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Co-chairs Bauer and Rodriguez and members of the commission, thank you for your invitation to testify today on the relationship between the confirmation process for Supreme Court justices and the ongoing calls for reform and enlargement of the court.

I would like to make five broad points today:

- First, the decay of the confirmation process is intimately connected with calls for court reform, enlargement, and related schemes. Indeed, the decay of the confirmation process is the but-for cause of the current agitation.
- Second, the decay of the confirmation process has been a bipartisan affair in which neither Republicans nor Democrats have refrained from escalation and in which both sides perceive themselves as playing defense—and routinely take offensive measures believing they are engaged in preemptive self-defense.
- Third, in the escalatory cycle that has developed, court enlargement or related changes are the logical next step. They are likely to happen exactly as soon as one political party or the other controls the levers of power sufficiently to make them happen. Because both sides believe, probably correctly, that the other side would take these steps if given the chance, both are likely to take them as a preemptive measure as soon as the chance presents itself.
- Fourth, the best way to head off a tit-for-tat cycle of court enlargements and related manipulations is to do reform in a negotiated, deliberative fashion with an eye toward deescalating matters and lowering the stakes. The alternative to waiting until one side or the other has the power to act unilaterally to its own benefit is to redesign the system of nominations and confirmations in a fashion that both is durable and reduces the incentive to gamesmanship.
- Fifth, to this end, I propose a simple test of whether a court-altering proposal represents a constructive, deescalatory intervention or merely invites a retributive response when power alignments shift. When confronted with any reform proposal, I urge the commission to ask the following question: What response will this proposal, if enacted, engender when the House and Senate and presidency are in different hands? Will it incentivize a tit-for-tat response, or will it provide a durable basis to keep political temperatures as low as possible in our polarized political system?

My background in this subject is admittedly peculiar. I am not a law professor or a Supreme Court practitioner. I never went to law school, and I am not a member of any bar. I am a senior fellow in Governance Studies at the Brookings Institution and the editor in chief of *Lawfare*—a web resource devoted to national security legal matters. By background, I am a legal journalist, who wrote about judicial confirmations for a number of years on behalf of the *Washington Post's* editorial page during both the Bill Clinton administration and the George W. Bush administration. In that capacity, I had a unique view of the confirmation process. I spoke regularly with White House officials responsible for nominations, with the nominees themselves, with the Senate staffers handling nominations, and with activist groups supporting and opposing them. I saw very directly the modalities and, frankly, the brutalities of the process and how it created cycles of retribution among political actors. I ultimately wrote my reflections on the process in the 2006 book *Confirmation Wars: Preserving Independent Courts in Angry Times*. I spent years advocating reforms and changes to the confirmation process. I no longer believe constructive change is likely on the subject and have, as a result, largely stopped writing and working in this space.

You have asked me to address the subject of “the United States Senate's processes for advising and consenting on the President's nominations to the Supreme Court and the role the confirmation process plays in debates over whether and how to reform the Supreme Court.” While this framing of the question focuses specifically on the Supreme Court, it is essential to take a slightly broader view of the question at hand. The confirmation process for Supreme Court justices is not, in fact, a different process from the one for lower court judges. It is, rather, a particularly high-stakes and high-profile iteration of a game played dozens of times a year by the same repeat players: the White House, the Senate majority, the Senate minority, and a novice who often has no idea what he or she is in for.

It is impossible to understand the gamesmanship we see between the political parties with respect to Supreme Court nominations in abstraction from the behavior of the same parties with respect to lower court nominations. It is, after all, in lower court nominations where those parties' strategies get road-tested and honed before being deployed with Supreme Court nominations.

Consider, for example, the outrageous treatment of Judge Merrick Garland at the time of his nomination to the Supreme Court, when Senate Republicans refused to move the nomination of an overwhelmingly qualified judge for almost the entirety of an election year. This was novel at the Supreme Court level. At the D.C. Circuit level, by contrast, it was well-trodden ground. Garland himself had been held up for the entirety of the election year of 1996 at the time of his original appointment to the D.C. Circuit; he was

confirmed in 1997 only after Clinton's reelection and Garland's consequent renomination.

Garland was not the first to receive this particular treatment. He was joined on the D.C. Circuit during the George W. Bush administration by now-Chief Justice John Roberts, who had originally been nominated to the court by George H.W. Bush early in the election year of 1992. The current president, Joe Biden, then the chair of the Senate Judiciary Committee, sat on that nomination for the duration of the year and Roberts's nomination died when Clinton became president.

The use of the filibuster too migrated from lower court nominations to Supreme Court nominations—as did the threat, and ultimately the reality, of altering Senate rules to prevent the use of the filibuster with respect to nominations.

My point here is that for whatever combination of reasons—and with whatever level of justification—our political system has decided to wage war over its courts in general, not the Supreme Court in particular. The highest-stakes battles in that war involve Supreme Court confirmations, but those battles are, in turn, highly conditioned by other fights that occur much more frequently. Supreme Court confirmations should therefore be understood as part of an ecosystem—one that has been badly degraded. It is impossible to restore the health of one component of that ecosystem without attention to its whole.

With that as prologue, let me turn to my first major point: **Current calls for court reform are almost entirely a creature of the degradation of the confirmation process.**

It is notable that amidst the arguments for enlarging the Supreme Court, for limiting its jurisdiction, or for imposing term limits on the justices, the complaints generally do not sound in the institutional performance of the courts—except with respect to ideological matters. Court enlargement has not become a politically salient issue, say, because the court cannot handle its workload or because a larger court might take on many of the cases that the current court is refusing to hear. Nor is there any serious public sentiment that the general level of professionalism of judicial opinions is subpar or that more justices would allow the court to have greater scholarly engagement with difficult questions.

Rather, the 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.

A similar process has taken place, with less dramatic effect, at the lower court level. One cannot blame Sen. Mitch McConnell or the Republican Senate majority for acting with alacrity to confirm as many judges as possible at the lower court level during the four recent years of unified Republican control of the White House and the Senate. The disparity between that energy and the stalling of Obama administration judicial nominations in the years of divided government, however, is stark. And it had a real impact. According to data from my Brookings colleague Russell Wheeler, the ranks of district court judges are split almost evenly by party of the appointing president, while 53 percent of active court of appeals judgeships are held by Republican appointees.<sup>1</sup> This despite the fact that Democrats have won two out of the past three and five out of the past nine presidential elections. It's not the dramatic disparity that many Democrats believe exists, but the perception among Democrats that Republican appointees are overrepresented on the lower courts relative to the electoral performance of the Republican Party has a significant element of truth. The aggressiveness of the Trump administration and Senate Republicans with respect to nominations and confirmations is the major explanation for this effect.

Put simply, there would be no significant debate about court reform and enlargement today, except in certain academic circles, but for the confirmation process. There is no grave problem with the courts that requires reform. Rather, the perception of the need

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<sup>1</sup> Russell Wheeler, "Can Biden 'Rebalance' the Judiciary," *Brookings*, March 18, 2021, <https://www.brookings.edu/blog/fixgov/2021/03/18/can-biden-rebalance-the-judiciary/>.

for change is driven by the disruption of a long-term equilibrium in the manner in which judges and justices are named and seated on the bench.

This brings me to my second point, which I understand will be controversial among combatants in the judicial confirmation wars: **The decay of the confirmation process has been a thoroughly bipartisan affair.** While I am deeply sympathetic to current Democratic grievances about the handling of the nominations of Garland and Justice Amy Coney Barrett, it is quite wrong to see the degradation of the judicial confirmation process as a one-sided affair that took place mainly in the late Obama and Trump administrations. The actual history of the decline of the process reveals a continuous cycle of escalation over three decades in which neither side refrained from seizing momentary advantage when it had the chance. A few key moments in the tit-for-tat cycle, by no means an exhaustive list, include:

- Senate Democrats began slowing nominations in the late Reagan and first Bush administrations.
- Republicans, when they took control of the Senate in 1994, systematized the slowdown for the duration of the Clinton administration.
- Democrats upped the ante during the second Bush administration by normalizing the use of the filibuster so that even a minority faction could now stop judges.
- Republicans threatened to eliminate the filibuster in response—but lacked the votes to do so after a bipartisan deal temporarily limited the use of the filibuster for lower court nominations.
- Republicans then abandoned this deal and began using the filibuster during the Obama administration.
- Democrats responded by eliminating the filibuster for lower court nominations.
- But Democrats then tried to use it during the Trump administration during Neil Gorsuch’s confirmation to the Supreme Court.
- Republicans responded by eliminating its use there too.

Having done so, there was nothing to prevent the majority from treating Barrett radically differently from the way it had treated Garland—confirming Barrett with lightning speed in the run-up to a presidential election, whereas Garland had seen no action though nominated many months before the previous presidential election. The true history is one in which, at every stage, both parties have used the previously untouched tools that were only recently imagined to be too aggressive to deploy.

I do not doubt that Republican conduct over the past half decade has set a new milestone of aggressiveness, and I am not trying to draw any sort of equivalence between Republican behavior during the Trump administration and prior outrages

against the norms of the confirmation process. They are not equivalent. That is the nature of an escalatory cycle; each escalation takes the combatants to a new place. My point, rather, is that the behavior was altogether predictable given the cycles of retribution that had taken place over the previous three decades.

I believe that court-packing, enlargement, or some other manipulative scheme will likely serve as the next phase of this ongoing escalation—unless, that is, as I describe below, our political actors take it as an opportunity for deescalation.

The essential reason for the long-term escalatory cycle is that both sides perceive themselves as playing defense against a high-stakes attack on their fundamental values. Both sides perceive the judicial nominations of the other side as deeply threatening and as part of a long-term attempt by the opposing party to exercise political control through unelected means. Moreover, both sides believe, with some justice, that the other side plays dirty and will manipulate the rules to its own advantage. Hence, each side has a significant incentive to violate the current norms when it has the chance and the power—believing, probably rightly, that the other side would do the same as soon as it had the chance. It's a classic prisoner's dilemma, and it operates according to its own logic.

The perception on the part of each party that it is acting defensively blinds both sides to their own contributions to the decay of the governing norms. Democrats defended their normalization of the filibuster on grounds that they had to stop right-wing judges who would roll back the gains of the civil rights era. Yet they also, when they had the chance and the power, ended the minority's access to the filibuster during the Obama administration for lower court judges—only to insist on their own access to it for Supreme Court justices during the Trump administration. Republicans, for their part, convinced that they are acting to protect the court from liberal activism, justified their treatment of Garland and the rushing through of Barrett on grounds that Democrats would have done precisely the same thing had they been in power—leaving aside for a moment that they didn't and they weren't. The logic is simple: each side believes its predations forgivable, because the other side is a threat and would engage in them too, and that threat requires preemption.

This brings me to court enlargement and related proposals—the latest escalation that one party sees as a defensive necessity to counter the outrages of the other side. Consider for a moment the logic of the current Democratic interest in court enlargement. It is not simply that Republicans “stole” two Supreme Court seats and that recompense is required. It is also rooted in the conviction that those same Republicans will themselves enlarge the court the next moment they have the chance. Given that many

Democrats believe this and will act on it when *they* have the chance, Republicans will perceive a need to preempt this attack—and the race is on.

Hence, my third key point: **Court enlargement or reform is the logical next step in the escalating war over the courts as long as the prisoner’s dilemma mentality persists.**

Some form of court-packing will, I believe, happen as soon as one political party or the other controls the levers of power sufficiently to make it happen. It will happen either because Democrats do it to compensate for the seats “stolen” from them and because they believe Republicans *would* do it, or because Republicans, temporarily in power, do it preemptively, knowing that Democrats would do the same if they had the chance. Depending on the fate of the legislative filibuster, it may take a while for the legislative and executive powers to align sufficiently for this to happen, but I think it is highly likely to happen eventually unless something intervenes to disrupt the prisoner’s dilemma logic of the larger confrontation. That has been the entire pattern of the degradation of the confirmation process, and I see no reason why it will not persist.

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.

We can kid ourselves that the escalatory cycle that began in the confines of the confirmation process will remain there and will thus end now that the capacity for further escalation in that arena is limited. Perhaps, we might tell ourselves, we will reach perfect partisanship in judicial confirmations—the understanding that no Senate will confirm *any* nominees of a president of the opposing party and that judicial nominations

can thus succeed only in periods of unified government—but the escalation will end there. I, however, see no reason to believe that some kind of Las Vegas principle, that what happens in the confirmation process stays in the confirmation process, will operate.

Rather, the pressures that have led senators of both parties to one-up each other in adopting the very tactics they decried only a few months or years earlier, and to feel righteous about doing so, will continue operating on them. There is no obvious principle to restrain senators, nor has senatorial behavior typically been touched by anything like principle in any event. As with confirmation politics, there is no correct answer to the question of how large the court should be—only a set of long-standing expectations embodied in statutes that are subject to change. Senators' fear that their opponents, when they have the power, will take a step is an incentive to act before they have the chance in this arena just as much as it is in the arena of confirmation politics. Put another way, Sen. Schumer would act to enlarge the court if he had the votes to do so because he knows that Sen. McConnell would act to enlarge the court if he had the votes to do so—and vice versa. No assurance either can give the other will suffice to impede either when the opportunity arises.

So don't bet against further escalation. It is very likely to happen.

Unless, that is, something intervenes to interrupt the prisoner's dilemma logic that has governed the politics of confirmations for so long. This brings me to my fourth point. **The question, in my view, is thus not whether reform of some sort will happen but whether it will happen in a negotiated fashion designed to deescalate current tensions or whether it will happen in a fashion that simply reflects temporary power relations.** David Pozen has described what he calls “anti-hardball” as “measures . . . that reduce the likelihood of constitutional hardball being played by either side. Hardball tactics invite retaliation and escalation; they raise the stakes of partisan conflict. Anti-hardball policies, in contrast, forestall or foreclose tit-for-tat cycles and lower the temperature of political disputes.”<sup>2</sup>

I want to stress that I am deeply pessimistic that a negotiated anti-hardball arrangement is likely. One would have to be a particular type of fool to have watched the confirmation process as long as I have and emerge optimistic that the better angels of anyone's nature will prevail. That said, it is possible to imagine reforms supported by significant camps of both conservatives and progressives that might reduce the incentive to

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<sup>2</sup> David E. Pozen, “Hardball and/as Anti-Hardball,” *New York University Journal of Legislation and Public Policy*, Vol. 21, p. 949, 2019 (2019). Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2575](https://scholarship.law.columbia.edu/faculty_scholarship/2575).



gamesmanship in the confirmation process and the metastasis of that gamesmanship to other arenas.

For example, a number of commentators at the commission's previous meeting endorsed the idea of staggered, 18-year term limits for Supreme Court justices, an idea many other scholars have also embraced. One argument for this idea, as Professor McConnell put it in his prepared statement is that,

Much of the intensity of political controversy over Supreme Court nominations stems from the fact that each one is the product either of a strategic retirement or an unexpected death or serious health problem, and therefore each has a potential to affect the overall balance of the Court. If every president had a regular and predictable number of vacancies to fill, the stakes of each would seem less momentous.<sup>3</sup>

Pozen, in his article on anti-hardball, makes a similar argument:

[T]here is little doubt that this approach would yield less opportunistic behavior around the timing of retirements and hearings, among numerous other potential benefits. . . . Were such a scheme to be implemented, the odds seem good that the scheme would become functionally entrenched in light of the high costs of transitioning away from it and its likely popularity with political independents. "Court packing" would lose much of its appeal.<sup>4</sup>

Because the idea would likely require a constitutional amendment, not merely a temporary legislative majority and control of the executive, it would require a considerable degree of buy-in from both political parties—and would thus be exceedingly difficult to unwind or one-up when temporary political power arrangements shifted. In other words, were a Democratic Congress to send such an amendment to the states for ratification, it would have to do so with considerable Republican support. And were states to ratify it, a future Republican Senate could not easily turn around and change the rules. What's more, if Professors McConnell and Pozen are correct as to the tendency of such a reform to reduce the temperature, a future Republican Senate might have significant incentive simply to live with the new rule—rather than to try to add seats to the court or take some other step in retaliation for it.

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<sup>3</sup> Written Testimony Before the Presidential Commission on the Supreme Court of the United States of Michael W. McConnell, June 30, 2021. Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>.

<sup>4</sup> Pozen, "Hardball and/as Anti-Hardball."

There are other possible deescalatory reforms that would, at least arguably, similarly operate to let the air out of the balloon. Short of term limits, for example, having a mandatory retirement age for justices, and judges more generally, would tend to lessen the stakes of any given appointment and confirmation simply by lessening the likely number of years of service.

There are even schemes for court enlargement that, I think, could operate in a deescalatory, rather than an escalatory, fashion—particularly if enacted in combination with other measures. Consider, for example, Franklin Roosevelt’s infamous court-packing scheme. The late D.C. Circuit Judge Stephen Williams once pointed out to me that, in his view, the court-packing plan was actually good policy, if inspired by crass partisan and ideological motivations. Under the plan, the court would have grown by a single seat, up to 15 justices, whenever a justice remained on the court for six months past the age of 70 without retiring. Viewed outside of the context of Roosevelt’s confrontation with the court and desire to force out several of its most conservative justices, the policy has much to recommend it—perhaps amended to account for longer active professional lives today. It would create a genuine incentive for justices (and perhaps lower court judges) to retire in a timely fashion yet would not force anyone to do so. And it would tend to operate against short-term ideological calcification of the court in either direction, as justices are constantly aging.

To function in a deescalatory fashion in the current context, of course, the plan would require adjustment—perhaps, say, by preventing any single presidential term from garnering more than a single appointment as a result of a justice who crosses the age threshold. One could also imagine drafting the statute so that the incumbent president did not reap a windfall of appointments on signing the bill but, rather, deferred the initial vacancies until after the next presidential election.

My point is not to endorse any of these particular schemes. It is, instead, to insist that making the goal deescalation, rather than tit-for-tat advantage and retaliation, does not rule out even significant reform or court enlargement schemes. It simply proposes a different question by which to evaluate such schemes.

This brings me to my final major point. **There is a simple test of whether a court-altering proposal represents a constructive, deescalatory intervention or merely invites a retributive response when power alignments shift. When confronted with any reform proposal, I urge the commission to ask the following question: What response will this proposal, if enacted, engender when the House and Senate and presidency are in different hands? Will it incentivize a tit-for-tat**

**response, or will it provide a durable basis to keep political temperatures as low as possible in our polarized political system?**

It is not enough, in my opinion, to ask the abstract question of whether a given intervention is good or bad policy. It is emphatically not enough to ask whether a given policy is implementable and advantageous to one's own side at a given moment in time. In the current political climate, one has to ask how it will interact with a long cycle that has been deeply damaging for the courts and that lives according to a logic of its own. Asking the question of how the other side will respond to the proposal when in power is a good acid test of whether it will fuel or tamp down the conflict.

An important related question is how easy or difficult a given reform would be to frustrate. Consider, for example, a crude court-enlargement scheme by which Democrats added two seats to the Supreme Court to compensate for the ones they feel properly should have been filled by Democratic presidents. Passing such legislation would require, at a minimum, reforming the legislative filibuster. So the bar to legislative response would necessarily be low. Now imagine one senatorial death in a Senate almost as geriatric as the courts, a small shift of power in the House of Representatives, and a single presidential election going the Republican Party's way. There would be no further obstacle to Congress in creating additional seats to rectify the situation from a Republican perspective. The short-term ease of enactment of an apparently high-impact "reform" has a serious cost: its gains would be highly unstable.

### **Conclusion**

I spent many years believing that a negotiated set of rules of the road with respect to the confirmation process was achievable. I no longer believe that. It is not plausible because the value of the conflict to both parties exceeds the value of a settled framework in which to argue about courts. I fully expect that the same logic will apply to court reform and enlargement proposals as we move to ever-more-perfect partisanship in legislative governance.

That said, if any body has the opportunity to disrupt this expectation, it is this commission, which has a mandate to make proposals designed not merely to improve the functioning of the courts themselves but to improve the process by which we select judges and justices. It would be a wonderful thing for this august group of scholars to urge on our political system a better way of doing business.

Thank you for the opportunity to present my views.