



LAWYERS' COMMITTEE FOR  
**CIVIL RIGHTS**  
U N D E R L A W

**COMMENT SUBMISSION OF**

**DAMON T. HEWITT, PRESIDENT AND EXECUTIVE DIRECTOR  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

**PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES**

**NOVEMBER 15, 2021**

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")<sup>1</sup> appreciates the opportunity to submit comments to inform the work of the Presidential Commission on the Supreme Court of the United States ("Commission"). The Lawyers' Committee is one of the nation's leading nonprofit civil rights legal organizations, founded in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and securing equal justice under law. For nearly sixty years, the Lawyers' Committee has been at the forefront of many of the most significant cases to advance racial equality and secure equal justice.

As a litigating civil rights organization committed to advancing racial equality, we understand the essential role the federal judiciary, and in particular the Supreme Court, plays in upholding and protecting the constitutional and civil rights of Black Americans and other people of color in the United States of America. We rely on the Supreme Court and the rest of the federal judiciary to ensure fair trials and secure equal rights for all under the law. Over the last five years, we've recognized a dynamic shift in the politicization of the Supreme Court and a weakening of the system of checks and balances essential to our democracy, which has fueled many of the recent calls for reforming the high court. Our mission and history make us uniquely qualified to comment on four issues central to that shift, which are at the forefront of the conversations to reform the Supreme Court, including (1) the creation of term limits on the length of time a Supreme Court Justice may serve on the Supreme Court; (2) the adoption of a Code of Conduct and procedures allowing for review of compliance with that Code to ensure that Supreme Court Justices are impartial and appear to be impartial to the American public; (3) the Supreme Court's issuance of summary orders without full briefing or a full written opinion that would allow insight into the justices' reasoning, known as the "shadow docket," and granting of petitions of certiorari before judgment; and (4) the United States Senate's advice and consent role during the Supreme Court nomination process.

### **AN EIGHTEEN -YEAR TERM LIMIT ON SUPREME COURT TENURE**

We recommend an eighteen-year limit on the tenure of a Supreme Court Justice. As noted by the discussion draft on term limits released by the Commission as part of its October 15, 2021 meeting materials, this recommendation for reform "enjoy[s] the most widespread and bipartisan support."<sup>2</sup> While there are many reasons that counsel in favor of adopting an eighteen-

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<sup>1</sup> The Lawyers' Committee is grateful to the following Members of our Board of Directors who advised and contributed to this comment and our organizational policy recommendations: Adam Banks, Edward Correia, Jeanine Conley Daves, Loren Kieve, John Libby, Brad Phillips, Bettina (Betsy) Plevan, Judge Shira Scheindlin, Marc Seltzer, and Eleanor H. Smith. This comment is dedicated to the memory of Betsy Plevan, who selflessly devoted decades of service to the Lawyers' Committee in multiple capacities, including serving as Co-Chair of our National Board of Directors, as well her leadership on multiple board committees, including this one.

Further, we greatly appreciate the work of former Policy Counsel Erinn Martin for drafting and editing these policy recommendations with the advice and guidance of our Board members and colleagues, and of Executive Assistant Isabella Kres-Nash for her work helping to coordinate and convene our Board advisory committee. We are also grateful to Alexandria Tindall Webb for pro bono research support, Temporary Policy Associate Sydney Richardson-Gorski for research support, and to current and former interns at the Lawyers' Committee who assisted with research and citations, including Brandon Goldstein, Rajan Srinivasan, and Rachel Weisz.

<sup>2</sup> President's Commission on Supreme Court Reform, *Term Limits*, 1 (Oct. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/TERM-LIMITS.pdf>.

year term limit for the Supreme Court justices,<sup>3</sup> our recommendation is grounded in three primary considerations.

First, the long-term trend in the tenure of Supreme Court Justices has led to less turnover on the Court and the concentration of judicial power in a small number of Justices. Although Supreme Court Justices were never meant to be politically accountable in the same way that elected officials are, the Framers intended a degree of indirect accountability by placing the power of appointment in an elected President and an elected Senate.<sup>4</sup> As the tenure of Justices has lengthened, even this indirect accountability has eroded.

Second, a President's desire to cement his or her views of Constitutional and statutory interpretation over the long term has often led to selecting the youngest possible qualified nominee who will serve for an extraordinarily lengthy period of time. An eighteen-year term limit lessens this incentive and encourages appointment of individuals with more experience and a more established record.

Finally, an eighteen-year term limit balances the value of Justices acquiring the expertise and experience to effectively serve on the Court with the value of allowing for turnover in the membership of the Court that provides for adding greater diversity, experience and perspectives among the Justices.

Our recommendation assumes that at the end of the eighteen-year term the Justice will continue his or her tenure as a federal judge by choosing to sit on Court of Appeals or District Court cases. The only restriction would be that the Justice would no longer sit on the Supreme Court. Thus, the life tenure conferred upon federal judges under Article III of the U.S. Constitution would be preserved.

Importantly, proposals to modify life tenure for Supreme Court Justices are not new, and have been advocated by individuals from across the political spectrum.<sup>5</sup> In the United States, “[p]roposals to replace life tenure for federal judges with term limits have been introduced in Congress at various points in American history starting in the early nineteenth century” and over the past fifteen years, there has been serious discussion of term limits specifically for Supreme Court justices.<sup>6</sup> During the 116<sup>th</sup> Congress, for example, Representative Ro Khanna (D-CA-17) introduced legislation that would establish staggered, eighteen-year terms for Supreme Court

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<sup>3</sup> See, e.g., *id.* at 2-5.

<sup>4</sup> U.S. CONST. art. II, § 2.

<sup>5</sup> *Conservative Thinkers Renew Their Support for SCOTUS Term Limits*, FIX THE COURT (Dec. 5, 2019), <https://fixthecourt.com/2019/12/conservative-thinkers-endorse-scotus-term-limits/>; see also Kathy Bolton, *Some Candidates Call for High Court Term Limits*, USA TODAY (July 2, 2015), <https://www.usatoday.com/story/news/politics/2015/07/02/candidates-call-high-court-term-limits/29655355/>.

<sup>6</sup> Chilton, Adam and Epps, Daniel and Rozema, Kyle and Sen, Maya, *Designing Supreme Court Term Limits* (February 25, 2021). Southern California Law Review, Forthcoming, Washington University in St. Louis Legal Studies Research Paper, Forthcoming, HKS Working Paper, Forthcoming, U of Chicago, Public Law Working Paper No. 763, at 7, available at: <https://ssrn.com/abstract=3788497> or <http://dx.doi.org/10.2139/ssrn.3788497> (hereinafter Chilton, et al.).

Justices.<sup>7</sup> Most states already have mandatory retirement ages for judges on their highest courts, and, as one scholar has pointed out, “[o]urs is the only Western democracy . . . with life tenure on its highest court.”<sup>8</sup>

We now address each of the considerations listed above.

### *Increasing Indirect Political Accountability*

Supreme Court Justices now serve significantly longer than at any time in history.<sup>9</sup> Yet, when the Constitution was written, the Supreme Court played a much different, and much less powerful, role. The expansion of the federal government and individual rights and liberties has resulted in the Court’s decisions having a greater impact on our lives than in earlier times. In the Court’s early years, it was assumed that Justices would return to private life or to other public positions. In modern times, Justices often remain on the Court for decades. In the early 1970s, Justices served an average of 15 years.<sup>10</sup> Since then, the average tenure is over 27 years.<sup>11</sup>

Supreme Court appointments have always been “political” to some extent. One of the most important powers of a President is the right to nominate Justices. Although the Senate has traditionally shown some deference to the President, confirmations have now become battles over political ideology, with the Court now routinely addressing hotly disputed issues such as abortion, voting rights, affirmative action, and Congressional power.<sup>12</sup> To some extent, this indirect political accountability was intended by the Framers.

Unlimited life terms for Justices exaggerate the influence of Presidents who have the opportunity to appoint them. Richard Nixon had four appointments. Jimmy Carter had none. Due to the variability in whether a President has the opportunity to appoint a Supreme Court Justice, or more than one, the linkage between the expressed political will of citizens and the composition of the Supreme Court has become attenuated. Also, the decision of a Justice to remain on the Court or retire often appears to be timed to coincide with the tenure of the

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<sup>7</sup> See Office of Rep. Don Beyer, *House Democrats Propose Supreme Court Term Limits, Appointments Schedule, Without Constitutional Amendment*, Sept. 25, 2020, available at: <https://beyer.house.gov/news/documentsingle.aspx?DocumentID=4925>.

<sup>8</sup> Gabe Roth, *Supreme Court Term Limits Do Not Require a Constitutional Amendment*, USA TODAY (Sept. 24, 2020), <https://www.usatoday.com/story/opinion/2020/09/24/supreme-court-justices-give-them-term-limits-instead-life-tenure-column/3503999001/>; see also Kalvis Golde, *Experts Tout Proposals for Supreme Court Term Limits*, SCOTUSBLOG (Aug. 4, 2020, 4:16 PM), <https://www.scotusblog.com/2020/08/experts-tout-proposals-for-supreme-court-term-limits/>; *In the Wake of Justice Scalia's Death, Calls for SCOTUS Term Limits Grow Louder. Much Louder*, FIX THE COURT (Feb. 25, 2016), <https://fixthecourt.com/2016/02/the-economist-various-other-media-endorse-scotus-term-limits-in-wake-of-scalias-death/>; Akhil Reed Amar and Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST (Aug. 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c/>.

<sup>9</sup> Chilton, et al., *supra* note 6, at 8; see also *Term Limits*, FIX THE COURT (Sept. 29, 2020), <https://fixthecourt.com/fix/term-limits/>.

<sup>10</sup> Kalvis Golde, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

President who will select his or her replacement.<sup>13</sup> Term limits would at least mitigate, if not altogether eliminate, that political incentive.

Under our recommendation, there is no guarantee that eighteen-year term limits will evenly allocate appointments among Presidents, let alone between or among political parties. One President might still have several opportunities to fill a vacancy during a single four-year term, while another President might have none. However, if a nominee is confirmed in, for example, the first year of the President's term in 2029, a future President can be assured the opportunity to appoint his or her replacement in 2047. While not a perfect solution to the problem of political accountability, term limits reduce the likelihood that one President or one party will have an undue influence on the Court.

### *Reducing the Incentive to Appoint Younger, Less-Experienced Justices*

In recent decades it appears that Presidents have selected younger Justices than in the past.<sup>14</sup> In the 1930s, the average age of the ten most recently confirmed Justices was about 58. When Justice Gorsuch was confirmed, the average age was 51.7 years.<sup>15</sup>

President Reagan made a point of nominating younger judges to the bench at all levels. President George H.W. Bush nominated Justice Thomas at age 43.<sup>16</sup> While there are surely talented people who are qualified to sit on the Court at a relatively early age, such nominations should not be the result of gamesmanship to preserve a President's political legacy on the Court. There are also benefits that come from experience in various walks of life, whether sitting as a lower court judge, practicing law in the private sector, teaching, or serving as a public official. A benefit of an eighteen-year term limit is that it reduces the incentive to put outsize weight on the expected tenure of a Justice, especially compared with the weight placed on experience gained prior to becoming a member of the Court.

### *Broadening Current Perspectives*

An eighteen-year term limit increases the number of persons who will serve on the Supreme Court and increases the likelihood of greater diversity and life experiences among the Justices.<sup>17</sup> There are many historical examples of Justices whose views evolved dramatically over time.<sup>18</sup>

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<sup>13</sup> For example, over the last 44 years Republicans held the Presidency for 24 years and appointed 15 Justices. During this same time period, Democrats held the Presidency for 20 years and appointed 4 Justices. U.S. Senate, *Supreme Court Nominations (1789-Present)* (Updated Oct. 2020), <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>.

<sup>14</sup> Chilton, et al., *supra* note 6, at 9; see also Norm Ornstein, *Why the Supreme Court Needs Term Limits*, THE ATLANTIC (May 22, 2014), <https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/>.

<sup>15</sup> See Mary Jo Buchanan, *The Need for Supreme Court Term Limits*, CENTER FOR AMERICAN PROGRESS (Aug. 3, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/>.

<sup>16</sup> Oyez, *Clarence Thomas*, OYEZ (Last visited Oct. 29, 2021), [https://www.oyez.org/justices/clarence\\_thomas](https://www.oyez.org/justices/clarence_thomas).

<sup>17</sup> Norm Ornstein, *supra* note 14.

<sup>18</sup> See generally Lee Epstein, et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. UNIV. L. REV. 1483 (2007).

Experience has shown that Justices' views are not frozen when they are confirmed. Nevertheless, their involvement in the non-judicial world stops when they begin serving on the Court. They no longer participate in and learn from activities outside the rarified atmosphere of the Supreme Court. As John Roberts wrote before he became Chief Justice, "The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal current of life for twenty-five or thirty years was a rarity then, but it is becoming commonplace now. Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence."<sup>19</sup>

In addition to the benefit of broader life experiences, increasing the number of opportunities to serve on the Court will increase the likelihood that persons from different backgrounds will serve on the Court.<sup>20</sup> Again, there is no guarantee that a President will choose people of color, women, or persons from other groups that have historically been underrepresented, but the greater number of opportunities means that the chances of a President doing so are higher.

### A CODE OF CONDUCT APPLICABLE TO SUPREME COURT JUSTICES

Assuring both the appearance and reality of impartiality and ethical behavior among the Justices of the United States Supreme Court is critical to the role of the Supreme Court as the court of last resort for all who seek equal justice under law. In our system of government, the judiciary is the one branch that can serve as a lone safeguard to protect the rights of disfavored and less-powerful minorities against the will of the majority expressed by the political branches.<sup>21</sup> For that reason, if the courts are to fulfill their promise to act as guardians of the rule of law, especially for those who have endured centuries of *de facto* and *de jure* discrimination, they must maintain their independence and integrity.

To that end, we recommend that a Code of Conduct applicable to the Justices be adopted and that procedures also be adopted to allow review of Justices' compliance with that Code, particularly including review of a Justice's decision to decline recusal or disqualification in a specific case.<sup>22</sup>

The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To achieve its mission, the Lawyers' Committee must often turn to the courts to combat the inequities confronting Black Americans and other communities of color. Our history has shown that accomplishing this mission has been and will continue to be a struggle, and that the Supreme Court has played and will continue to play a pivotal role in that struggle. Indeed, from the Court's now infamous decisions in *Dred Scott* and *Plessy v. Ferguson*

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<sup>19</sup> *In the Wake of Justice Scalia's Death, Calls for SCOTUS Term Limits Grow Louder. Much Louder*, *supra* note 8.

<sup>20</sup> See Mary Jo Buchanan, *supra* note 15; see also Norm Ornstein, *supra* note 14.

<sup>21</sup> See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 285 (2010) (describing the judicial branch's core function as counter-majoritarian: protecting minority rights from majoritarian excess).

<sup>22</sup> For a detailed discussion of the mechanics of implementing and administering a Code of Conduct for Supreme Court Justices, see President's Commission on Supreme Court Reform, *Case Selection and Review: Docket, Rules, and Practices*, at 22-28 (Oct. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/CASE-SELECTION-AND-REVIEW.pdf>.

through its landmark decision in *Brown v. Board of Education*, right up to its regressive decisions in *Shelby County v. Holder*, *Brnovich v. Democratic National Committee*, and beyond, the Supreme Court has determined whether systems that perpetuate or combat racial discrimination in this country will prevail.<sup>23</sup> The Court’s decisions directly impact the rights and freedoms enjoyed (or not) by the most marginalized groups in our society, and the Court will continue to be a major determinant of whether our country will live up to its democratic ideals.

The Lawyers’ Committee works ceaselessly to protect and advance the rights of Black Americans and other communities of color. Much of our work is conducted through state and federal courts, and we regularly appear in cases before the U.S. Supreme Court. For any court to properly serve its high purpose of fairly dispensing justice and enforcing the rule of law, the judges on that court must be impartial and independent—and must be perceived as such. Because of the preeminent role of the Supreme Court in our democracy and its role as the “great leveler” (or not) on matters of racial justice, it is especially important that the Justices of the Supreme Court are in fact—and are perceived to be—fair minded, impartial, and independent. This is particularly true in an era in which the Court’s decisions are increasingly viewed by the public as partisan in nature.<sup>24</sup>

Currently, unlike all other federal judges, the Justices of the Supreme Court are not subject to the Code of Conduct for United States Judges. This omission has been the subject of considerable debate and discussion and has prompted several proposals for remedial legislation. The Lawyers’ Committee strongly believes that, in order to provide the assurance of impartiality and ethical behavior by the Justices of the Supreme Court, a Code of Conduct applicable to the Justices must be adopted, and that corresponding procedures must be adopted to allow review of compliance with that Code, particularly of a Justice’s decision to decline recusal or disqualification in a particular case.

### **THE SUPREME COURT’S SHADOW DOCKET RULINGS IMPACT THE RIGHTS OF PEOPLE OF COLOR**

The Supreme Court’s “shadow docket” rulings are quietly impacting the rights of people of color when it comes to voting rights, immigration, COVID-19 regulations, LGBTQ+ discrimination and other areas. The shadow docket rulings are decided by the Supreme Court outside of the merits docket, usually on an accelerated basis in response to an emergency request and consist primarily of one-sentence summary orders that are unsigned. The merits docket rulings, in contrast, are signed opinions that reveal the high court’s rationale for deciding and resolving a particular case. Shadow docket cases also differ from merits docket cases because they generally are not fully briefed by lawyers or outside parties, and there is no oral argument.

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<sup>23</sup> Compare *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896) with *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) and *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic Nat’l Comm.* 594 U.S. \_\_ (2021).

<sup>24</sup> See Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 51 (2020) (arguing that the conservative majority on the Court is making decisions that help entrench Republicans in power and insulate them from competition).

Over the last four years, there has been a dramatic increase in the issuance of shadow docket rulings involving the federal government. From 2001-2017 under Presidents George W. Bush and Barack Obama, the Department of Justice sought emergency relief from the Supreme Court in only eight instances.<sup>25</sup> In contrast, the Trump administration filed 41 applications for emergency relief in the span of its four-year term.<sup>26</sup> In the eight applications filed by the Obama and Bush administrations, the Supreme Court granted four and denied one, with only one ruling prompting a public dissent.<sup>27</sup> Since 2017 when President Trump assumed office, the Court has granted 24 emergency relief applications in full and four in part, giving the Trump administration a 70% success rate on its emergency applications.<sup>28</sup> The Trump administration repeatedly filed emergency applications and petitions for certiorari before judgment in attempts to expedite the judicial process, which can take several years in some instances, to get the high court to overturn a district court decision and bypass the court of appeals within the course of a few months.<sup>29</sup> This effectively denies the Supreme Court the important benefit of federal court of appeals deliberation and causes the Court to issue decisions with unwarranted haste.<sup>30</sup>

While the Trump Administration's frequent use of emergency appeals to the Supreme Court has contributed to the rise in shadow docket rulings, the Court's recent willingness to acquiesce to these appeals has serious implications for the way the Court will operate in the years ahead. Shadow docket rulings are often unsigned opinions without a rationale for the decision, making it more difficult for lower courts to interpret than the high court's opinions issued in cases it hears on the merits. The lack of transparency is particularly troubling given that the Court's shadow docket decides cases impacting the rights of people of color, immigrants, people on death row, and partisan battles on voting rights.<sup>31</sup> This practice has not only made it appear less impartial in matters involving the executive and legislative branches, it also has led to decisions by the Court that have had major civil rights and immigration implications. Given the growing shadow docket and its significant impact on civil rights of individuals and the institutional authority of the Court, it is not surprising that it has been identified as one of the main areas for reform by the Commission.<sup>32</sup>

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<sup>25</sup> Stephen I. Vladeck, *Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 162 tbl.3 (2019).

<sup>26</sup> See Steve Vladeck (@steve\_vladeck), TWITTER (Jan. 20, 2021, 11:21 AM), [https://twitter.com/steve\\_vladeck/status/1351927798882066436](https://twitter.com/steve_vladeck/status/1351927798882066436).

<sup>27</sup> See *Veasey v. Perry*, 135 S. Ct. 9 (2015) (mem.); *United States v. Comstock*, No. 08A863 (Roberts, Circuit Justice, Apr. 3, 2009) (mem.); *Dep't of Health & Hum. Servs. v. Alley*, 556 U.S. 1149 (2009) (mem.); *Gates v. Bismullah*, 554 U.S. 913 (2008) (mem.); *Rumsfeld v. Reil*, No. 05A231 (Ginsburg, Circuit Justice, Sept. 8, 2005); *Ashcroft v. O Centro Espirita Beneficente Uniao do Vegetal*, 543 U.S. 1032 (2004) (mem.); *Bush v. Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft v. N. Jersey Media Grp.*, 536 U.S. 954 (2002) (mem.); *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

<sup>28</sup> See Steve Vladeck (@steve\_vladeck), TWITTER (Jan. 20, 2021, 11:21 AM), [https://twitter.com/steve\\_vladeck/status/1351927798882066436](https://twitter.com/steve_vladeck/status/1351927798882066436).

<sup>29</sup> See Tucker Higgins, *Trump Says He Expects the Supreme Court to Uphold His National Emergency Declaration After Presumptive Losses in Lower Courts*, CNBC (Feb. 15, 2019), <https://www.cnbc.com/2019/02/15/trump-says-he-expects-scotus-to-uphold-national-emergency-declaration.html>; Linda Greenhouse, *Opinion: On the Border Wall, the Supreme Court Caves to Trump*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/trump-supreme-court-border-wall.html>.

<sup>30</sup> 7 FED. PRAC. & PROC. JURIS. § 4036 (3d ed.) at 5.

<sup>31</sup> Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE (Aug. 11, 2020), <https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html>.

<sup>32</sup> President's Commission on Supreme Court Reform, *supra* note 22.



During the Trump Administration, the Supreme Court frequently granted the federal government's requests for emergency and extraordinary relief on issues that were not fully litigated in the lower courts, and the Supreme Court's constant yielding created a deferential dynamic between the Executive and Judicial branches of government. In acquiescing to the Trump administration's arguments in its applications for a stay and petitions for certiorari before judgment, without adequately weighing the competing claims of harm, the Court effectively lowered its normally high standard for review and deprived affected parties of the much-needed opportunity to fully brief and argue a matter before the high court steps in. Furthermore, from a historical perspective, the Trump administration's repetitive requests for emergency and extraordinary relief, citing the irreparable harm of not being able to implement its policy and alleged time constraints, are not exceptional enough to warrant relief from the Court. The Supreme Court's granting of stays in the Muslim travel ban, public charge rule, transgender military ban and asylum ban cases have caused irreparable harm to people of color and LGBTQ+ people and stifled immigration,<sup>33</sup> and also impacted the integrity of the Court as a separate and co-equal branch of government.

It is imperative that transparency on the Supreme Court be increased in its decisions to grant or deny stays and petitions for certiorari before judgment. Therefore, we recommend that both the formal rules and informal norms for both procedures and the timing of emergency stays be changed for greater clarity and consistency in their application.<sup>34</sup> Some of these reforms could include the Supreme Court holding oral argument when their potential grant or denial of a petition could change the legal status quo, and that the Court provide at least a short explanation of its order under these circumstances.<sup>35</sup>

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<sup>33</sup> *Int'l Refugee Assistance Project v. Trump*, 137 S. Ct. 2080 (2017); Application for Stay, *Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16A1190); Application for Stay, *Trump v. Hawaii*, 138 S. Ct. 49 (2017) (mem.) (No. 16A1191); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); United States Citizenship and Immigration Services, *Final Rule on Public Charge Ground of Inadmissibility*, (Feb. 24, 2020) <https://www.uscis.gov/archive/archive-news/final-rule-public-charge-ground-inadmissibility>; Dep't of Homeland Security v. New York, No. 19A785, 589 U.S. \_\_\_\_ (2020); *Wolf v. Cook County*, No. 19A905, 589 U.S. \_\_\_\_ (2020); Petition for Writ of Certiorari Before Judgment, *Trump v. Karnoski*, 139 S. Ct. 946 (2019) (mem.) (No. 18-676); Application for Stay, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.) (No. 18A625); Petition for Writ of Certiorari Before Judgment, *Trump v. Doe*, 139 S. Ct. 946 (2019) (mem.) (No. 18-677); Application for Stay, *Trump v. Doe*, 139 S. Ct. 950 (2019) (mem.) (No. 18A626); Petition for Writ of Certiorari Before Judgment, *Trump v. Stockman*, 139 S. Ct. 946 (2019) (mem.) (No. 18-678); Application for Stay, *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.) (No. 18A627); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019); E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1029–30 (9th Cir. 2019); Application for a Stay, *Barr v. E. Bay Sanctuary Covenant*, No. 19A230 (U.S. Aug. 26, 2019); E. Bay Sanctuary Covenant v. Barr, No. 19A230, 2019 WL 4292781 (U.S. Sept. 11, 2019); Sabrina Tavernise, *Immigrant Population Growth in the U.S. Slows to a Trickle*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/census-immigration.html>.

<sup>34</sup> See *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 31–32 (written testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, Univ. Texas Sch. L.). accessed at:

<https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf>.

<sup>35</sup> See *id.* at 33–34. accessed at: <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf>.

## THE SENATE MUST MEANINGFULLY FULFILL ITS ADVICE AND CONSENT ROLE

In addition to reforms by the institution of the Supreme Court, it is also essential that the United States Senate recommits to protecting the process of its advice and consent role in our Constitution. The Appointments Clause outlines an essential separation of power between the executive and legislative branches by requiring the Senate to provide “advice and consent” on the president’s nominees for lifetime seats on the federal bench.<sup>36</sup> The Clause states that the president has the power to “...nominate, and by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court.”<sup>37</sup> The Senate’s advice and consent obligation serves as an important check on a president’s power to nominate individuals to lifetime positions on the federal bench. The American public relies on the Senate to fulfill its obligation to provide advice and consent on judicial nominees and to properly vet all candidates to ensure unqualified candidates are not granted lifetime appointments, because a judge cannot be removed from the bench through the political process.

For years, the Senate’s advice and consent obligation played an essential role in ensuring judges confirmed to the federal bench were of the highest integrity and committed to the rule of law. However, there was an abrupt shift in the Senate’s approach to this role with a refusal by then-Majority Leader Mitch McConnell to provide advice and consent when a vacancy arose following the death of Associate Justice Antonin Scalia.<sup>38</sup> Shortly after, the same Majority Leader allowed a rushed nomination and confirmation process for now-Associate Justice Brett Kavanaugh<sup>39</sup> and now-Associate Justice Amy Coney Barrett.<sup>40</sup> Neither the refusal, nor the rushed process, allowed the Senate to meaningfully fulfill its advice and consent role.

On February 13, 2016, one hour after the death of Justice Scalia and nearly nine months before the 2016 Presidential Election, Senate Majority Leader Mitch McConnell stated that “[t]his vacancy should not be filled until we have a new President.”<sup>41</sup> The Constitution includes no language that calls for a suspension of the President’s or the Senate’s constitutional obligations during a presidential election year, nor any other period. The very purpose of the Senate’s advice and consent role is to fill the essential positions needed to operate the government the Framers created, as supported by the Framers’ insertion of the recess appointments clause to give the President authority to unilaterally fill vacancies temporarily, if

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<sup>36</sup> U.S. CONST. art. II, § 2.

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

<sup>39</sup> The Lawyers’ Committee filed suit in 2018 seeking to uphold the Senate’s advice and consent responsibility during then-Judge Brett Kavanaugh’s nomination to the United States Supreme Court because the executive branch under President Donald Trump blocked the Senate’s access to key documents bearing on Kavanaugh’s views and character, thus inhibiting the Senate’s ability to fully review his record. *Merkley v. Trump*, No. 1:18-cv-02226 (D.D.C. 2018).

<sup>40</sup> Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>.

<sup>41</sup> Press Release, Mitch McConnell, *Justice Antonin Scalia* (Feb. 13, 2016), <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=8E6839F9-181B-42F5-B8F0-F4244B9D7927>.

the Senate is in recess and unable to provide advice and consent.<sup>42</sup> The Senate’s refusal to provide advice and consent to fill the vacancy arising from Justice Scalia’s death frustrated the entire purpose of the appointments clause.

Prior to 2016, there was no case where the Senate, or even a single Senator, took the position that the Senate should or could flatly refuse to consider a nominee to the Supreme Court under similar circumstances.<sup>43</sup> However, despite clear constitutional obligations and historical precedent, the Senate refused to participate in the advice and consent process when President Barack Obama nominated Judge Merrick Garland to the Supreme Court of the United States in March of 2016.<sup>44</sup> The Senate Judiciary Committee could have moved forward with holding a hearing on Judge Garland’s nomination and allowed for an up-or-down vote on his nomination, but the Committee followed Majority Leader McConnell’s direction and failed to act. The Senate’s refusal to consider Garland was wholly inconsistent with the roles of the President and the Senate as envisioned by the Framers, and created a dangerous precedent empowering the Senate to decide not to fulfill its constitutionally mandated role without any check from the executive or judicial branches.

The Senate’s shirking of its advice and consent obligation for Supreme Court nominees continued with the nomination of Brett Kavanaugh in 2018 as the Senate failed to review the entire record of his time serving in the George W. Bush Administration as a White House counsel and as staff secretary. On July 9, 2018, President Donald Trump nominated Judge Kavanaugh to the United States Supreme Court to fill the vacancy that arose following the retirement of Associate Justice Anthony Kennedy.<sup>45</sup> Kavanaugh had a voluminous record from his time serving as a lawyer in the Bush Administration, which contained over 100,000 pages of documents never accessed or reviewed by the Senate during his nomination under the guise of a sweeping claim of executive privilege.<sup>46</sup> With awareness of the existence of the relevant documents, then-Senate Judiciary Committee Chairman Charles Grassley scheduled Kavanaugh’s confirmation hearing for the start of September, weeks before the National Archives would have the opportunity to release to the public select, but not complete, records from Kavanaugh’s time at the White House.<sup>47</sup> The Senate’s premature hearings without waiting

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<sup>42</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>43</sup> On March 16, 2016, Sen. McConnell stated “the Senate will continue to observe the Biden Rule so that the American people have a voice in this momentous decision” and quoted the words of then-Senate Judiciary Committee Chairman Joe Biden’s June 1992 floor speech urging the Senate president to delay proceedings on the nomination of a Supreme Court justice until after the election and political campaign season ended if a vacancy were to occur. There was no vacancy on the Supreme Court in June 1992 at the time of the floor speech and there was no call to delay until the next president assumed office. See C. Eugene Emery Jr., *In Context: The ‘Biden Rule’ on Supreme Court nominations in an election year*, POLITIFACT (Mar. 17, 2016), <https://www.politifact.com/article/2016/mar/17/context-biden-rule-supreme-court-nominations/>.

<sup>44</sup> Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017), <https://www.scotusblog.com/2017/01/garland-nomination-officially-expires/>.

<sup>45</sup> Amy Howe, *Trump Nominates Kavanaugh to Supreme Court*, SCOTUSBLOG (Jul. 9, 2018), <https://www.scotusblog.com/2018/07/trump-nominates-kavanaugh-to-supreme-court/>.

<sup>46</sup> Sheryl Gay Stolberg, *White House Withholds 100,000 Pages of Judge Brett Kavanaugh’s Records*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/us/politics/kavanaugh-records.html>.

<sup>47</sup> Rebecca Shabad & Frank Throp V, *National Archiver: All Requested Kavanaugh Documents Probably Won’t Be Released Until the End of October*, NBC NEWS (Aug. 2, 2018), <https://www.nbcnews.com/politics/congress/national-archives-all-requested-kavanaugh-documents-probably-won-t-be-n896991>.

for the release of the complete record raised questions about the integrity of the nomination process.

The unprecedented lack of Senate access to Kavanaugh's record while serving in the Bush Administration and the handling of an FBI investigation into his conduct damaged the public's confidence in the Senate's power and role in the nomination process. The process ultimately led to a tumultuous confirmation in October of 2018 at the start of the Supreme Court's term.<sup>48</sup> Nearly three years later, in July 2021, the FBI disclosed to Democratic Senators that its investigation into Kavanaugh's background and conduct during his nomination was shaped by lawyers in the Trump Administration, not by the agency,<sup>49</sup> further calling into question the independence and thoroughness of the vetting and legitimacy of the nomination proceedings, as the Senate largely followed the White House's lead during the nomination proceedings. The confirmation process of Justice Kavanaugh highlights the importance of the Senate's advice and consent role "as an excellent check on a spirit of favoritism in the President and would tend greatly to prevent the appointment of characters from State prejudice, from family connections, from personal attachment, or from a view to popularity" as Alexander Hamilton expressed in Federalist No. 76.<sup>50</sup>

In September of 2020, following the death of Associate Justice Ruth Bader Ginsburg, then-Majority Leader Mitch McConnell issued a statement saying: "President Trump's nominee will receive a vote on the floor of the United States Senate."<sup>51</sup> This statement directly contradicted Sen. McConnell's 2016 position that "the important principle in the middle of this presidential year is that the American people need to weigh in and decide who's going to make this decision."<sup>52</sup> While there is precedent for the consideration and confirmation of nominees by the Senate more than six months before a presidential election,<sup>53</sup> there had never been a circumstance in our nation's history where a nominee was named and confirmed during the last eight weeks of an ongoing presidential election.<sup>54</sup> The Republican Senate majority's inconsistent position on the nomination process, based on the party in control of the White House, improperly politicized the selection and confirmation of Associate Justices and eroded the confidence of the American people in the Supreme Court and our democracy.

Beyond the transparently partisan decision to consider the Barrett nomination in the final days leading up to the 2020 presidential election, the rushed process did not afford the Senate the opportunity to engage in meaningful advice and consent and thoroughly examine her record.

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<sup>48</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

<sup>49</sup> Kate Kelly, *Details on F.B.I. Inquiry into Kavanaugh Draw Fire From Democrats*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2021/07/22/us/politics/kavanaugh-fbi-investigation.html>.

<sup>50</sup> *The Appointing Power of the Executive*, THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>51</sup> Press Release, Mitch McConnell, *McConnell Statement on the Passing of Justice Ruth Bader Ginsburg*, (Sept. 18, 2020), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-statement-on-the-passing-of-justice-ruth-bader-ginsburg>.

<sup>52</sup> Katie Wadington, *Then and now: What McConnell, Others Said About Merrick Garland in 2016 vs. After Ginsburg's Death*, USA TODAY (Sept. 19, 2020), <https://www.usatoday.com/story/news/politics/2020/09/19/what-mcconnell-said-merrick-garland-vs-after-ginsburgs-death/5837543002/>.

<sup>53</sup> Amy Howe, *Supreme Court Vacancies in Presidential Election Years*, SCOTUSBLOG (Feb. 13, 2016, 11:55 PM), <https://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/>.

<sup>54</sup> *Id.*

Typically, the Senate Judiciary Committee holds a nominee's hearing a little over a month after the nominee submits her Senate Judiciary Committee Questionnaire ("Questionnaire"), a practice the Republican-controlled Senate had followed for President Trump's first two Supreme Court nominees. For example, then-Judge Kavanaugh submitted his Questionnaire on July 21, 2018 and his nomination hearings began September 4, 2018,<sup>55</sup> and then-Judge Gorsuch submitted his Questionnaire on February 11, 2017 and the Senate Judiciary Committee commenced hearings on March 20, 2017.<sup>56</sup> Because the entire Barrett nomination lasted less than a month, the Senate Judiciary Committee had just 13 calendar days from the time the Questionnaire was submitted on September 29, 2020 to the commencement of the nomination hearings on October 12, 2020, a federal holiday while the Senate was in recess, to review over 1800 pages of documentation.<sup>57</sup> Senators in the minority party motioned to delay the rushed process to afford more time to review Barrett's record, but the motion was defeated on a party line vote.<sup>58</sup> The Senate Judiciary Committee advanced her nomination to the Senate floor on October 22, 2020 and she was confirmed by the Senate to the Supreme Court four days later.<sup>59</sup> Justice Barrett was the first justice confirmed with only one party's support since 1869.<sup>60</sup>

It is impossible to ignore the harm to our democracy when the Senate's advice and consent process cynically changes based on which party controls the Senate and who is in the White House. Our democracy depends on the rule of law and the consistent application of processes to ensure that public faith and trust in our institutions is not diminished, particularly for Black Americans and other people of color, who often experience disparate treatment.

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<sup>55</sup> U.S. Senate Committee on the Judiciary, *Judge Brett M. Kavanaugh: Nominee to Serve as an Associate Justice on the Supreme Court of the United States*, <https://www.judiciary.senate.gov/kavanaugh>. As discussed above, the Senate Judiciary Committee did not have full access to Kavanaugh's record when the nomination hearings commenced as the hearings started in early September. The National Archives indicated it would not be able to release the records until October, but the six-week period did allow for review of the limited documents that were available during that time.

<sup>56</sup> Mallory Shelbourne, *Gorsuch Submits Questionnaire for Supreme Court Nomination*, THE HILL (Feb. 11, 2017), <https://thehill.com/homenews/319082-gorsuch-submits-questionnaire-for-supreme-court-nomination>; U.S. Senate Committee on the Judiciary, *Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States* (Mar. 20, 2017), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-neil-m-gor>.

<sup>57</sup> U.S. Senate Committee on the Judiciary, *Judge Barrett Returns Senate Judiciary Questionnaire* (Sept. 29, 2020), <https://www.judiciary.senate.gov/press/rep/releases/judge-barrett-returns-senate-judiciary-questionnaire>; Associated Press, *Republicans Schedule Vote to Approve Amy Coney Barrett's Nomination Before the Nov. 3 Election*, CBC (Oct. 12, 2020), <https://www.cbc.ca/news/world/us-supreme-court-amy-coney-barrett-senate-confirmation-hearings-1.5759452>.

<sup>58</sup> Ana Radelat, *Blumenthal Tries to Stall Barrett Confirmation, but Procedural Move Fails*, THE CT MIRROR (Oct. 15, 2020), <https://ctmirror.org/2020/10/15/blumenthal-tries-to-stall-barrett-confirmation-but-procedural-move-fails/>.

<sup>59</sup> U.S. Senate Committee on the Judiciary, *Senate Judiciary Committee Unanimously Sends Judge Barrett's Nomination to the Full Senate* (Oct. 22, 2020), <https://www.judiciary.senate.gov/press/rep/releases/senate-judiciary-committee-unanimously-sends-judge-barretts-nomination-to-the-full-senate>; U.S. Senate Committee on the Judiciary, *Nominations:PN2252-116: Amy Coney Barrett*, <https://www.judiciary.senate.gov/nominations/executive/PN2252-116>. See also Amy Howe, *Barrett Confirmed as 115th Justice*, SCOTUSBLOG (Oct. 26, 2020), <https://www.scotusblog.com/2020/10/barrett-confirmed-as-115th-justice/#>.

<sup>60</sup> Sarah Binder, *Barrett is the First Supreme Court Justice Confirmed Without Opposition Support Since 1869*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/politics/2020/10/27/barrett-is-first-supreme-court-justice-confirmed-without-opposition-support-since-least-1900/>.

Thus, the Senate must commit to conducting a full and fair investigation into every nominee to the Supreme Court. In meaningfully fulfilling its advice and consent role, the Senate must ensure that Supreme Court nominees and other federal judicial and executive nominees are qualified, impartial, fair-minded, and committed to equal justice under law. As our courts directly impact the rights of Black Americans and other people of color, it is essential that the judges serving on the courts understand the impact their decisions have on the lives of people of color. Finally, a nominee should also never be denied consideration by the Senate, or to experience an undue delay in their nomination process unless there are prudential, non-political considerations for our democracy and system of government that are evenly applied regardless of which political party controls the presidency and the Senate, such as Americans casting their votes across the country in an ongoing presidential election.

### CONCLUSION

Thank you for your service on the Presidential Commission on the Supreme Court of the United States, and for the opportunity to inform the important work of the Commission. The Supreme Court has played an invaluable role in advancing the rights of Black Americans and other people of color and enforcing equal protection under the law when people of color, the LGBTQ+ community, people with disabilities and women lacked protections under state laws. We urge the Commission to consider the ways in which term limits, an ethical code of conduct, the Supreme Court's administration of justice, and the confirmation process could be improved to ensure transparency, consistency, and equality to strengthen our democracy and fulfill the promise of equal justice for all under the law. Thank you again for your consideration of our recommendations.

Sincerely,



Damon T. Hewitt  
President & Executive Director  
Lawyers' Committee for Civil Rights Under Law