid attorney or for a nonprofit civil rights organization. Indeed, only Justice Sotomayor spent any notable time on work relating to the litigation of the rights of marginalized people—and this was as a board member at the Puerto Rican Legal Defense and Education Fund, not as an attorney on staff. Eight of the sitting justices have been lawyers for the government in various capacities. Six worked stints at private law firms, often representing large corporate clients. Taken as a whole, the current Court has had little professional exposure to the shortcomings in our legal system when it comes to advancing and protecting the rights of marginalized people and communities.
[...]
Throughout history, the Supreme Court played a direct and central role in the conditions that created systemic racial inequality. Using starkly racist terms, an all-white Supreme Court upheld slavery, segregation, bans on interracial marriage and immigration, and Japanese Internment. While the court eventually prohibited de jure segregation in Brown v. Board of Education, and other arenas, its commitment to addressing racial inequality soon waned with shifting ideological commitments of the justices, resulting in the Court creating heavy, and often insurmountable barriers to challenge racial

discrimination and inequality. The Court has erected evidentiary burdens and procedural rules that make it harder, and in some cases impossible, for people of color to challenge discrimination and disparate impact in federally funded programs, housing, employment, voting rights, the death penalty, and police stops and racial profiling.
[...]
With the country facing glaring, material racial inequalities that the pandemic has again laid bare, the Court's lack of diversity and highly partisan majority has significant ramifications for the rights and lives of people of color as the Court considers critical issues affecting their lives -- from qualified immunity to affirmative action. The absence of judicial diversity limits the perspectives available to inform critical judicial deliberations; people of color and women bring unique understandings to issues such as criminal justice, immigration, affirmative action, and reproductive rights and health.

Without a diverse judiciary, the Court is limited in the experience it brings to scrutinizing public and private action that systematically disadvantages vulnerable social groups, and is less likely to consider the social context in which race-based policies emerge. Without these critical understandings, judicial outcomes will continue to replicate and entrench the practices that keep racial minorities in an economically and socially disadvantaged position. According to studies of federal courts, when a female justice or a justice of color sits on a panel, their male or white colleagues are more likely to side with plaintiffs in civil rights cases.

Racial diversity also adds significant value to the judiciary and positions the Court by increasing its legitimacy. For parties to a case and the public more generally, the Court's legitimacy is strengthened when decision-makers share characteristics with them. According to a study by the Brennan Center based on 60 years of data, the Judges who preside over the nation's courts generally continue to be overwhelmingly white and male. The integrity and public legitimacy of our entire judicial system is undermined if the judges making crucial decisions about the law don't reflect the diversity of the communities affected.

Janai S. Nelson, Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

As an unelected body whose decisions are unreviewable, the Court relies on the confidence of the American people to fulfill its role in our democracy. The public cannot vote for the Justices who are installed on the Court with lifetime tenure. Thus, the Court's legitimacy as the final voice of authority on legal issues that affect the lives of all people in this country derives not only from Article III of the Constitution, but also from the trust the people place in it as an institution.

Unfortunately, there is a growing crisis of confidence in the Court that threatens to undermine our democracy. In today's climate of hyper partisanship, amplified discrimination, and stoking of racial grievances, the Court's role as an impartial arbiter uninfluenced by politics is of paramount importance. The Court must be above the fray of politics and polarization, both in appearance and practice. However, many believe the Court has failed to live up to this role. Specifically, there several key factors that erode public confidence in the credibility, objectivity, and integrity of the Court: (1) the Court's lack of diversity, (2) the Court's lack of neutrality, and (3) the Court's lack of transparency.

As civil rights lawyers, we see a Supreme Court that does not reflect the diversity of our society or even the diverse professional experiences of the legal profession. We see a Court that, on many issues of critical importance, does not neutrally apply the law or precedent but instead fashions outcomes aligned with certain political parties, ideologies, or positions of authority and often against marginalized communities. We see a Court that increasingly makes important decisions that upend lower court rulings through the opaque process of the so-called shadow docket. These trends diminish confidence that the Court can rise above polarization to render carefully reasoned decisions that are deliberative, disinterested, and dedicated to strengthening our democracy.

[...]

The Supreme Court's democracy jurisprudence has eroded the confidence of the American public in the Court's impartiality. The arc of the Court's largely one-sided judicial activism in this space has diminished access to the franchise and emboldened attacks on the very foundation of our democracy.

[...]

In particular, the Court has engaged in judicial activism to erode the protections of the Voting Rights Act of 1965. In a pair of monumental decisions, the Court has sharply curtailed the ability of the Act to protect Black and Latino/a voters from election laws and procedures that, throughout America's history, have in purpose and practice operated to diminish their political participation.

Maya Sen, Professor of Public Policy John F. Kennedy School of Government Harvard University

For the reasons I stated, I think term limits are a well-supported type of reform that would have salubrious impacts on trends in Court politicization. However, I also consider a second class of reform – increasing the size of the Court beyond nine members. Court expansion proposals address some immediate problems with accountability and partisan imbalance but perhaps do not go as far as term limits in neutralizing the underlying incentives that have led to strategic retirements and increased politicization around nominations. However, Court expansion can be used in tandem with the logic of term limits as part of a strategy that decouples retirements and appointments (for example as suggested by Hemel, 2021).

Jeff Shesol, Author, Supreme Power: Franklin Roosevelt vs. the Supreme Court

I would propose, therefore, that the Commission focus on the mischief it might conceivably prevent: Senate Republicans' gaming of the system of Supreme Court appointments. What we are witnessing is a gross abuse of the Senate's constitutional responsibility to "advise and consent." In Republican hands, this power has become a partisan weapon, the key instrument in a smash-and-grab approach to ensuring conservative dominance of the Court for the long term, defying, by design, the verdicts of the American electorate.

[...]

The consequences will be felt for the long term—most significantly in the Court's rulings, but also in the playbook that Senate Republicans will almost certainly use whenever a Democrat is president. In 2016, Carrie Severino of the conservative Judicial Crisis Network described the blockade of President Obama's nominee, Judge Merrick Garland, as an "opening act." Indeed, later that year, Republican leaders promised to deny Hillary Rodham Clinton even a single Supreme Court appointment if the

voters made her president. Similar vows have been made since Joe Biden took office, and it would be naïve to dismiss them as bluster. It is likely that whenever Republicans hold power in the Senate, Democratic presidents will be reflexively, routinely denied their constitutional prerogative to name justices to the Court, even if this leaves the Court with fewer than nine members.
[...]
[I]t would be a mistake to assume that given time, the situation will somehow improve of its own accord—that the balance will right itself, activist judges will curb themselves, and Republican senators, having enjoyed such success, will call it a day and restrain themselves. It is far more likely that the crisis will worsen. A 6-3 conservative majority, from the perspective of the right, is a big improvement over 5-4, but an advantage of 7-2, 8-1, or 9-0 would be better still. The G.O.P., now flush with success and undeterred by its few remaining institutionalists, should be expected to pursue a larger majority at all costs.

Also, importantly, Republicans have powerful allies in this campaign for control: the very justices they have helped install. Conservative justices and Senate Republicans are not only ideologically aligned, espousing the same originalist cant and showing a similar contempt for voting rights, civil rights, social programs, and the separation of church and state; they are also bound together in a system of mutual dependence and mutual reinforcement.

Consider that the past three appointees were nominated by a president who had lost the popular vote by a margin of three million and were confirmed by senators predominantly from a party that held a majority of seats despite representing a minority of the American people. (The Court is not the only institution with a countermajoritarian difficulty.) The Electoral College and the malapportionment of Senate seats, both created by the Constitution, are only the beginning of the problem. Numerous non-partisan analyses show how partisan gerrymandering heightens the overrepresentation of Republican officials, how the volumes of undisclosed "dark money" favor Republican candidates, and how restrictions on voting rights, by design, disproportionately affect populations that tend to vote Democratic.

All this has increased the conservative dominance of the Court. And conservative justices, once in place on the bench, do their part to perpetuate the cycle. Consistently they sanctify these same practices—partisan gerrymandering; the flow of money into politics; the organized suppression of voting rights—as expressions of constitutional principle, cementing the G.O.P.'s hold on power even as its electoral support has shrunk.

Thus the Court majority is both a product and sponsor of the partisan wars that define our times.
[...]
Patience, at some point, is no longer a virtue: patience is acquiescence. And patience, we see, is wearing thin.

So far, the degradation of norms has been a Republican project. Despite assertions by Republican politicians that both sides do it, the results speak for themselves. In the game of "constitutional hardball," the Democrats have yet to field a team. Still, we should not expect the party to endure these tactics eternally without mustering an equivalent response. Rising frustrations on the left, which have shown themselves most recently in calls to pack the Court, will find this or other avenues of expression.

At stake, after all, is not only the membership of the Court, but the direction of the country, its faithfulness to the Constitution, and the lives and livelihoods of millions of our fellow citizens.
[...]
The appeal of Court expansion is straightforward and strong, as it was for Franklin Roosevelt.

It is constitutional, it is not without precedent (though such precedents are more than a century and a half old), it can (conceivably) be achieved quickly, and it can undo the gross imbalance on the Court. All these apparent virtues would be familiar to FDR. Other arguments are made by present-day proponents: that expanding the Court to outnumber its conservatives would stop or at least hinder the right's assault on democracy; that it would "reset" or "unpack" the Court to the balance it would have attained absent the G.O.P.'s machinations; that not to pack the Court would show a foolish, unilateral attachment to norms that Republicans have already shattered.
Each of these arguments has its merits. The support for court-packing offered by nearly the entire Democratic field in 2020—with the notable exception of the one who became president—attests to that. Yet it was clear then, and is worth acknowledging today, that the appeal of court-packing is not exclusively pragmatic. Court expansion is of course a brand of reform, but also a means of retribution—a meeting of hardball tactics with an even harder, well-deserved response.

Neil S. Siegel, David W. Ichel Professor of Law Professor of Political Science Duke Law School

Although Court-packing is almost always a bad idea that may still violate a constitutional convention, it would be overstated to say that Court-packing would never be justified, for at least three reasons. First, packing the Court would be a proportionate response to a previous decision of the other political party to pack the Court. Proportionality is a vitally important concept when the majority party in the Senate is considering how to respond after the other party has violated a constitutional norm in order to affect the Court's composition. Proportionality does not mean an identical response to the other party's norm violation, but it does mean not responding in a way that is substantially out of proportion to the underlying violation. Proportionality is relevant to assessing both the motivation for a particular response and the genuineness of the expressed concern about violation of the underlying norm. Proportionality also enables a political party to deter and punish misconduct by the other party, as well as to safeguard its own democratic authority to affect the Court's composition through the regular appointments process, but proportionality does so while limiting the damage to the Court's legitimacy and efficacy.

Second, there might be extraordinary circumstances in which Court-packing would restore the Court's legitimacy. If the Justices were to issue decisions that the American people viewed as extreme and damaging—as a radical lurch in a particular ideological or interpretive direction that decimated basic institutions or tore at the fabric of constitutional law—Court- packing might well be legitimacy-improving. (These triggers are unavoidably vague but the general ideas they capture are indispensable.) Alternatively, if the Senate were able to confirm a nominee only through bribery of wavering Senators, Court-packing at a later date might be the only way to undo the possibly decades-long impact of the appointment—to "free the taint," so to speak.

Christopher Jon Sprigman, Murray and Kathleen Bring Professor of Law, New York University

It is time for the American people to start asking why nine judges on the Supreme Court are given the power to make so many important decisions for a nation of 331 million people. [...] If we want to put an end to the politicization of the judiciary, we need to get unelected judges out of the business of deciding so many of our country's most difficult political, social, and cultural issues. The way to do that is through structural reform that will allow the democratic process to push back against judicial overreach. [...] What we get from the Supreme Court so often seems more like the "rule of five" than the "rule of law." Many Americans understand that. America's politicians certainly do, which is why control of the courts has emerged as a central theater of partisan warfare.

More broadly, the "rule of law" is of little value if law does not rest on a foundation of democracy. But judges are not democratically accountable and the Constitution that they interpret is, at best, very imperfectly democratic. No one alive now ever voted for it. And given Article V's very demanding amendment rules, we are, barring some enormous change in America's partisan polarization, stuck—unless we can find a way for the elected branches to push back. [...] Our disagreements over issues like abortion, gun safety, affirmative action, and even free speech and the validity of most economic and social legislation are fundamentally struggles about values. A resolution to any of these disputes, at least one that commands the assent of those who disagree, will rarely be found in the spare, oracular, anachronistic text of the Constitution, or in its history, or in precedent. Decisions about values are political. They should be made democratically, according to regular voting procedures that apply to the people and their representatives. They should not be made according to the preferences of five lawyers.

Mark Tushnet, William Nelson Cromwell Professor of Law emeritus, Harvard Law School and Advisory Board Co-chair, Take Back The Court

My perspective from the beginning has been one of skepticism about the contributions of constitutional review to the system of democratic governance in the United States, a perspective that I bring to this submission. I note as well that I am the co-chair of the Advisory Board to Take Back the Courts, an advocacy group urging Court expansion as the most effective available response to current concerns about the Court's operation. (Of course I agree with that policy position, though it is not the focus of my comments here.)

Benjamin Wittes, Senior Fellow in Governance Studies, The Brookings Institution

[T]he complaint driving the move to court enlargement is that the distorted confirmation process has yielded a court (and a larger court system) radically out of balance with respect to the two major political parties given the election returns over time. To wit, the concern is that the process has generated a court far more conservative than the public at large and entrenched in that conservatism by a combination of judicial life tenure and the structural features of both the Senate and the Electoral College that currently favor Republicans.

I want to stress that there is significant truth empirically in this complaint in the crude political terms in which our political culture has come to debate courts. Of the nine current justices, six were appointed by Republican presidents. Over the period of time that coincides with their appointments, Democrats have won five of nine presidential elections (and have won popular vote majorities in seven of nine). This disparity between the court's makeup and the parties' performance in presidential elections (particularly in the two-party vote in those presidential elections) is almost entirely a function of Republican aggressiveness within the confirmation process. Had Garland been confirmed in 2016, after all, and had Ruth Bader Ginsburg's successor been named by the winner of the 2020 election, Democratic appointees would account for five of the nine justices—a ratio that would precisely match the election results over time.
[...]
The simple reality is that we have run out of possible escalations within the narrow confines of the mere treatment of nominees. We have already reached the point at which a nominee can expect unanimous or near-unanimous opposition from the party not in control of the White House—irrespective of his or her qualifications. We have already reached the point at which a nominee cannot count on a vote at all in the event that the Senate is not controlled by the same party as the presidency. And we have already reached the point where a nominee can expect aggressive and swift confirmation, even late in an election year, in the event of united control—the minority's dilatory tactics having been gutted. In other words, the work has already been done to ensure a perfectly partisan confirmation process; there are no more norms left to violate in that space. The areas remaining for escalation all involve questions outside of the four corners of that process: the number of seats available to fill on a court, for example, the jurisdiction of the courts, their budgets, and whether their judges are subject to impeachment for votes that members of Congress don't like. Of these available battlefields, the size of the courts is the most immediately responsive to the current concern with the court's ideological balance.