

ABOVE THE FRAY

Changing the stakes of Supreme Court
selection and enhancing legitimacy



**A Report of the Task Force on
Federal Judicial Selection**

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We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Task Force on Federal Judicial Selection



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Our Values

We are a small task force of people with diverse backgrounds and points of view who have come together to seek common ground in addressing the structural challenges facing the Supreme Court. Among us, we have experience as jurists on state and federal courts and as scholars of the judicial and legislative branches.

What brought us together is a shared commitment to fair and excellent judging. We know that our state and federal courts play a vital role in protecting rights, ensuring equality of treatment, respecting the dignity of individuals, promoting economic stability, and responding to allegations of government misconduct. Our hope is that the judges selected to serve on courts will rise above the political fray surrounding the appointment process and adjudicate cases fairly and independently.

The Problems

The political stakes of judicial selection, especially at the Supreme Court level, have cast a shadow over the integrity of that process. The U.S. Constitution commits the responsibility of judicial selection to the President and Senate, which makes politics an inherent part of the process. But, under the present system, partisans have incentives to control the composition of the courts so as to try to affect the resolution of disputes in a way that furthers particular policy objectives and politics. This process distorts the actual and the perceived fairness and independence of the courts.

A variety of factors, weighted differently among us, make the stakes of federal judicial confirmation so high. On the Supreme Court, under the current structure, vacancies are rare and erratic. Therefore, a handful of people hold the power of that office for a long time. In contrast to earlier eras, today's justices have virtually total control over which cases to hear. In recent years, the Court has relied more on forms of rapid decision-making that do not provide full development of the factual and legal issues, and, in some cases, the Court has not provided an explanation when dispositions are made. Problems of process and transparency have therefore become acute.

Judges on the district and appellate courts are at the center of federal adjudication, and once appointed, they are likewise at the forefront for consideration for the U.S.

Supreme Court. Given their life-time authority and the importance of their work, the process for selecting those judges also merits review.

And finally, the current concentration of power on the Supreme Court also underscores the importance of a robust and functioning ethical framework to govern the conduct of the justices, transparency in the Court's decision-making, and improved access to its public proceedings.

In this report, we address the interrelated concerns of the selection of judicial nominees, the procedures for decision-making on the Supreme Court, the duration of service on the Court, and conduct while on the bench. Our reasons for recommending interactive reforms, and specific changes that we believe deserve consideration, are detailed below.

A Holistic Approach

This task force has spent many months discussing how to be helpful amidst the heated discussions about the role of the federal judiciary and appointments to the bench.

Our packet of proposed reforms aims to alter some of the incentives that drive the current dysfunction. The U.S. Constitution requires the President to nominate federal judges with the advice and consent of the Senate. Further, the Constitution provides for judicial independence through protecting salaries and service during “Good Behavior.”¹

But the Constitution does not set out criteria for selection of Supreme Court justices, and it does not speak to the number of justices on the Court, the place in which they sit while holding office, or their processes for decision-making. Our inquiry primarily focuses on how to adjust those aspects to try to lower the heat of nominations by altering the stakes of each individual's selection. Judges and justices must be understood as public servants committed to a fair and impartial review of the facts and the law, and we believe that our approach will help advance that vital purpose.

Of course, the federal judiciary is embedded in a system of government, and many are concerned about the dysfunctions of the legislative and executive branches and how to maintain a robust democracy at both the state and national levels. Our focus is on the judiciary, and our view is that responses to the current problems require reconsidering how judges are selected, how power is distributed during their tenure, how long they serve in particular roles, and their obligations to be transparent and adhere to the highest ethical standards.

Dozens of proposals have been put forth in decades past and more are in view now. In this report, we blend some of these proposals together to encourage a holistic approach. The process of designing institutions that reflect and safeguard the values of our democratic society is just that—a process. There is no single solution, and reasonable people can disagree about how to move forward. In our view, at this point in time, a multi-faceted packet of reforms *interacting together* would modify political incentives to reduce the excessive tensions that accompany the current process.² This package of reforms aims to protect judicial independence and support judges focused on deciding cases based on the facts before them, the relevant legal principles, and the country’s need for fair and just decision-making.

A Package of Reforms to Lower the Stakes and Enhance Legitimacy

Despite enormous changes in the country and in the lower courts, the Supreme Court’s structure has not changed for nearly a century. Because what once worked appears now no longer to be the best approach, a package of reforms to alter the concentration of power and enhance the legitimacy of the Court’s decision-making needs to address a series of issues:

- 1. Selection for service on the federal courts;**
- 2. The structure of decision-making in the Supreme Court;**
- 3. The length of judicial service; and**
- 4. Judicial conduct, including ethical obligations, transparent decision-making, and access to the Supreme Court’s public proceedings**

The proposals we discuss are built from experiences with the lower federal courts, state courts, and other constitutional democracies that are likewise committed to judicial independence, as well as ideas and proposals of many others who have also sought to mitigate the problems of the current system.

Although we may not agree on each individual proposal, we are unanimous in seeking fundamental change and agree that consideration of all of these recommendations is helpful to understanding the problems and useful responses. Our purpose here is not to mine the methods and details on implementation, but rather to sketch the larger picture. Some changes we suggest could come by the Supreme Court changing its own practices, others would require Congress to enact legislation and could, depending on different interpretations of Article III of the U.S. Constitution, require constitutional amendments.

1. SELECTION FOR SERVICE ON THE COURTS

A threshold question for any reform agenda is how to recruit and screen judicial candidates. Because the Constitution empowers the President and the Senate to select life-tenured federal judges, we endorse the use of screening committees, working in a transparent fashion, to assess and recommend judicial candidates based on specified and objective qualifications.

This method is familiar because it is in use in many jurisdictions, and our endorsement comes from that experience. Screening mechanisms for federal judges date back at least to the 1970s, when President Jimmy Carter created a national committee to identify nominees for the appeals courts and encouraged senators to create their own committees to screen district court nominees.³ Although no other President has replicated President Carter's model, many senators continue to use screening committees. One count records 43 senators from 21 states, as well as representatives of the District of Columbia, who use screening committees to assist with the federal judicial nomination process.⁴

A similar process is currently in use *within* the Article III judiciary when it selects individuals to join life-tenured judges and serve as bankruptcy judges and magistrate judges. Congress has empowered appellate judges to select bankruptcy judges⁵ and

has authorized district court judges to select magistrate judges.⁶ At both levels, screening committees typically identify a list of candidates from which life-tenured judges select.⁷

Parallel processes occur in many states. About two-thirds of the states, joined by the District of Columbia, rely on forms of screening committees to evaluate judicial nominees.⁸ In some jurisdictions, that process is legally mandated, and in some instances, committees both screen and propose a slate from which a selection is made by either a Governor, a legislature, or both.⁹

Because “their *success* often depends on their *structure*,”¹⁰ screening committees should possess clear criteria for their own membership and for their inquiries into the qualities of candidates.¹¹ Many committees rely either on constitutional or statutory criteria or have crafted their own metrics to identify candidates who have integrity, generosity of thought, commitments to the well-being of their communities, varied practices and backgrounds, and demographic diversity.¹² Moreover, in many instances, committees have made their processes transparent and make information public through a variety of mechanisms, including by livestreaming proceedings.¹³

Outside the United States, some countries also use screening committees for various levels of their courts, including the Supreme Court. Canada provides one illustration as it utilizes an advisory board made up of stakeholders including government appointees and representatives of the bar, bench, and academia, which offers non-binding recommendations to the prime minister.¹⁴

Based on experiences of these many screening processes, we recommend the use of screening committees for all lower courts as these judges preside over the bulk of federal litigation.¹⁵ Committees should be composed of individuals with diverse legal, personal, and professional backgrounds. They should be charged with selecting individuals with legal expertise, significant experience as lawyers, an even-keeled approach indicative of judicial temperament, a commitment to public service, and demonstrable adherence to the bar’s ethical standards. In reviewing candidates, committees should attend to individuals’ backgrounds, experiences, and legal practices to ensure that the judiciary is comprised of people who reflect the diversity of the country and are dedicated to the impartial application of the rule of law.

Further, committees should publicize calls for nominations and build in transparency to make their own decisions accountable.

We also believe it would be wise for the President to consider a screening committee for Supreme Court justices. Moreover, if Supreme Court justices continue to be drawn primarily from the lower federal courts, implementation of a committee-based screening process for lower court judges would also aid in the selection of Supreme Court justices.¹⁶

2. THE STRUCTURE OF DECISION-MAKING AT THE SUPREME COURT

At present, power on the Supreme Court is highly concentrated. The Court is composed of nine justices, each of whom sits on that specific court for as long as they serve. Under the current system, the justices also have unfettered discretion over the cases they vote to review. All nine justices hear every case as a group unless an individual justice steps aside. Reform is needed to diffuse the concentration of power, and to do so, reforms should consider altering the composition and the decision-making processes of the Court.

Composition of the Court

For many, the Court's size and its method of decision-making are taken for granted. Yet the number is not fixed by the Constitution. Since 1869, the Supreme Court has been a group of nine people, but over the course of U.S. history, the size has varied and the Court has had as few as six justices and as many as 10.¹⁷ Absent a recusal, the full Court hears each case.

In contrast, in federal appellate courts, state appellate courts, and outside the United States, the justices or judges sit in panels of three and, on occasion, sit as a larger group, known as "en banc."¹⁸ For example, the Delaware Supreme Court, which has five members, hears most of its cases in three-justice panels and sits en banc for certain types of cases or when a panel does not reach unanimity.¹⁹ In the United Kingdom, the Supreme Court is comprised of twelve justices, and the court often relies on panels of five and seats larger panels for certain cases.²⁰

The fixed, unchanging system of sitting as a whole in the U.S. Supreme Court has helped to bring to the fore the power of individual justices. In today's world, commentators and litigants routinely focus on and predict what each individual justice will decide in an effort to count the "five" that will form a majority. The term "swing" justice captures the idea that when an individual justice is open to moving between the perceived groups of four, that person has an outsized influence on the Court's decision-making. By having a set practice of nine people deciding each case, the stakes of selection are amplified. Now, members of the political branches look to appoint individuals to form a majority on the Court that they believe will repeatedly and consistently shape specific areas of law.²¹

Enlarging the size of the bench or having justices sit in panels for at least some cases could alter this dynamic because it would disrupt static voting blocks.²² Moreover, justices who seek to shift legal doctrine may come to understand that because they will not be voting on all the cases, they need to persuade other justices about their views, and doing so may moderate efforts to take strident positions.²³

Were more people and different panels in place, a sense of the fixed views of the set of nine could be diffused. Of course, many issues of implementation would need to be addressed, including the development of ways to minimize inter-panel conflicts and establish criteria for sitting in larger groups or as a whole.²⁴

In addition to, or as an alternative to, enlarging the number of seats on the Court and shifting to a panel system, the composition of the Court could shift if some individuals rotated on and off that bench. For example, a pool of judges drawn from the lower federal appellate courts could be formed from which to identify individuals to serve on the Supreme Court for fixed terms and then return to their former position.²⁵ Such a process, which would make Supreme Court membership time-limited, would provide specified terms and regular turnover and would diffuse the concentration of power held by a small number of justices.

As with our other suggestions, we have drawn the idea of rotating on and off the Court from former and current practices that permit federal judges to sit on a court other than that to which they were appointed. During the early days of the Republic, Supreme Court justices "rode circuit" to serve as temporary judges for lower courts.²⁶

In modern times, retired Supreme Court justices can choose to serve on circuit courts.²⁷ Further, federal law permits the Supreme Court's Chief Justice to assign federal trial and appellate judges to sit at different levels and within different circuits of the federal courts.²⁸

Our reference to the authority of the Chief Justice brings us to another issue, which is the breadth of the power held by the individual who occupies that role. The Chief Justice has unique obligations related to the primary business of the Court, such as assigning justices to author opinions when in the majority.²⁹ Over the decades, the Chief Justice's powers and responsibilities have grown. The Chief Justice functions as the head of the federal judiciary, including chairing the Judicial Conference of the United States, appointing judges to special courts such as the Foreign Intelligence Surveillance Court, selecting members of rulemaking and of other committees, and approving judges who sit by designation on a lower court other than the one to which they are assigned.³⁰ All told, the Chief Justice has roughly 80 statutorily defined duties in addition to adjudicating cases.³¹ None of these duties are mandated by the U.S. Constitution.³²

The increase in the concentration of power in this role raises concerns that could be mitigated by altering the portfolio of the Chief Justice through limiting the array of duties or by rotating the office from one person to another.³³ Here again, we draw on experiences in other courts. Congress has provided that the chief judges of federal district and circuit courts serve seven-year terms before returning to regular service.³⁴ On many state supreme courts, chief justices serve set terms and then resume their role as associate justices.³⁵ In some of these systems, the role is assigned by seniority and in others by the decision of the other sitting justices.

In sum, we believe that adjusting the decision-making structure of the Supreme Court and the role of the Chief Justice could help reduce some of the tensions that accompany the current selection process. In particular, these reforms could reduce the incentives to use the confirmation process to shape a particular agenda for how the Court should rule.

Case Selection

Only during the last century did the Supreme Court gain unfettered discretion to decide which cases it will hear through its decision to grant certiorari (“cert”).³⁶ Under the current practice, four of the nine justices must agree to add a case to the Court’s docket. Several justices participate in what is known as a “cert pool,” in which their law clerks work together to review the certiorari petitions, of which thousands are filed annually.³⁷ During the 2018 term, the last full term prior to the COVID-19 pandemic’s disruption, the Court heard argument in 73 cases.³⁸

Astute litigants and lower court judges know how to bring cases to the attention of four justices, and some of the justices themselves have signaled through opinions or other commentary that they are looking to address certain legal issues.³⁹ Some may view such commentary as a useful dialogue and conclude that justices are appropriately using their perch to encourage advocates with resources to develop litigation strategies. Others object that justices should not encourage resourced litigants to find cases to fit the mold of the law to which Supreme Court justices aspire.⁴⁰ Whether signaling is a problem or not, the power to select cases means the Court can set its own agenda, which has repeatedly raised concerns about what cases are selected for review,⁴¹ as well as broader concerns about the type of power judges should have.⁴²

The current system is not inevitable, nor in centuries past was the Court’s agenda-setting power so complete. One way to lessen the concentration of power is to obtain input on case selection from judges other than those on the Supreme Court. This would not only alter the power of the justices, but also provide more perspectives and vantage points from those steeped in the sweep of the case law about when the Court’s input is needed for clarification and development of legal precepts.

A variety of proposals have been put forth to reallocate some of the decision-making about the docket, and most include having the Supreme Court retain some authority as well.⁴³ For example, in 2009, a group of commentators proposed that a few experienced circuit court judges be appointed as a “cert panel” to select cases for decision by the Court.⁴⁴ Such judges could serve for a fixed number of years and then rotate off, to be replaced by others. The 2009 proposal also created mechanisms for

the Supreme Court to add cases to its own docket. To ensure knowledgeable review of cases coming from state courts, such a panel should also include state supreme court justices, who could be selected by an entity like the Conference of Chief Justices.⁴⁵ Other approaches would alter the degree of authority of a cert panel and render its recommendations advisory, or enhance mechanisms like certification from circuit courts to identify cases that require the Supreme Court's attention.⁴⁶

In addition, Congress could delineate more categories of cases for mandatory review by the Supreme Court. Again, history provides examples. Until 1925, when Congress gave the Court discretion over a large share of its caseload, mandatory cases were a common element of the Supreme Court docket. Congress further increased the Court's discretion over the following six decades.⁴⁷ Currently, Congress requires the Supreme Court to hear cases that arise from three-judge district courts, which are themselves now only required for a small subset of cases.⁴⁸

These statutes provide examples of congressional choices to send some cases directly to the Supreme Court. Our general point is that as a matter of history, the Supreme Court did not have unfettered control over its docket, and many routes are available to achieve a reallocation of power.

3. LENGTH OF JUDICIAL SERVICE

Supreme Court justices serve as long as they choose, absent illness, death, or impeachment. While the actual amount of time that federal judges spend on the bench has varied over the course of the country's history, it is now common for justices to spend two to three decades on the bench.⁴⁹ The concentration of the significant power of the justices for so long raises concerns, both because few people hold this office and because it limits opportunities for others to contribute to the adjudicatory process. We endorse limits on Supreme Court tenure because more turnover could bolster the Court's relationship to democratic legitimacy and, by expanding the number of people selected at regular intervals, reduce some of the pressures on the selection process.

The Constitution rightly shelters federal judges from political interference by protecting their tenures during their good behavior and their salaries during their

term of office.⁵⁰ But the Constitution does not define “good behavior,” and while it is commonly interpreted to denote holding office for life, it is not necessarily tethered to holding a particular position within the federal judiciary for that term of service.⁵¹ Many Constitutions protect the independence of judges, but often rely on fixed terms of office, mandatory retirement, or other ways to limit the length of service. Thus, as currently interpreted, Article III’s life tenure provision is unusual when contrasted with most state judiciaries and other constitutional democracies.⁵² For example, the Constitution of the Commonwealth of Massachusetts, which predates the U.S. Constitution, also grants judges tenure “during good behavior.” In 1972, Massachusetts amended its Constitution to define the term of judicial tenure as good behavior until mandatory retirement at age 70.⁵³

Several options are available to alter the pattern, and many proposals have been put forth. One approach is to create an 18-year non-renewable term on the Supreme Court, followed by a transition to senior status or to active service on lower Article III courts.⁵⁴ Again, current practice provides a model. For justices who wish to serve on lower courts after their retirement from the Supreme Court, a statute outlines the procedure to do so; Justices Sandra Day O’Connor and David Souter provide recent examples of its use.⁵⁵ If the number of justices on the Court remained at nine or if that number is increased, a fixed, 18-year term would result in an open Supreme Court seat at least every other year and thereby create the opportunity for a president to nominate at least two justices each presidential term.⁵⁶

Alternatively, a mandatory retirement age could be implemented.⁵⁷ A number of constitutional democracies and several U.S. states have mandatory retirement ages, typically at age 70 or 75.⁵⁸ The idea of linking service to age is commonplace in many other professions and aims to ensure that people have the stamina and capacity to do the required work. To address concerns about disability while in office, a 1980 statute creates a mechanism to identify such problems within the lower federal courts, but it does not create additional support to judges who retire after developing a disability.⁵⁹

A retirement age, like a fixed term, creates some predictability about the duration of individuals’ service, even though individuals could leave before they reach retirement age. Because a retirement age requirement could create incentives to select younger appointees, such a reform would need to be coupled with other suggestions—such as

the use of panels—to diffuse the power held by any single justice during their term of service.

Another route—again, commonplace in other working environments—is to create incentives for a justice to retire or move on.⁶⁰ Many judges have indicated that a desire for public service is a key factor motivating them to take senior status rather than leaving the bench altogether.⁶¹ Therefore, while incentives are often financial, in addition to enhanced pension benefits for people choosing such options, both the courts and Congress could provide opportunities for retired justices to serve government in other roles.⁶² To the extent financial incentives are used, they would need to be calibrated to avoid disproportionately incentivizing judges with fewer means to step away from the bench earlier than their wealthier peers.

Overall, limits on judicial service could align the Court with democratic practices that seek to preserve the legitimacy of an independent judiciary through, in part, avoiding lifetime appointments. Such limits could also de-escalate the current tensions associated with that current selection process.

4. CONDUCT OF THE COURT: CLEAR ETHICAL OBLIGATIONS, TRANSPARENT DECISION-MAKING, AND ACCESS TO THE COURT'S PUBLIC PROCEEDINGS

Given the centrality of the Supreme Court, and its current state as untethered to the ethical and procedural obligations imposed on other courts, reform of its approach to ethics and recusal and to the accessibility and transparency of its decision-making is needed.

Ethical Obligations

Justices of the Supreme Court are not bound by codes of conduct that apply to lower federal court and to state court judges.⁶³ Those codes address issues of partiality, prohibit participation in fundraising activities, and guide judges as they decide what roles to take in the public sphere. The justices may seek guidance from the United States Code of Conduct, yet they are not compelled to comply with it, nor does the Code address special circumstances that may face Supreme Court justices.⁶⁴

Federal statutes also provide limited guidance on when a justice should step aside from a case. Federal law mandates that judges and Supreme Court justices recuse themselves in any case where their “impartiality might reasonably be questioned,” as well as under specified circumstances, such as if they have financial interests in a specific case.⁶⁵ In some state courts, rules provide that a judge other than the one whose impartiality is questioned decide the question of recusal.⁶⁶ Litigants can also appeal a judge’s refusal to recuse. In contrast, Supreme Court justices’ decisions about their potential conflicts are made by each individual justice, and no mechanism exists for review of their personal judgments about whether to step aside.

Creating clearer ethical obligations and guidance for Supreme Court justices and mechanisms to have more than the individual justice decide issues of impartiality would bring the institution in line with the rest of our government and end the practice of justices being “judges in their own case.”⁶⁷ One way to do so would be to end the self-governance practices of the Court and replace them with a binding code of conduct. In terms of when to step aside, to be effective that code would need to address recusal determinations. One option would be to require that all justices determine recusal.⁶⁸ Some state supreme courts take this approach, typically by referring a recusal motion to the full court or authorizing a party to appeal a justice’s refusal to recuse to the full court.⁶⁹ Another option is to ask a panel of circuit judges to advise on requests for recusal.

Further, the code needs to address the justices’ presumption against recusal. Under the current practice of a nine-person bench, the justices’ concerns about an evenly split decision have been used to explain as weighing against recusal.⁷⁰ Were more justices on the bench, or panels in place, or appellate judges rotating on and off, those concerns would be assuaged. Moreover, the experience of having a Court of eight people for many months has demonstrated that four-four split decisions, which leave a lower court decision in place, will not necessarily result from an even-numbered group of justices rendering judgments.⁷¹ Some of the justices also indicated that a sense of the need to avoid deadlock prompted more conciliatory or more modest decisions.⁷² Scholars have found that Supreme Court recusals do not often produce equally divided rulings.⁷³ This history makes plain that enforcement of norms to step aside is the wiser course.⁷⁴

The code also needs to address the conduct of the justices when they are off the bench. The justice's appearance before organizations that are perceived to be partisan affects public perceptions of judicial impartiality. To avoid the specter of bias, the Code should advise justices to avoid participating in organizations, whether or not traditional political associations, that cast doubt on the justice's impartiality.⁷⁵

The system for discovering and appropriately responding to financial conflicts of interest also needs to be improved, which would, in turn, improve decision-making about recusal. The justices, like all judges, are required by statute to file financial disclosures.⁷⁶ Yet examples exist of judges at all levels of the judiciary sitting on cases in which evidence of a conflict later emerges. One way to avoid a conflict is to require justices and judges to divest individual stock ownership or to place their assets in a blind trust.⁷⁷ Practices from the executive branch may provide an example. In recent decades, most presidents, from both parties, have placed their assets in blind trusts or held non conflicting assets like diversified mutual funds, and it is common for incoming executive branch officials to divest assets that would present conflicts.⁷⁸

Accessible and Transparent Decision-Making

"Publicity is the very soul of justice,"⁷⁹ and our Constitution and common law have shaped a jurisprudence in which the public has access to all criminal and civil judicial proceedings.⁸⁰ Thus, another important facet of judging is communication with the public.⁸¹

The Supreme Court's practice of publishing opinions and orders reflects this commitment. Yet, during the past several years, the Court has entered a significant number of cases without full briefing and oral argument. Instead, in what some call a "shadow docket," the Court has ruled on motions, granted stays, issued unsigned decisions, and taken up cases that have not reached a final decision in the lower court,⁸² including in death penalty cases under execution warrant.⁸³ Likewise, when justices do recuse themselves, they do not regularly explain why.⁸⁴

Furthermore, unlike all the other courts, where rulemaking is a public process with time for notice and comment, the Supreme Court makes its own rules without relying on that process.⁸⁵ Lower courts rely on the Rules Enabling Act procedures to gain

input from lawyers and litigants about the rules proposed to be altered, but the Supreme Court does not have the benefit of such input unless it does so on an ad hoc basis.

We need the disciplined development of precedent to guide future decisions, as well as disciplined procedure to produce that law. Adhering to the process of full briefing and arguments and publication is an important facet of this obligation, and the departure from these practices is worrisome.⁸⁶ We recommend that the Court move away from its ad hoc procedure, explain the reasons for its dispositions, and regularize its rulemaking processes by adopting the procedures that it currently oversees for the lower courts.

Public Access to the Court's Proceedings

The Supreme Court's commitment to being accessible is part of its responsible use of power. Accordingly, the public should be able to hear and see the oral arguments of the Supreme Court. An important first step was prompted by the COVID-19 crisis, when the Court relied on telephonic oral arguments and, for the first time in its history, allowed live remote access to the audio of those proceedings.⁸⁷ The significant public interest in the audio broadcasts of the Court's telephonic arguments confirms that the time has come for regular live video and audio access to the Court's proceedings.⁸⁸

Here, as elsewhere in this report, examples from other jurisdictions are plentiful. Broadcast proceedings through closed systems have become commonplace in many state and federal courts, as well as in courts outside the United States.⁸⁹ The literature on this issue is vast, and here we join with many others in calling for ready access—no matter where people live—to see and hear the public proceedings of the U.S. Supreme Court.⁹⁰

A Closing Comment on These Interactive Reforms

We have outlined a packet of interrelated reforms because the various components need to work together to respond to the problems of this era. These proposals address troubling facets of the current system—from selection and nomination through the practices of decision-making and judicial tenure to ethics and

transparency. If these reforms were put into place, they could work in tandem, complement one another, and create more robust and effective change than would any single proposal, standing alone.

We provide just brief illustrations. Consider, for example, recusal. Currently, Supreme Court justices weigh the “duty to sit” against the potential of an actual or perceived conflict of interest—frequently erring on the side of hearing a case for which objective considerations would counsel recusal. But, if enforced recusal rules were coupled with a system in which the composition of the Court is drawn from various circuit court judges, another (circuit) judge would be available to hear the case. Similarly, if the membership of the Court is increased or panels used, the recusal of one justice would not necessarily mean an even number of justices would hear a case. In short, with more people in play, there would be more dynamism in decision-making on the Court, the power concentrated in any single person on the Court would be diffused, *and* the justices would be better situated to decide to disqualify themselves when appropriate.

Similarly, a limit of service on the Supreme Court necessarily creates more opportunities for appointments to the Court. On its own, one might anticipate more conflicts over confirmation, but combined with the use of screening committees and compositional changes that deemphasize individual justices, the whole package of such reforms can help alter the stakes by lowering the impact of each individual selected.

In closing, we have learned a great deal through being in conversation with each other and reaching out to many other experts during the course of the many months of this project. Moreover, as is evident, we are indebted to many scholars, advocates, and policymakers who have thought about these issues in prior and current times and put forth proposals. Rather than debate each suggestion one by one, we have sought to chart a path forward by focusing on how to lower the stakes of each judicial selection. To do so requires, in our view, addressing how judicial candidates are identified and selected, the structure of decision-making on the Court, the duration of service, and the conduct of the Court itself. While there are many ways to respond, addressing *each* and *all* of these key areas is vital to ensuring the vitality and legitimacy of the federal courts.

Our hope is that, by focusing on how to alter the incentives that make judicial selection such a high stakes proposition, these proposals will assist justices in carrying out their important obligations and in staying above the political fray.

Endnotes

¹ U.S. Const., Art. III.

² Our framing of an interactive package of reforms echoes the point made by Professor Vicki C. Jackson on the interrelatedness and interdependencies of judicial design. See Vicki C. Jackson, “Packages of Judicial Independence: Implications for Reform Proposals on the Selection and Tenure of Article III Judges,” *Daedalus*, vol. 137, no. 4 (2008): 48, <https://direct.mit.edu/daed/article/137/4/48/26770/Packages-of-judicial-independence-implications-for>.

³ The committee was made up of panels for each appellate circuit. Exec. Order No. 11972 (February 14, 1977); Exec. Order No. 12097 (November 8, 1978); The Governance Institute, the Institute for the Advancement of the American Legal System, and the Brookings Institution, *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them* (2011), I, https://www.brookings.edu/wp-content/uploads/2016/06/0913_judicial_screening.pdf.

The Carter committee, together with the 1978 bill that expanded the federal judiciary by 152 seats (33 percent), transformed the demographic makeup of the judiciary. Mary Clark, “Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other ‘Human Rights’ Record,” *American University Journal of Gender, Social Policy & the Law*, vol. 11, no. 3 (2003): 3, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1323&context=jgspl>; Mark Joseph Stern, “Carter’s Quiet Revolution,” *Slate*, July 14, 2019, <https://slate.com/news-and-politics/2019/07/jimmy-carter-diversity-judges-donald-trump-court-nominees.html>; Renee Knake Jefferson and Hannah Brenner Johnson, *Shortlisted: Women in the Shadows of the Supreme Court* (New York: NYU Press, 2020), 201.

⁴ By tradition, senators recommend candidates for judicial office within their states to the president. Senators most commonly use committees for district court nominees, though some screen circuit court nominees as well. The committees vary widely in scope, composition, and operation, with several failing to ensure diversity of membership and transparency. The Governance Institute, the Institute for the Advancement of the American Legal System, the Brookings Institution, *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them* (2011), 29-36, https://www.brookings.edu/wp-content/uploads/2016/06/0913_judicial_screening.pdf.

⁵ 28 U.S.C. §152(a).

⁶ 28 U.S.C. §631(a).

⁷ The judicial councils (made up of circuit and district judges) of each circuit are responsible for identifying candidates for bankruptcy judgeships. 28 U.S.C § 152 note (“Appointment to Fill Vacancies; Nominations; Qualifications”). Judicial Conference regulations allow each judicial council to appoint a

merit panel to screen and recommend candidates to the council. Judicial Conference of the United States, Regulations for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges §§ 3.01-4.01 (2006) (“Establishment of Panel; Membership; Duties; Panel Report; Alternative to Panel; Selection of Nominees”). A bankruptcy judge is appointed from the council’s list by a majority of the judges serving on the circuit court, or by the chief judge of the circuit if no candidate gets majority support. 28 U.S.C. §128(a)(1).

As of 2013, eleven circuits used merit panels for the screening of bankruptcy judicial candidates. Malia Reddick and Natalie Knowlton, Institute for the Advancement of the American Legal System, *A Credit to The Courts: The Selection, Appointment, and Reappointment Process for Bankruptcy Judges* (April 2013), 10.

https://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf.

Federal law also establishes basic qualifications for bankruptcy judges, including bar membership in good standing; good character; sound health; commitment to equal justice; demonstrated legal ability; and judicial temperament. 28 U.S.C. § 152 note.

Federal law requires the use of merit panels in the selection of magistrate judges. 28 U.S.C. §631(b)(5). These panels must consist of at least seven members of the public from the jurisdiction, at least two of whom should not be lawyers. Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 3.02 (2001). In each district, the active judges select a candidate to become a magistrate judge from the list of candidates the panel recommends. If no candidate has majority support, the district’s chief judge is to decide. 28 U.S.C. §631(a); Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 4.01. *See also* Tracey E. George and Albert H. Yoon, “Article I Judges in an Article III World: The Career Path Of Magistrate Judges, *Nevada Law Journal*, vol. 16 (2016): 831.

<https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1678&context=nlj>.

As with bankruptcy judges, there are qualification requirements for magistrate judges. These include bar membership in good standing for at least five years, competency, and having no familial relationship with a judge on the appointing court. 28 U.S.C. § 631(b). Judicial Conference regulations additionally require five years of active legal practice, good moral character, emotional stability and maturity, commitment to equal justice, good health, patience, courteousness, ability to deliberate and decide, and a maximum age of sixty-nine on initial appointment. Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 1.01 (2001).

Some of the history of the creation of these statutory judgeships and the case law addressing their constitutionality is provided in an essay, written for the 200th anniversary of the D.C. District Court. *See* Judith Resnik, “‘Uncle Sam Modernizes His Justice:’ Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation,” *Georgetown Law Journal*, vol. 90 (2001-2002): 629-643, 669-674,

https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1769&context=fss_papers.

⁸ *See* Rachel Paine Caufield, American Judicature Society, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*, (2012), 63-66, http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf

f; Brennan Center for Justice, “Judicial Selection: Significant Figures,” May 8, 2015, <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>; American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges* (October 2009), 1, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf; National Center for State Courts, “Methods of Judicial Selection,” http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm.

⁹ South Carolina is currently the only state in which a screening commission nominates judicial candidates and state legislators—not governors or the public—choose judges. See S.C. Const. Art. V, § 27. See generally Jed Handelsman Shugerman, *The People’s Courts* (Cambridge, MA: Harvard University Press, 2012).

For examples of states with constitutional and statutory requirements, see Ariz. Const., Art. 6, §§ 36, 37, and 41; N.Y. Const. Art. VI § 2(e) (“The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission...”); Conn. Gen. Stat. § 51-44a. (“There is established a Judicial Selection CommissionThe commission shall evaluate incumbent judges who seek reappointment to the same court and shall forward to the Governor for consideration the names of incumbent judges who are recommended for reappointment as provided in this subsection.”); Idaho Code Title 1, Ch. 21 (“There is hereby created a judicial council ...The judicial council shall: ... Submit to the governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the supreme court, judge of the court of appeals, or district judge”).

In some other states, commissions are established by executive order. See, e.g., Del. Exec. Order No. 4 (“The Judicial Nominating Commission is continued to assist the Governor regarding all appointments of judges ...”); Ga. Exec. Order, February 7, 2019 (“[T]here is created the Judicial Nominating Commission for the State of Georgia. The Commission shall make nominations to fill vacancies on all courts of record in the State.”); Mass. Exec. Order No. 558 (“A Judicial Nominating Commission (‘Commission’) is hereby established to identify and invite application by persons qualified for judicial office and to advise the Governor with respect to appointments of justices to the Appeals Court and Trial Court departments”).

¹⁰ Alicia Bannon, Brennan Center for Justice, *Choosing State Judges: A Plan for Reform* (2018), 6, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

¹¹ For example, in Connecticut, the screening committee must include both lawyers and non-lawyers. Conn. Gen. Stat. § 51-44a.

See also Rachel Paine Caulfield, “What Makes Merit Selection Different?,” *Roger Williams University Law Review*, vol. 15, 765 (2010): n.7, https://docs.rwu.edu/cgi/viewcontent.cgi?article=1441&context=rwu_LR; Charles Geyh, “Methods of Judicial Selection and Their Impact on Judicial Independence,” *Daedalus* (2008): 98, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1053&context=facpub>; G. Allen Tarr, “Designing an Appointive System: The Key Issues,” *Fordham Urban Law Journal*, vol. 34, no. 1 (2007): 301-303, <https://ir.lawnet.fordham.edu/ulj/vol34/iss1/16/>; Malia Reddick and Rebecca Love Kourlis, Institute for the Advancement of the American Legal System, *Choosing Judges: Judicial*

Nominating Commissions and the Selection of Supreme Court Justices (2014), 6-7,
https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

¹² For example, Minnesota and Rhode Island laws sets forth several criteria that seek to diversify the judiciary. Minn. Stat. 480B.01 (“A Commission on Judicial Selection is established. ... The commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial offices.”); 545-10 R.I. Code. R. § 1.1(A) (“...said Commission shall actively seek out and encourage applications who will reflect the diversity of the community they will serve”), and (B) (“The Commission shall advertise for the filling of judicial vacancies in newspapers ... including minority publications Said advertisement shall encourage racial, ethnic, and gender diversity within the judiciary”).

With respect to consideration of the political affiliation of judicial candidates, the U.S. Supreme Court recently examined a provision in Delaware’s Constitution that stipulates that no more than three of the five members of the state supreme court can “be of the same major political party, and two of said Justices shall be of the other major political party.” The Court dismissed the case on standing grounds without addressing the requirement. However, Justice Sotomayor wrote separately to note that limiting government service to members of certain parties raised constitutional concerns. *Carney v. Adams*, 141 S. Ct. 493, 503 (2020).

¹³ For example, the Arizona constitution requires its judicial selection commission to hold public hearings and review public testimony. Ariz. Const. Art. VI, § 36(D); Arizona Commission on Appellate Court Appointments, Nominating Committee, “Meeting Agendas and Minutes,” <https://bc.azgovernor.gov/bc/commission-appellate-court-appointments>. The committee’s May 27, 2020 meeting was held by phone and the public was permitted to join. See also Alicia Bannon, Brennan Center for Justice, *Choosing State Judges: A Plan for Reform* (2018), 7-9, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

¹⁴ Order in Council PC 2016-0693; Office of the Commissioner for Federal Judicial Affairs Canada, “The Independent Advisory Board for Supreme Court of Canada Judicial Appointments,” <https://fja-cmf.gc.ca/scc-csc/2021/establishment-creation-eng.html>; Office of the Commissioner for Federal Judicial Affairs Canada, “Guide for Candidates,” <https://www.fja.gc.ca/appointments-nominations/guideCandidates-eng.html#Judicial>.

Canadian law does not require the use of committees; recent prime ministers have established them as a matter of custom, though the details of the processes, especially the degree of transparency they provide, have varied between governments. See generally Jacob Ziegel, “A New Era in the Selection of Supreme Court Judges?,” *Osgoode Hall Law Journal*, vol. 44, no. 3 (Fall 2006), <https://digitalcommons.osgoode.yorku.ca/cqi/viewcontent.cgi?article=1286&context=ohlj>.

The Canadian system has been criticized for failing to achieve a diverse bench. Brennan Center for Justice, “Diversity on the Bench: Not Just an American Problem,” March 25, 2017, <https://www.brennancenter.org/our-work/analysis-opinion/diversity-bench-not-just-american-problem>.

The United Kingdom, in a process mandated by law, selects members of the Supreme Court based on the input of a panel made up of the president of the Supreme Court, another senior judge, and the leaders of the judicial selection panels for England and Wales, Scotland, and Northern Ireland. The panel issues recommendations to the lord chancellor, who in turn makes a final recommendation to the prime minister. Constitutional Reform Act 2005, c. 4, §§26-27B. The jurisdictions that make up the UK also use committees. Judiciary and Courts (Scotland) Act 2008, c. 13, §§ 9-18; Justice (Northern Ireland) Act 2002, c. 26 § 3; Judicial Appointments Commission Regulations 2013, SI 2013/2191 (Eng.). See generally Judith Maute, “English Reforms to Judicial Selection: Comparative Lessons for American States?,” *Fordham Urban Law Journal*, vol. 34, no. 1 (2007), <https://ir.lawnet.fordham.edu/ulj/vol34/iss1/13/>.

For essays on judicial selection methods from a variety of countries, see Kate Malleson and Peter Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006). See also Jan van Zyl Smit, Bingham Centre for the Rule of Law, *The Appointment, Tenure, and Removal of Judges under Commonwealth Principles: A Compendium and Analysis* (2015), https://binghamcentre.biicl.org/documents/38_van_zyl_smit_2015_commonwealth_compendium.pdf.

¹⁵ In the 12-month period ending September 30, 2020, there were about 73,000 criminal and 267,000 civil filings in federal district courts (not including an anomalously large multidistrict lawsuit over earplug product liability); about 48,000 appeals filed in circuit courts; and about 5,500 cases filed in the Supreme Court, with 73 argued. Chief Justice John Roberts, *2020 Year-End Report on the Federal Judiciary* (December 31, 2020), 5-6, <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf>.

¹⁶ Susan Navarro Smelcer, Congressional Research Service, “Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010,” R40802 (April 9, 2010), 15; Kristen Bialak, “What backgrounds do U.S. Supreme Court justices have?,” Pew Research Center, March 20, 2017, <https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/>.

¹⁷ See Peter Fish, “Justices, Number of,” in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit Hall, 2nd ed. (Oxford University Press, 2005), 550.

¹⁸ Federal Rule of Appellate Procedure 35 governs en banc review generally (“[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc”). The specific procedures vary according to the local rules in each circuit. See generally Alexandra Sadinsky, “Redefining En Banc Review in the Federal Courts of Appeals,” *Fordham Law Review*, vol. 82, no. 4 (2014): 2001, http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_82/Sadinsky_March.pdf.

FRAP 35 generally precludes judges who have taken senior status from participating in en banc proceedings, although 28 U.S.C. § 46(c) provides that “any senior circuit judge of the circuit shall be eligible ... to participate ... as a member of an in banc court reviewing a decision of a panel of which such judge was a member.”

¹⁹ Delaware Supreme Court Rule 4; *see also* Tracey E. George & Chris Guthrie, “Remaking the United States Supreme Court in the Courts’ of Appeals Image,” *Duke Law Journal*, vol. 58, no. 7 (2009): 1461, <https://scholarship.law.duke.edu/dlj/vol58/iss7/7>.

²⁰ UK law provides that “The Supreme Court is duly constituted in any proceedings only if all of the following conditions are met—a) the Court consists of an uneven number of judges; b) the Court consists of at least three judges.” Constitutional Reform Act 2005, c. 4, § 42(1); U.K. Supreme Court, *Annual Report and Accounts, 2019-2020* (September 17, 2020), 65, <https://www.supremecourt.uk/docs/annual-report-2019-20.pdf>.

²¹ As professors Jack Balkin and Sanford Levinson have commented, “by installing enough judges and Justices with roughly similar ideological views over time, Presidents can push constitutional doctrine in directions they prefer ... partly for this reason the Supreme Court tends, in the long run, to cooperate with the dominate political forces of the day.” Jack Balkin and Sanford Levinson, “The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,” *Fordham Law Review*, vol. 75, no. 2 (2006-2007): 490, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4194&context=flr>.

²² Others have suggested such a reconfiguration. Tracey E. George and Chris Guthrie, “Remaking the United States Supreme Court in the Courts of Appeals’ Image,” (*see* note 19); Tracey E. George and Chris Guthrie, “‘The Threes’: Re-Imagining Supreme Court Decisionmaking,” *Vanderbilt Law Review*, vol. 61, no. 6 (2008): 1825-1860, <https://scholarship.law.vanderbilt.edu/vlr/vol61/iss6/4/>; H.R. 865, 47th Cong. (1st Sess. 1881); “Minority Report on the Relief of the United States Courts,” *Annual Report of the American Bar Association*, vol. 5 (1883): 368.

²³ Scholars note that judicial decisionmaking in groups has fundamentally different dynamics than individual judging. Lewis Kornhauser and Lawrence Sager, “The One and the Many: Adjudication in Collegial Courts,” *California Law Review*, vol. 81, no. 1 (1993): 6-10, <https://lawcat.berkeley.edu/record/1114609>. In addition, the dynamics of group decisionmaking vary based on the size of the group, with smaller groups tending to cooperate better. George and Guthrie, “Remaking the United States Supreme Court in the Courts of Appeals’ Image,” 1472-1474 (*see* note 19). This has led some panel proponents to suggest that three-justice panels may be more likely to find common ground to avoid dissents. George and Guthrie, “‘The Threes’: Re-Imagining Supreme Court Decisionmaking,” 1837 (*see* note 22).

²⁴ Some experts have expressed concern that panels would not fundamentally alter the dynamics of decision making on the Court if significant cases were heard en banc. Russel Wheeler, “Should We Restructure the Supreme Court?,” The Brookings Institution, March 2, 2020, <https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court/>; Daniel Epps and Ganesh Sitaraman, “How to Save the Supreme Court,” *Yale Law Journal*, vol. 129 (2019): 175, <https://www.yalelawjournal.org/feature/how-to-save-the-supreme-court>.

Others have argued that it would be problematic for the full Court not to hear significant cases. *See, e.g., Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491 (letter of Chief Justice Charles Evans Hughes).

The manner in which panels are selected requires careful attention, as research on panel systems abroad suggests that when given the discretion to appoint panels, chief justices may do so based on their expectations of how judges will decide cases. Lori Hausegger and Stacia Haynie, “Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division,” *Law & Society Review*, vol 37, no. 3 (2003): 655.

²⁵ John O. McGinnis, “Justice Without Justices,” *Constitutional Commentary*, vol. 16 (1999), 541, <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1541&context=concomm>; Epps and Sitaraman, “How to Save the Supreme Court,” 181, (see note 24).

²⁶ Judiciary Act of 1789, 1 Stat. 73, § 4 (1789); Judiciary Act of 1802, 2 Stat. 73, § 4 (1802). Congress reduced the circuit riding requirement to one term every two years in 1869, Judiciary Act of 1869, 16 Stat. 44, § 4, and eliminated it in 1891. Judiciary Act of 1891, 26 Stat. 826 (1891).

²⁷ 28 U.S.C. § 294.

²⁸ 28 U.S.C. §§ 291-292.

²⁹ The extent to which these powers allow the Chief Justice to exert influence over the other justices and the business of the court, and the mechanisms by which that influence is exercised, has been the subject of debate among scholars. See, e.g., David J. Danelski, “The Influence of the Chief Justice in the Decisional Process of the Supreme Court,” in *American Court Systems*, ed. Sheldon Goldman and Austin Sarat (San Francisco: W.H. Freeman, 1978), 506-519; Frank Cross and Stefanie Lindquist, “The Decisional Significance of the Chief Justice,” *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1665-1707, https://scholarship.law.upenn.edu/penn_law_review/vol154/iss6/9/; G. Edward White, “The Internal Powers of the Chief Executive: The Nineteenth-Century Legacy,” *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1463-1510, <https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/White154U.Pa.L.Rev.1463%282006%29.pdf>; Joel Goldstein, “Leading the Court: Studies in Influence as Chief Justice,” *Stetson Law Review*, vol. 40, no. 3 (2011): 717-761, <https://www.stetson.edu/law/lawreview/media/40-3-Goldstein-PublicationCopy.pdf>; Alan Morrison, “Opting for Change in Supreme Court Selection, and for the Chief Justice, Too,” in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger Cramton and Paul Carrington, (Durham: Carolina Academic Press, 2006), 203-224.

³⁰ 28 U.S.C. § 331 (“He shall preside at such conference which shall be known as the Judicial Conference of the United States;” “If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice”); 50 U.S.C. §1803(a)(1) (“the Chief Justice of the United States shall publicly designate 11 district court judges” to serve on the Foreign Intelligence Surveillance Court); 28 U.S.C. § 601 (Administrative Office of the United States Courts is led by a director and deputy director “appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference”); 28 U.S.C. §§ 291-292.

Research suggests that Chief Justices have used their appointment powers to place ideologically aligned judges on influential panels. See e.g. Dawn Chutkan, “The Chief Justice as Executive: Judicial Conference Committee Appointments,” *Journal of Law and Courts*, vol. 2, no. 2 (2014): 302, 313, <https://www.journals.uchicago.edu/doi/10.1086/677172>; David Nixon, “Policy-Making by a Different

Means: The Chief Justice's Attempts to Shape Policy through the Judicial Conference of the United States," *Rationality and Society*, vol. 15, no. 3 (2003): 356.

³¹ "Appendix B: Statutory Duties of the Chief Justice of the United States," in Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," *University of Pennsylvania Law Review* vol. 154, no. 6 (2006): 1652-1657, https://digitalcommons.law.yale.edu/fss_papers/697/; see also Alan Morrison and Scott Stenhouse, "The Chief Justice of the United States: More Than Just the Highest Ranking Judge," *Constitutional Commentary*, vol. 1 (1984): 57-79, <https://scholarship.law.umn.edu/concomm/46/>.

³² The Chief Justice has one constitutionally mandated duty, which is to preside over impeachment trials of presidents. U.S. Const. Art. I, § 3.

³³ Resnik and Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," 1644-1649 (see note 31); Theodore W. Ruger, "The Judicial Appointment Power of the Chief Justice," *University of Pennsylvania Law Review*, vol. 7, no. 2 (2004): 387-389, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1303&context=jcl>; Theodore W. Ruger, "The Chief Justice's Special Authority and the Norms of Judicial Power," *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1570-1573

<https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/Ruger154U.Pa.L.Rev.1551%282006%29.pdf>; Edward Swaine, "Hail, No: Changing the Chief Justice," *University of Pennsylvania Law Review*, vol. 154, no. 6, 1709 (2006): 1720-1724. <https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/Swaine154U.Pa.L.Rev.1709%282006%29.pdf>.

³⁴ 28 U.S.C. §§ 45, 136.

³⁵ "Appendix C: Tenure and Methods of Selection of State Chief Justices," in Resnik and Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," 1658-1664 (see note 31).

³⁶ Congress granted the Court discretion over a large portion of its docket in the 1925 Judges' Bill, which allowed the Court to hear most cases by writ of certiorari. Judiciary Act of 1925, Pub. L. 68-415, 43 Stat. 936 (1925). By 1988, Congress had repealed nearly all the provisions that called for mandatory review of certain types of cases. Supreme Court Case Selections Act, Pub. L. 100-352, 102 Stat. 662 (1988). See generally Edward Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review*, vol. 100, no. 7 (2000); see also Jonathan Sternberg, "Deciding Not to Decide: the Judiciary Act of 1925 and the Discretionary Court," *Journal of Supreme Court History*, vol. 31, no. 1 (2012): 5, <https://www.martindale.com/matter/asr-1628380.pdf>.

³⁷ See Michael Sturley, "Cert Pool," in *The Oxford Companion to the Supreme Court of the United States*, 155-6 (see note 17). There were 6,442 cases filed in the Supreme Court in the 2018 term. Chief Justice John Roberts, *2019 Year-End Report on the Federal Judiciary*, 5 (see note 15).

³⁸ In the 2004 term, it heard 87 cases, and in 1984, it heard 175 cases. Chief Justice John Roberts, *2019 Year-End Report on the Federal Judiciary*, 5 (see note 15).

³⁹ See Vanessa Baird and Tonja Jacobi, “Judicial Agenda Setting Through Signaling and Strategic Litigant Responses,” *Washington University Journal of Law and Policy*, vol. 29, no. 1 (2009): 238, https://openscholarship.wustl.edu/law_journal_law_policy/vol29/iss1/8.

⁴⁰ Linda Greenhouse, “Bring Me a Case,” *New York Times*, November 13, 2013, <https://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html>; Adam Liptak, “With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear,” *New York Times*, July 6, 2015, <https://www.nytimes.com/2015/07/07/us/supreme-court-sends-signals-to-request-cases-they-want-to-hear.html>.

⁴¹ Some scholars have expressed concern that the justices do not always select the cases most deserving of the Supreme Court’s attention. See generally Samuel Estreicher and John Sexton, *Redefining the Supreme Court’s Role* (New Haven: Yale University Press, 1986).

A vast literature examines the factors that inform the justices’ cert decisions. While a complete survey of the literature is beyond the scope of this report, a review reveals that some of these factors are legal and jurisprudential, while others raise concerns about potentially inappropriate influences.

Supreme Court Rule 10 sets out a non-exhaustive list of factors that the Court may consider when deciding to grant cert:

“(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.”

Several studies suggest that the factors in Rule 10 make the Court more likely to grant cert. Actual or apparent conflict between lower courts or with the Supreme Court is associated with a higher likelihood of cert. Gregory Caldeira and John Wright, “Organized Interests and Agenda Setting in the U.S. Supreme Court,” *American Political Science Review*, vol. 82, no. 4 (December 1988): 1118-1121; S. Sidney Ulmer, “The Supreme Court’s Certiorari Decisions: Conflict as a Predictive Value,” *American Political Science Review*, vol. 78, no. 4 (1984): 909; Ryan Black and Ryan Owens, “Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence,” *Journal of Politics*, vol. 71, no. 3 (July 2009): 1070.

The presence of the United States as a party also increases the likelihood of cert. Caldeira and Wright, 1118-1121; S. Ulmer, 908-911. Some scholars interpret the solicitor general’s success with cert as an indication that the Court views the office’s involvement as a sign that there is an “important federal question” at issue, in line with Rule 10. Margaret Cordray and Richard Cordray, “The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection,” *Washington University Law*

Review, vol. 82, no. 2 (2004): 408,

https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1369&context=law_lawreview.

Studies have also found that the presence of amicus briefs increased the likelihood of cert. Caldeira and Wright, 1122; Black and Owens, 1072. Caldeira and Wright suggest that this is because amicus briefs indicate a case's broader significance (1112), again in line with Rule 10, but there are other possible interpretations, including the specter of inappropriate influence from organized interests.

Jurisprudential factors like the justices' views of the proper role of the Court, such as how to enforce precedent or whether to drive social change, also influence their cert decisions. Cordray and Cordray, 423-452; Doris Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980), 6.

However, a number of studies suggest that the justices' personal policy preferences also influence their cert decisions. See e.g. Gregory Caldeira, John Wright and Christopher Zorn, "Sophisticated Voting and Gate-Keeping in the Supreme Court," *Journal of Law, Economics, and Organization*, vol. 15, no. 3 (October 1999), 549-572; Ryan Black and Ryan Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," *Journal of Politics* vol. 71, no. 3 (July 2009), 1062-1075; H.W. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991)

The justices also appear to be sensitive to public opinion. See Amanda Bryan, "Public Opinion and Setting the Agenda on the U.S. Supreme Court," *American Politics Research* vol. 48, no. 3 (2020).

The identity of the attorney filing a cert petition also affects its success. Research suggests that members of the Supreme Court bar at elite law firms have significantly higher than average success rates, and also that when former Supreme Court clerks appear as attorneys on cert petitions or related amicus briefs a case is more likely to be granted cert. Richard Lazarus, "Advocacy Matters Before and Within the U.S. Supreme Court: Transforming the Court by Transforming the Bar," *Georgetown Law Journal*, vol. 90 (2008): 1515-1517,

https://scholar.harvard.edu/rlazarus/files/rlazarus/files/lazarus_advocacy_matters_before.pdf;

Huchen Liu and Jonathan Kestelec, "The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court" (unpublished manuscript, May 26, 2021).

Information and advocacy completely outside the record of a case from online sources like social media may also shape perceptions of a case's cert-worthiness. Jeffrey Fisher and Allison Orr Larsen, "Virtual Briefing at the Supreme Court," *Cornell Law Review*, vol. 105 (2019): 103-4.

⁴² One fundamental concern with the Court's discretion is that it challenges the classic conception, which Alexander Hamilton described in Federalist 78, that courts exercise "judgement," rather than "will."

Contemporary scholars have echoed this concern. See e.g. Peter Fish, "Judiciary Act of 1925," *The Oxford Companion to the Supreme Court of the United States*, 550; Edward Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review*, vol. 100, no. 7 (2000), 718; Paul Carrington, "Checks and Balances: Congress and the Federal Courts," in Roger

Cramton and Paul Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham: Carolina Academic Press, 2006), 154.

⁴³ See Paul Carrington and Roger Cramton, “Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court,” *Cornell Law Review*, vol. 94, no. 3 (2009), 633, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1015&context=facpub>.

⁴⁴ Paul Carrington and Roger Cramton, “Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court,” *Cornell Law Review*, vol. 94, no. 3 (2009), 632-634, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1015&context=facpub>.

⁴⁵ The Conference of Chief Justices is composed of the chief judicial officer in all 50 states, territories, and the District of Columbia.

For another proposal in favor of including state judges in the cert process, see Sanford Levinson, “Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?,” *Yale Law Journal Online*, vol. 119 (2010): 111, <https://www.yalelawjournal.org/forum/assessing-the-supreme-courts-current-caseload-a-question-of-law-or-politics>.

⁴⁶ Amanda Tyler, “Setting the Supreme Court’s Agenda: Is There a Place for Certification?,” *George Washington Law Review*, vol. 78, no. 6 (2009-2010): 1326, <https://www.gwlr.org/wp-content/uploads/2012/08/78-6-Tyler.pdf>. The certification procedure is defined at 28 U.S.C. § 1254(2) and states that when an appeals court certifies a question of law and requests instructions, “the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.” However, it is almost never used in modern times.

⁴⁷ See note 36.

⁴⁸ 28 U.S.C. §1253 states that “...any party may appeal to the Supreme Court ... in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”

Congress created three-judge courts in 1903 for certain antitrust cases. Act of Feb. 11, 1903, 32 Stat. 823. After the U.S. Supreme Court held in *Ex parte Young* that state officials could be sued to block them from implementing unconstitutional state laws, Congress also provided three-judge courts when litigants seek to enjoin state laws on U.S. constitutional grounds. See Act of June 18, 1910, ch. 309, §17; Pub. L. 75-352, 50 Stat. 751 (1937).

In 1976, Congress repealed most of the jurisdiction of three-judge courts and thereby also removed a significant source of the Supreme Court’s mandatory docket. Pub. L. 94-381, 90 Stat. 1119 (1976); See also Mark Tushnet, “The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments,” *University of Cincinnati Law Review*, vol. 46, no. 2 (1977), 347; “The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives,” *Journal of Criminal Law, Criminology, and Police Science*, vol. 62, no. 2 (1971); Margaret Cordray and Richard Cordray, “The Supreme Court’s Plenary Docket,” *Washington & Lee University Law Review*, vol. 58, no. 3 (2001), 737; “Note on Three-Judge District Courts, the Johnson Act of 1934, and the Tax Injunction Act of 1937,” in *Hart and Wechsler’s*

The Federal Courts and the Federal System, ed. Richard Fallon et al., 7th ed. (Foundation Press: 2015), 1089-1090.

⁴⁹ One study found that, during the period between 1983 and 2003, length of service among Supreme Court justices averaged about 24 years, compared to 14 years from 1789 to 1809. Judith Resnik, “Judicial Selection and Democracy: Demand, Supply, And Life Tenure,” *Cardozo Law Review*, vol. 26, no. 2 (2005): 616, https://digitalcommons.law.yale.edu/fss_papers/759/.

Another study similarly found that justices who left office between 1971 and 2005 served an average of 26.1 years, compared with 7.5 for those leaving the bench between 1789 and 1820, and 14.9 years for those leaving any time before 1971. Steven G. Calabresi and James T. Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” in *Reforming the Court: Term Limits for Supreme Court Justices*, 23-24 (see note 29).

There is debate about the causes and significance of the shift. Some argue it can be explained by short tenures becoming rarer in modern times, rather than long tenures becoming longer. Alvin Chang, “Supreme Court terms have been getting longer. Here’s why,” *Vox*, February 17, 2016, <https://www.vox.com/2016/2/17/11032182/pope-president-and-justice-ages>.

Others question the utility of average tenure as a metric, and argue that the focus ought to be on median length of service, age of judge, and age at appointment, which show that recent decades are broadly in line with earlier periods. See Kevin McGuire, “Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court,” *Judicature*, vol. 89, no. 1 (July-August 2005): 10-12, <https://mcguire.web.unc.edu/wp-content/uploads/sites/1749/2014/01/tenure.pdf>; See also Ward Farnsworth, “The Regulation of Turnover on the Supreme Court,” *University of Illinois Law Review*, vol. 2005, no. 2 (2005): 428, <https://www.illinoislawreview.org/wp-content/ilr-content/articles/2005/2/Farnsworth.pdf>.

A complete dataset on federal judicial tenures is available from the Federal Judicial Center. Federal Judicial Center, “Demography of Article III Judges, 1789-2020,” <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges>.

⁵⁰ The text reads: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. Const., Art. III.

⁵¹ In practice, at the federal level, good behavior has meant life tenure, subject to removal through impeachment. However, there is some debate as to whether good behavior tenure inherently implies life tenure, or whether the two concepts are distinct. For an analysis of the common law history of the term, suggesting a good behavior tenure lasts a lifetime in the absence of misbehavior, see Raoul Berger, “Impeachment of Judges and ‘Good Behavior’ Tenure,” *Yale Law Journal*, vol. 79, no. 8 (1970): 1477-1479, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6044&context=yjl>.

For suggestions that good behavior tenure can imply a temporally bounded term, see e.g. Robert Kramer and Jerome Barron, “The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of ‘During Good Behavior,’” *George Washington Law Review*, vol. 35 (1966-1967): 455; Resnik, “Judicial Selection and Democracy: Demand, Supply, And Life Tenure,”

Cardozo Law Review, 614-619, [\(see note 49\)](#); David Dow and Sanat Mehta, “Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?,” *Duke Journal of Constitutional Law and Public Policy*, vol. 16 (2021): 107-109, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1172&context=djclpp>.

⁵² For instance, members of the German Constitutional Court serve 12-year terms with mandatory retirement at age 68. Law of the Federal Constitutional Court of Germany (as amended 2017), § 4. Mandatory retirement for members of the Australian and Canadian high courts is at ages 70 and 75, respectively. Austl. Const. ch. III, § 72; Supreme Court Act, R.S.C., ch. S-26, § 9(2) (1985) (Can.). See also Resnik, “Judicial Selection and Democracy: Demand, Supply, And Life Tenure,” *Cardozo Law Review*, 614-5 (see note 49)..

⁵³ Mass. Const., Pt. 2, ch. III, art. I; Mass. Const. Art. XCVIII.

⁵⁴ A bill to create an 18-year term limit for Supreme Court justices was introduced in 2020. Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Congress, § 4 (2020). A number of scholars have also advocated for 18-year term limits. James E. DiTullio and John B. Schochet, “Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms,” *Virginia Law Review*, vol. 90, no. 4 (2004): 1093, <https://www.virginialawreview.org/wp-content/uploads/2020/12/1093.pdf>; Steven G. Calabresi and James T. Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” *Harvard Journal of Law and Public Policy*, vol. 29, no. 3 (2006): 769; Philip D. Oliver, “Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court,” *Ohio State Law Journal*, vol. 47, no. 4 (1986): 800-801.

Some of these proposals have drawn support from a variety of sources. See, e.g. American Academy of Arts and Sciences Commission on the Practice of Democratic Citizenship, *Our Common Purpose: Reinventing American Democracy for the 21st Century* (2020), 6, https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf; John Kruzell, “Dozens of legal experts throw weight behind Supreme Court term limit bill,” *The Hill* (Oct. 23, 2020), <https://thehill.com/regulation/court-battles/522447-dozens-of-legal-experts-throw-weight-behind-supreme-court-term-limit>; Fix the Court, “What Senators Have Said About Supreme Court Term Limits,” May 19, 2021, <https://fixthecourt.com/2021/05/senatorsonscotustermimits/>.

Others have proposed term limits of lengths other than 18 years. See L.H. Larue, “Neither Force Nor Will,” *Constitutional Commentary*, vol. 12 (1995), 180; Charles Collier, “The Supreme Court and the Principle of Rotation in Office,” *George Washington University Law Review*, vol. 6 (1938): 424.

Other commentators have raised concerns with term limit proposals. Their questions include potential unconstitutionality and negative effects on the Court and confirmation process. See, e.g., John Lawlor, “Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court,” *University of Pennsylvania Law Review*, vol. 134 (1986): 991-993; Arthur Hellman, “Reining in the Supreme Court: Are Term Limits the Answer?,” in *Reforming the Court: Term Limits for Supreme Court Justices*, 298-312 (see note 29); Stephen Burbank, “An Interdisciplinary Perspective on the Tenure of Supreme Court Justices,” in *Reforming the Court: Term Limits for Supreme Court Justices*, 333-341 (see note 29); Ward Farnsworth, “The Case for Life Tenure,” in *Reforming the Court: Term*

Limits for Supreme Court Justices, 251-265 (see note 29); David Garrow, "Protecting and Enhancing the U.S. Supreme Court," in *Reforming the Court: Term Limits for Supreme Court Justices*, 275-285 (see note 29).

⁵⁵ 28 U.S.C. § 294; see E. Jon Gryskiewicz, "The Semi-Retirement of Senior Supreme Court Justices," *Seton Hall Circuit Review*, vol. 11 (2015): 297 <https://core.ac.uk/download/pdf/303929337.pdf>.

⁵⁶ Steven G. Calabresi and James T. Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy*, vol. 29, no. 3 (2006): 769.

⁵⁷ See, e.g., Richard Epstein, "Mandatory Retirement for Supreme Court Justices," in *Reforming the Court: Term Limits for Supreme Court Justices*, 419-427 (see note 29); David Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review*, vol. 67, no. 4 (2000): 1086-7, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5893&context=uclev>. As Garrow recounts, such proposals were considered several times during the 20th century.

⁵⁸ Resnik, "Judicial Selection and Democracy: Demand, Supply, And Life Tenure," 615 (see note 49).

⁵⁹ Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. 28 U.S.C. § 372(a) allows judges who become permanently unable to perform their duties to retire with full pay if they have served for at least 10 years, and on half-pay if not. They may also take senior status, and be exempted from the workload requirements of that status upon their written certification of their disability. 28 U.S.C. § 371(e)(1)(E).

⁶⁰ See, e.g., Ryan W. Scott and David R. Stras, "Retaining Life Tenure: The Case for a Golden Parachute," *Washington University Law Quarterly*, vol. 83, no. 5 (2006): 1439-1467, <https://www.repository.law.indiana.edu/facpub/394>; McGuire, "Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court," 15, (see note 49); Judith Resnik, "So Long," *Legal Affairs*, July-August 2005, https://www.legalaffairs.org/issues/July-August-2005/argument_resnik_julaug05.msp.

A number of studies suggest pension eligibility can affect judges' retirement decisions, but several argue that as currently constructed, pensions have the least or no effect at the Supreme Court level. See, e.g., Albert Yoon, "Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002," *American Law and Economics Review*, vol. 8, no. 1 (2006): 143; Stephen Burbank, Jay Plager, and Gregory Ablavsky, "Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences," *University of Pennsylvania Law Review*, vol. 161, no. 1. (2012): 63, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1005&context=penn_law_review; Peverill Squire, "Politics and Personal Factors in Retirement from the United States Supreme Court," *Political Behavior*, vol. 10, no. 2 (1988): 186; Jessica Perry and Christopher Zorn, "The Politics of Judicial Departures in the U.S. Federal Courts" (Apr. 15, 2008) (unpublished manuscript): 17. <http://ssrn.com/abstract=1120773>; Ross M. Stolzenberg and James Lindgren, "Retirement and Death in Office of U.S. Supreme Court Justices," *Demography*, vol. 47, no. 2 (2010): 281-2; Terri Peretti and Alan Rozzi, "Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?," *Quinnipiac Law Review*, vol. 30 (2011): 153-4.

⁶¹ Burbank, Plager, and Ablavsky, “Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences,” 6-11, 53, (see note 60).

⁶² The current pension system for justices and judges is outlined at 28 U.S.C. § 371(a) and (c). Congress has authorized retirement with a yearly salary equal to the salary at the time of leaving office, upon the age of 65 and once a justice or judge’s age plus years of service add up to at least 80.

⁶³ Guide to Judiciary Policy, Code of Conduct for United States Judges, Introduction, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges”); Chief Justice John Roberts, *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), 4, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>. The Code of Conduct for United States Judges “includes ethical canons that apply to federal judges and provides guidance on their performance of official duties and engagement in a variety of activities.” <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

⁶⁴ The Committee on Codes of Conduct of the Judicial Conference of the United States also publishes advisory opinions “on ethical issues that are frequently raised or have broad application.” See Guide to Judiciary Policy, Vol.2, Pt. B, Ch. 2, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

⁶⁵ 28 U.S.C. § 455. Although the statute uses the term “justice,” Chief Justice John Roberts has called into question whether the justices can be bound by § 455. John Roberts, *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), 7, <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

⁶⁶ See, e.g., Cal. Code Civ. P. 170.3(c)(5) (“A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge’s answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson.”); Utah R. Civ. P. 63(c)(1) (“The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge.”).

At the federal level, Article III judges may “bow out of the case or ask that the recusal motion be assigned to a different judge for a hearing,” but the law does not require it. *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998).

⁶⁷ “A fair trial in a fair tribunal is a basic requirement of due process.... To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” *In re Murchison*, 349 U.S. 133, 136 (1955). The Court has restated this principle on numerous occasions. Examples include *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986); *Marshall v. Jerrico, Inc.*,

446 U.S. 238, 242 (1980); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

⁶⁸ Caprice Roberts, “The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort,” *Rutgers Law Review*, vol. 57 (2005): 169, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=869257.

⁶⁹ See, e.g., Tex. R. App. P. § 16.3 (“[t]he challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court ... [t]he challenged justices or judge must not sit with the remainder of the court to consider the motion as to him or her”); Alaska Stat. 22.20.020(c) (“If a judicial officer denies disqualification the question shall be heard and determined by ... the other members of the supreme court”). See also Matthew Menendez and Dorothy Samuels, Brennan Center for Justice, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, (2016), n. 47, <https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification>; Russel Wheeler and Malia Reddick, *Judicial Recusal Procedures*, Institute for the Advancement of the American Legal System (June 2017), 5-8, https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf.

Several scholars have argued for similar practices at the federal level. See Amanda Frost, “Keeping Up Appearances,” *Kansas Law Review*, vol. 53, no. 3 (2005): 535; Charles Gardner Geyh, “Why Judicial Disqualification Matters. Again.” *Review of Litigation*, vol. 30 (2011): 720, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1829&context=facpub>.

⁷⁰ Supreme Court Justice William Rehnquist cited a “duty to sit” in *Laird v. Tatum*, a case challenging the constitutionality of President Nixon’s Army surveillance program. *Laird v. Tatum*, 409 U.S. 824 (1972). Litigants had requested Justice Rehnquist disqualify himself from the case based on his role in the Office of Legal Counsel at the time that the administration began the surveillance program at issue. James Sample, “Supreme Court Recusal from Marbury to the Modern Day,” *Georgetown Journal of Legal Ethics*, vol. 26 (2013): 116-117. Justice Rehnquist refused, stating that the consequence of disqualification of a justice of the Supreme Court is “that the principle of the law presented by the case is left unsettled...I believe it is a reason for not ‘bending over backwards’ in order to deem oneself disqualified.” *Laird*, 409 U.S. at 838. Following Rehnquist’s decision in *Laird*, in 1974, Congress enacted an amendment to the judicial qualification statute, 28 U.S.C. § 455, requiring judges’ and justices’ disqualification in cases where their “impartiality might reasonably be questioned.” Sherrilyn A. Ifill, “Do Appearances Matter?: Judicial Impartiality and the Supreme Court in *Bush v. Gore*,” *Maryland Law Review*, vol. 61, no. 3 (2002), 619, <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3174&context=mlr>.

In 1993, Justices William Rehnquist, John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg issued a recusal policy statement that expressed an unwillingness to recuse in some circumstances due to the perceived impact of recusal on the Court: “We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court.” “Statement of Recusal Policy,” November 1, 1993, 1.

The duty to sit could be rendered moot with a mechanism for replacing a recused justice. An example comes from Texas, where, in a 1925 case involving a fraternal order that all the judges then sitting were members of, the governor appointed three women lawyers to serve as an ad hoc Supreme Court. See *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925); see also Judith Resnik, “On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges,” *Southern California Law Review*, vol. 61 (1987-1988): 1894-5, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1930&context=fss_papers. Texas law now allows the state’s Chief Justice to call a retired justice into temporary service when there is a vacancy left by recusal. Tex. R. of Judicial Admin.8; Tex. Gov. Code §74.003(b).

⁷¹ There were four cases that resulted in a 4-4 split after Justice Scalia’s death. Kedar S. Bhatia, *Stat Pack for October Term 2015*, SCOTUSblog (June 29, 2016), 1, http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf.

⁷² Of the 2017 Supreme Court term, when, after the death of Justice Scalia, the Court had eight justices, Justice Samuel Alito commented that “Having eight was unusual and awkward. That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases that we would have issued otherwise...” Jess Bravin, “With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc,” *Wall Street Journal*, April 21, 2017, <https://www.wsj.com/articles/BL-WB-68082>. See also Adam Liptak, “A Cautious Supreme Court Sets a Modern Record for Consensus,” *New York Times*, June 27, 2017, <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html>.

How to understand the impact of a recusal and when it could result in perpetual deadlock is unclear. The conciliatory behavior described by some during the year of eight justices might have been shaped by the knowledge of the new appointment that would come.

⁷³ See Ryan Black and Lee Epstein, “Recusals and the ‘Problem’ of an Equally Divided Supreme Court,” *Journal of Appellate Practice and Process*, vol. 7, no. 1 (2005): 81, <https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1315&context=appellatepracticeprocess>.

⁷⁴ “As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling.” Jed Handelsman Shugerman, “In Defense of Appearances: What *Caperton v. Massey* Should Have Said,” *DePaul Law Review*, vol. 59, no. 2 (2010): 552, <https://core.ac.uk/download/pdf/232966625.pdf>. To guard against an increase in frivolous motions to recuse in the context of a more robust recusal regime, Federal Rule of Civil Procedure 11—applicable at the trial level—provides a model, including sanctions, against attorneys using motions to abuse the judicial process.

⁷⁵ The Judicial Conference attempted to address this issue in 2020 with its draft ethics opinion No. 117, which would have barred judges from being members of the American Constitution Society and Federalist Society (“reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests”). The proposal was abandoned after a group of judges objected to the ban on Federalist Society membership. See Letter to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, March 18, 2020, <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf>.

In a November 2020 speech to the Federalist Society, Justice Alito thanked “the many judges and lawyers who stood up to an attempt to hobble the debate that the Federalist Society fosters.” Samuel Alito (speech, Federalist Society National Lawyers Convention, November 12, 2020), <https://fedsoc.org/conferences/2020-national-lawyers-convention?#agenda-item-address-8>.

Supreme Court journalist Adam Liptak said, “By not attending [the annual conventions of the American Constitution Society and Federalist Society], Kagan and the Chief are really showing the way. It is such a small thing, to simply stay at home...There is so much evidence of politicization in the Court and there is no need for the members to add to it.” Interview with Adam Liptak, Columnist, *New York Times* (March 26, 2020) (on file with authors).

⁷⁶ The Ethics in Government Act requires all “judicial officers” to file financial disclosures within 30 days of receiving their position, and thereafter annually. 5 U.S.C. App. 4 §§ 101-111 (2006); 5 U.S.C. App. 4 § 109(10) (2006) (defining judicial officer as “the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, ... and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior”).

⁷⁷ Canon 4(D)(3) of the Code of Conduct for United States Judges directs judges to “divest investments and other financial interests that might require frequent disqualification.” However, given the difficulty in predicting what entities may be parties to cases, this requirement may be insufficient.

⁷⁸ Walter Shaub, “Conflicts of Interest,” in Brookings Institution, *If It's Broke, Fix It* (2021), 12, <https://www.brookings.edu/wp-content/uploads/2021/02/Brookings-Report-If-its-Broke-Fix-it.pdf>.

Federal law currently calls on the Judicial Conference to review judges’ financial disclosure. 5 U.S.C. app. § 106(a)(2). However, some scholars and advocates have called for more robust oversight mechanisms within the judicial branch. See Diane M. Hartmus, “Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General,” *California Western Law Review*, vol. 35, no. 2 (1999): 243; Jacquelin Thomson, “House Democrats Urge Federal Judiciary to Add Inspector General,” *National Law Journal*, September 6, 2019. <https://www.law.com/nationallawjournal/2019/09/06/house-democrats-urge-federal-judiciary-to-add-inspector-general/>.

To avoid undue burdens on judges who may not have the means to employ numerous professionals to ensure compliance with rigorous disclosure requirements, justices and judges could also be provided with assistance in evaluating how to comply with disclosure requirements.

⁷⁹ Jeremy Bentham, “Draught of a New Plan for the Organisation of the Judicial Establishment in France: With Critical Observations on the Draught Proposed by the National Assembly Committee, in the Form of a Perpetual Commentary, in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 4 (New York: Russell & Russel, 1962), 316. ,”

⁸⁰ The Supreme Court has repeatedly affirmed the public’s right to access criminal trials and pre-trial proceedings. See *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court, County of Norfolk*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986).

While the Supreme Court has not issued similar rulings on civil proceedings, there is good reason to believe they should be treated similarly to criminal proceedings. See James Nowaczewski, “The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co. v. Superior Court*,” *University of Chicago Law Review*, vol. 51, no. 1 (1984): 286.

⁸¹ Congress has considered but not yet enacted laws to increase the amount of information the courts share with the public. See e.g., Sunshine in the Courtroom Act of 2021, S. 818, 117th Cong. (2021), which would permit public broadcast of the proceedings of appellate courts, including the United States Supreme Court; Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017), which would have required the release of certain kinds of court information unless a judge found confidentiality outweighed the public interest.

⁸² See generally William Baude, “Foreword: The Supreme Court’s Shadow Docket,” *New York University Journal of Law and Liberty*, vol. 9 (2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1961&context=public_law_and_legal_theory; Stephen Vladeck, “The Solicitor General and the Shadow Docket,” *Harvard Law Review*, vol. 133 (2019), <https://harvardlawreview.org/2019/11/the-solicitor-general-and-the-shadow-docket/>; *The Supreme Court’s Shadow Docket: Hearing Before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet*, 117th Cong., February 18, 2021. <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4371>.

⁸³ For example, in two January 2021 capital cases, the Court vacated a stay of execution ordered by circuit court without explanation. *U.S. v. Higgs*, 592 U.S. ____ (2021); *Rosen, Acting Att’y Gen., et al. v. Lisa Montgomery*, No. 20A122 (2021) (order granting vacatur), https://www.supremecourt.gov/orders/courtorders/011221zr1_f2ag.pdf. In *Higgs*, the Court reversed a stay before the circuit court had ruled on the merits of the case, granting “cert before judgment.”

⁸⁴ It was the Court’s practice in the late 1800s to give brief explanations for a justice’s non-participation in a case. The practice ended in 1904. Gabe Roth, “Explaining the Unexplained Recusals at the Supreme Court,” *Fix the Court*, May 3, 2018, <https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf>.

The explanation could be made in a manner that does not disclose potentially damaging information about a party before the court.

⁸⁵ The Rules Enabling Act empowers the Supreme Court and lower federal courts to prescribe rules “for the conduct of their business.” 28 U.S.C. § 2071-2077. For any rule prescribed by a lower court, the law requires a notice and comment period, permitting the public an opportunity to participate in the process. However, rules promulgated by the Supreme Court for itself or for lower courts are exempt from this requirement. 28 U.S.C. § 2071(b). The Act also requires the Judicial Conference of the United States to prescribe a process for adoption of such rules, as well as appoint a standing committee to review proposed rule changes. 28 U.S.C. § 2073; *Judicial Conference of the United States, Procedures for Committees on Rules of Practice and Procedure*, § 440.

⁸⁶ Congress has considered requiring the justices to disclose recusal explanations. *Supreme Court Transparency and Disclosure Act of 2011*, H.R. 862, 112th Cong. (2011).

A number of scholars have advocated for more transparent recusal decision-making. See Frost, “Keeping Up Appearances,” 535 (see note 69); Suzanne Levy, “Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions,” *University of Pennsylvania Journal of Constitutional Law*, vol. 16, no. 4 (2013-2014): 1170-1179, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1533&context=jcl>; James Sample, “Supreme Court Recusal: From Marbury to the Modern Day,” *Georgetown Journal of Legal Ethics*, vol. 26, no. 1 (2013): 150-151, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1949&context=faculty_scholarship; New York City Bar Association Committee on Government Ethics, *Supreme Court Ethics: The Need for Greater Transparency in a Justice’s Decision to Hear a Case* (September 2012), <https://www2.nycbar.org/pdf/report/uploads/20072211-SupremeCourtEthics--TheNeedforGreaterTransparencyinaRecusal.pdf>.

⁸⁷ Adam Liptak, “The Supreme Court Will Hear Arguments by Phone. The Public Can Listen In,” *New York Times*, April 13, 2020, <https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html>. Since April 2020, the Court has decided on a monthly basis whether telephonic oral arguments will be continued and whether livestreaming will be permitted. See U.S. Supreme Court, “COVID-19 Announcements,” <https://www.supremecourt.gov/announcements/COVID-19.aspx>.

⁸⁸ Tens of thousands of people listened to the first live streamed cases in May 2020. Melissa Wasser, Reporters Committee for Freedom of the Press, “Summary of Supreme Court Oral Argument Numbers (May 2020),” (on file with authors). A majority of the public believes that Supreme Court arguments should be televised. C-SPAN/PSB, “Supreme Court Survey: Agenda of Key Findings,” August 28, 2018, <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf>.

The Supreme Court could act on its own to permit camera access, and Congress has also considered obliging the Court to do so. In June 2021, the Senate Judiciary Committee favorably reported a bill that would require the Court to allow television coverage of open sessions. See Cameras in the Court Act, S.807, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/807/text>. For a discussion of similar past legislative efforts, see Congressional Research Service, *Video Broadcasting from the Federal Courts: Issues for Congress*, R44514 (October 28, 2019), <https://fas.org/sqp/crs/misc/R44514.pdf>; Lorraine Tong, Congressional Research Service, *Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues*, RL33706 (November 8, 2006), <https://fas.org/sqp/crs/secretary/RL33706.pdf>.

⁸⁹ Government Accountability Office, *U.S. Supreme Court: Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings*, GAO-16-437 (April 2016), <https://www.gao.gov/assets/gao-16-437.pdf>; Reporters Committee for Freedom of the Press, “Open Courts Compendium,” <https://www.rcfp.org/open-courts-compendium/>.

For discussion of camera access policies in several other countries’ highest courts, see generally Kyu Ho Youm, “Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?,” *Brigham Young University Law Review*, vol. 2012, no. 6 (2012),

<https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2699&context=lawreview>.

⁹⁰ See generally Tony Mauro, "Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism," *Reynolds Courts & Media Law Journal*, vol. 1 (2011); Jordan M. Singer, "Judges on Demand: The Cognitive Case for Cameras in the Courtroom," *Columbia Law Review Sidebar*, vol. 115 (2015), <https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/>; Lisa McElroy, "Cameras at the Supreme Court: A Rhetorical Analysis," *Brigham Young University Law Review*, vol. 2012, no. 6 (2012), <https://digitalcommons.law.byu.edu/lawreview/vol2012/iss6/6/>.

One line of research suggests that courts gain legitimacy when the public is exposed to the unique symbols and practices that set them apart from partisan institutions, which could imply that greater access will increase legitimacy. But scholars also suggest legitimacy could suffer if the court appeared partisan. See generally James Gibson and Gregory A. Caldeira, "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court," *Journal of Politics*, vol. 71, no. 2 (2009). See also Vanessa A. Baird and Amy Gangl, "Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness," *Political Psychology*, vol. 27, no. 4 (2006): 606-607;

Christopher Kromphardt, "Shine a Light: Televised Oral Arguments and Judicial Legitimacy," American Political Science Association Annual Meeting Paper, 2013, 8-9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300517.



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