

Presidential Commission on the Supreme Court of the United States:
Testimony of Aaron Belkin, Founder, Take Back The Court
August 15, 2021

Chairs Rodriguez and Bauer: It is an honor to submit testimony to the Commission on the crucial matter of Supreme Court expansion. I thank you for the invitation to do so, and I thank you and your fellow commissioners for your service. I would also like to thank those at Take Back the Court for assisting me in preparing this testimony.¹

I founded Take Back the Court in response to Republicans' refusal to hold a hearing for Merrick Garland and subsequently suspending Senate rules to replace him with Neil Gorsuch. The theft of a Supreme Court seat -- refusing to honor a president's nominee with even a hearing -- marked an unprecedented assault on the legitimacy of our judiciary for Republican political gain. Court rebalancing has been the primary focus of our organization for the last three years. Our mission is to inform the public of the necessity of expansion to rebalance the Court and of the dangers that the current Supreme Court poses to democratic institutions and to the rights and wellbeing of all Americans.

The Commission has received important testimony from several experts and advocates who have made clear the harm the Supreme Court inflicts on working people, racial minorities, women, LGBTQ families, and countless other Americans. Nan Aron, Craig Becker, Wade Henderson, and Sharon McGowan have submitted powerful testimony that has centered the rights and well-being of the American people -- the safeguarding of which, after all, is the ultimate purpose of government. The Commission has also received expert testimony from Michael Klarman, Chris Kang, Larry Kramer, and others firmly establishing the constitutionality and appropriateness of expansion of the Supreme Court, the unprecedented norm-breaking by Republicans that demands such a response, and the role expansion can play in rebalancing and depoliticizing the courts. Inevitably, my own testimony will touch on similar themes, though I will attempt to limit duplication of arguments that have already been so well made.

The Commission has also received testimony from several critics of Supreme Court expansion. This testimony has been unpersuasive. Worse, it has been riddled with disingenuous arguments, such as the risible contention that there was "nothing shocking" in Senate Republicans' refusal to even consider then-President Obama's nominee to a vacant Supreme Court seat in 2016, and that the refusal -- and accompanying threat to hold open any vacant seats for as long as a Democrat held the White House -- did not break any norms. At least one witness has gone so far as to dishonestly suggest the refusal to consider President Obama's nominee actually *followed* bipartisan precedent.² The simple fact is that these witnesses produced no actual precedent for Senate Republicans' actions, because none exist. And in making their case, they pretend a Senate controlled by Democrats did not confirm Anthony Kennedy in 1988, the final year of Ronald Reagan's presidency. But that confirmation *did* happen,³ so conservatives attempt to define it out of existence with technically-accurate statements intended to create an inaccurate understanding of history. An equally frivolous

¹ Many thanks to Jamison Foser and Chelsey Davidson for their outstanding contributions to this testimony.

² <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>

³ <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/>

objection raised against expansion asserted that any more than nine justices would make “oral argument chaotic,”⁴ as if we should endure an illegitimate and undemocratic Supreme Court simply for the convenience of a few lawyers.

These disingenuous arguments against Court expansion are a thumb in the eye of a Commission that invited their testimony in good faith, and I won’t help them distract you by dedicating any more of my testimony to these arguments. I urge you not to fall into the trap of engaging in good faith with arguments made in bad faith to deceive and distract you.

Instead I will devote my testimony to two essential points. The first is that Court expansion, the merits and appropriateness of which have been well-established, is not merely a good idea but an urgent one that must be acted on immediately, or we risk deep harm to our fellow citizens and the loss of democracy itself. The second is that while Court expansion is unlikely to be the *last* Court reform we need, it is certainly the *first* we must accomplish if we are to have any hope of enacting other important reforms.

The Supreme Court threatens the rights and well-being of the American people

In preparing this testimony, I asked Take Back The Court’s members why reforming the Court is important to them. After all, governments are about real people, not abstract theories. In the more than 1,500 responses I received, from all 50 states, not one person mentioned the Federalist Papers or blue slips or the Harvard Law Review. Their responses focused on the threat the court poses to everyday Americans:

“I’m in this fight because far too long the court has been occupied by people who do not see me as an equal human being.” -- Peggy S., Louisiana

“The Supreme Court makes decisions that affect millions of Americans’ lives such as whether or not a woman has the right to determine what happens to her body not the state in the matters of abortion and contraceptive access, who can get married legally in this country, and who can vote.” -- Ramon P., Oregon

“Just look at what this present Supreme Court did to voting rights!” -- Bill C., Massachusetts

“I care to live in a democracy. A majority of the Court obviously does not.” -- Sarah M., Massachusetts

“Women’s freedoms and voting rights for all are threatened by a severely conservative Supreme Court. We must balance out the Court for the survival of American Democracy.” -- Betsy K., New Jersey

“We came too close to losing our freedom on Jan. 6. and I don’t see the ‘S.C.’ helping to protect it.” -- Dennis S., Wisconsin

“The Court as it stands is a partisan tool for the dismantling of critical civil and human rights laws and protections, such as LGBT rights, DACA, and voting rights, and essential

⁴ <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>

environmental legislation. All people deserve protection under the law of the United States, regardless of race, gender, sexuality, immigration status. We must restore and steward our environment, and the threatened animal and plant species that inhabit this country, during this time of ecological crisis and climate change. In order to protect our democracy, the environment, and the values of the United States, the composition of the Court must be addressed and rebalanced.” -- Brooke S., California

These Take Back the Court members and countless other Americans see the Supreme Court as an imminent threat to their health, economic security, and rights as Americans. And for good reason. This upcoming term, the Supreme Court will hear oral arguments in *Dobbs v. Jackson Women’s Health Organization*, in which the state of Mississippi is asking the Court to overturn *Roe v. Wade*.⁵ The Supreme Court’s conservative majority has made its hostility to abortion rights well known, so even if *Roe* survives this challenge, the threat will remain as long as the Court is in the hands of a radical political minority. Such a decision would have a real and immediate impact on the rights and health of millions of women. The Court will also soon hear *New York State Rifle & Pistol Association Inc. v. Corlett*, which has the potential to eviscerate gun safety laws supported by the overwhelming majority of the American people.⁶ And just last month, the Court dealt yet another blow to the Voting Rights Act, helping Republican politicians across the country make it harder for Americans to vote. The Supreme Court is not waiting patiently on the sidelines for policymakers to undertake a years-long deliberation about how to reform the Court; it is hard at work imposing on America a hard-right ideology that is opposed by large majorities of the American people.

As Wade Henderson, president and CEO of the Leadership Conference on Civil and Human Rights, told the Commission last month, the Supreme Court’s decisions “tell us who can vote; receive equal pay; marry the person they love; access affordable health care, education, and housing; obtain an abortion; breathe clean air and drink clean water; hold police officers accountable for using excessive force and other constitutional violations; and so much more. [...] This is a time not just for serious reflection, but serious action to make our Court work for all of us. How much more evidence do we need? How many more voices must be silenced, dreams dampened, and lives lost before our elected leaders address the crises facing our nation?”⁷

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

⁵ https://www.washingtonpost.com/politics/courts_law/mississippi-abortion-supreme-court-roe-v-wade/2021/07/22/9b30cb8a-eb23-11eb-97a0-a09d10181e36_story.html

⁶ <https://www.vox.com/2021/4/26/22364154/supreme-court-guns-second-amendment-new-york-state-rifle-corlett-shootings-kavanaugh-barrett>

⁷ <https://www.whitehouse.gov/wp-content/uploads/2021/07/Henderson-Testimony.pdf>

The Supreme Court is an active participant in the Republican Party's attempts to destroy American democracy and govern via minority rule

Faced with the prospect, or even the reality, of a harmful Supreme Court decision, the standard reaction from policymakers is to attempt to pass a new law to overcome or work around the ruling. Of course, such a law would itself be vulnerable to a partisan Court. But the greater danger is the threat the Court poses to democracy itself. By undermining democracy and making it increasingly difficult for the majority to win control of other branches of government, the unelected extremists who compose the Court's majority entrench their own power and build a moat around their unpopular decisions.

The Republican Party's assault on our democracy has been well-documented. For decades, Republicans have tried to "win" elections by disallowing votes from those likely to oppose them, particularly people of color. When Republicans have won elections, they have moved swiftly to rig future elections in their favor, passing onerous restrictions on voting that target people of color, young people, the working class, and others likely to oppose them; creating gerrymandered districts to ensure they are overrepresented in both state and federal legislatures; and allowing and encouraging a flood of corporate dark money, giving wealthy elites disproportionate influence over our elections. They have seized control of federal and state courts, often by manipulating their size. In defeat, their assaults on democracy have been even more troubling: They have used their lame-duck powers to strip governing authority from their elected successors. They have even begun attempting to overturn the results of free and fair elections, through disinformation, manipulation, and, most shockingly, a deadly insurrection at the U.S. Capitol incited by a sitting president.

Put simply: The Republican Party knows it is America's minority political party, and it does not care. It intends to impose minority rule on the nation through any means necessary, including violence. This reality is clear to all who are willing to see it. Critics and opponents of the Republican Party have been warning of this danger for years, but the alarm has now been sounded by neutral observers, scholars, and even some Republicans who helped lay the groundwork for our current crisis. In June, more than 100 democracy scholars issued a chilling statement of concern, warning "our entire democracy is now at risk" due to Republican initiatives that are "transforming several states into political systems that no longer meet the minimum conditions for free and fair elections." Republican attempts to overturn the 2020 election, and their efforts to rig future elections "call into question whether the United States will remain a democracy," according to the scholars, who concluded "Our democracy is fundamentally at stake. History will judge what we do at this moment."⁸

Stuart Stevens, one of the most prominent Republican strategists of the last half century, recently echoed the scholars' warning: "I know a lot of these people. I worked with many in previous campaigns. If I could deliver one message to [sic] country it would be that 2020 and 1/6th was the beginning not the end. Do not underestimate the threat we face. These people do not plan to lose. If we don't fight, they win."⁹ Three years *before* the January 6 insurrection, David Frum, who served as an advisor to George W. Bush, issued a similar warning: "If conservatives become convinced that they cannot win democratically, they will not abandon conservatism. They will reject democracy."¹⁰

⁸ <https://www.newamerica.org/political-reform/statements/statement-of-concern/>

⁹ <https://twitter.com/stuartpsteven/status/1423487690671071232>

¹⁰ <https://www.theatlantic.com/politics/archive/2018/01/frum-trumpocracy/550685/>

No one can say they weren't warned.

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

The unprecedented machinations by which Republicans seized their current commanding 6-3 majority on the Court have been well-documented; I will not detail them further here. Nor will I spend more time rebutting farcical attempts to retcon a justification for the GOP's actions; their absurdity is transparent. More importantly, they are a distraction from what really matters: The undemocratic composition of the Supreme Court violates the principle that governments derive their legitimacy from the consent of the governed.

The Republican Party is America's minority party. It has lost the popular vote in seven of the last eight presidential elections, and fewer Americans identify as Republican than Democrat.¹¹ Despite being America's minority party and winning the popular vote for president only once in the last 30 years, Republicans have appointed 15 of the last 19 Supreme Court justices, including six of the nine current justices -- with five of those six having been appointed by Republicans who took office after *losing* the popular vote. One-third of the Court was appointed by a president that lost the popular vote, fired the FBI director investigating the assistance he received from a hostile foreign power, was impeached twice, and incited a deadly insurrection at the U.S. Capitol upon his defeat. For more than 50 years, a majority of Supreme Court justices have been appointed by Republican presidents. The GOP stranglehold on the Court is so thorough that two-thirds of all Americans weren't even born yet the last time a majority of the Court was appointed by Democratic presidents.¹² And the Court's current 6-3 Republican majority, coupled with Republican Party's stated intent to block Democratic presidents from filling any vacancies that arise, means that absent reform, Republicans are likely to continue to enjoy a majority on the Court for decades to come. Even if this minority party dominance of the Court was entirely the result of random chance rather than unprecedented norm-breaking, it would still represent an untenable condition in a democracy.

An undemocratic majority put in place via minority rule has behaved as we should expect. As Demand Justice co-founder Chris Kang recently told the Commission: "The court's most consistent victim is democracy itself."¹³

In *Citizens United v. FEC*, the Court invited a flood of unlimited corporate spending on elections, giving wealthy elites and corporations disproportionate influence over our government. The Court again sided with corporate donors in *Americans for Prosperity Foundation v. Bonta*, helping these donors wield unchecked secret influence. (It can't have hurt that Americans for Prosperity and other Koch-funded interest groups have spent lavishly in support of Republican efforts to remake the judiciary, including in support of the nominations of current Justices.) In *Janus v. AFSCME*, the Court struck a blow against the ability of workers to organize in unions, weakening workers' economic and political power. The assault on unions was furthered by the Court's recent ruling in *Cedar Point Nursery v. Hassid*, in which it sided with corporations and gutted a California regulation that required employers to allow union

¹¹ <https://news.gallup.com/poll/328310/party-average-2020-winds-similar-prior-years.aspx>

¹² <https://crooked.com/articles/supreme-court-untrustworthy/>

¹³ <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf>

organizers onto the premises. Conservative justices on the Roberts Court have worked in tandem with Republican lawmakers to undermine democracy and make it easier for the GOP to seize power against popular will. Last year, the Court even sided with a Republican effort to make it harder for Wisconsinites to vote in the middle of a pandemic.¹⁴ We have already seen that a Republican-dominated Supreme Court can brazenly determine the outcome of a presidential election: In 2000, five Republican-appointed justices prematurely stopped Florida's vote count with George W. Bush ahead by a mere 537 votes (one of the justices was appointed by Bush's own father). The Court's decision was so absurd that it insisted it not be used as precedent in future cases.

Worst of all, the Court has eviscerated the Voting Rights Act. Originally passed in 1965 and reauthorized and amended five times, the Voting Rights Act stood for a half century as a foundational pillar of American democracy, protecting the rights of racial minorities to participate in elections. For decades, the Voting Rights Act turned back persistent Republican efforts to prevent Black Americans from casting ballots. The VRA was so central to American democracy that even as it curtailed their attempts to rig elections in their favor,¹⁵ Republicans in Congress dared not oppose it: When the VRA was re-authorized in 2006, it passed the House of Representatives on a 390-33 vote, unanimously passed the Senate, and was signed by President George W. Bush.

Then John Roberts came along, eager to do the GOP's work. As a young lawyer in the Reagan Justice Department, Roberts had worked so tirelessly to undermine the Voting Rights Act, one of his colleagues later said, "John seemed like he always had it in for the Voting Rights Act. [...] I remember him being a zealot when it came to having fundamental suspicions about the Voting Rights Act's utility."¹⁶ By 2013, Roberts was chief justice of the Supreme Court, having been appointed by a Republican president who took office after losing the popular vote, and finally had the power to gut the VRA. Roberts wrote the decision in *Shelby County v. Holder*, taking a hatchet to key provisions of the Voting Rights Act under the absurd rationale that racism was no longer a barrier to voting. By a 5-4 vote, the unelected conservative majority on the Supreme Court gutted a law that had been in place for 48 years and had been reauthorized by overwhelming bipartisan majorities of America's elected legislature. The effects were as immediate as they were predictable: A flood of new Republican attempts to make it harder for people, particularly people of color, to vote, one coming within hours of Roberts' ruling in *Shelby County*.¹⁷ Did the consequences of the *Shelby County* decision make Roberts reconsider his contention that the VRA is no longer necessary? They did not: Earlier this year, Roberts and his fellow Supreme Court conservatives struck yet another blow to the Voting Rights Act in *Brnovich v. Democratic National Committee*.

As champions of voting rights respond to the Court's evisceration of the original VRA by working to pass a new one, it is essential to understand the Court's hostility to the very concept of voting rights. The John Lewis Voting Rights Act is an important bill; the congressional majority should do whatever is necessary to pass it. But the original Voting Rights Act was not gutted because of flaws current members of Congress can avoid; it was gutted because John Roberts and the Republican Party saw it as a barrier to their ability to govern via minority rule. The VRA was a pillar of American democracy; it stood for a half-century and was reauthorized

¹⁴ <https://crooked.com/articles/supreme-court-wisconsin/>

¹⁵ <https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052/>

¹⁶ <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/>

¹⁷ <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>

overwhelmingly by our duly-elected representatives, only to be cast aside by a Supreme Court that has repeatedly demonstrated its hostility to democracy. The cause of voting rights requires a new Voting Rights Act, and it requires a new judiciary.

The same is true of a host of other urgently-needed reforms that would strengthen our democracy: All are vulnerable to a Supreme Court that has been captured by a political party committed to establishing minority rule.

Should Congress enact laws to restore democracy — enfranchise U.S. citizens in its territories and D.C., explicitly combat the voter suppression laws cropping up across many conservative and battleground states, or alter the campaign finance laws allowing dark money to flood politics — the entrenched conservative Court can strike down any legislation that would threaten the Republican stranglehold on the country.¹⁸

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

As President Biden said just a few weeks ago: "We're facing the most significant test of our democracy since the Civil War. That's not hyperbole. Since the Civil War. The Confederates back then never breached the Capitol as insurrectionists did on January the 6th. I'm not saying this to alarm you; I'm saying this because you should be alarmed."¹⁹

We should be alarmed. And we must act.

The window to save democracy is closing

With a president and majorities in both chambers of Congress that are at least nominally supportive of democracy, there is currently a window in which democracy can be saved and strengthened -- but that window may soon close. And once closed, it may never reopen.

Republicans need to win control of only one chamber of Congress next year in order to thwart any effort to strengthen our democracy. With razor-thin margins in both the House and Senate, the Senate's structural bias in favor of small rural states, aggressive Republican gerrymandering of congressional districts in several states, and an avalanche of state laws intended to prevent people of color and others likely to support Democrats from voting (laws the Supreme Court paved the way for by gutting the Voting Rights Act), Republicans are well-positioned to capture at least one chamber of Congress in the November 2022 elections. But the governing window could close even sooner than that. The death of a single Democratic Senator -- not an uncommon occurrence even in non-pandemic times; seven senators died in office from 2007-2018 -- would hand Republicans at least temporary control of the Senate. Democratic control of the House is nearly as fragile.

¹⁸ <https://www.takebackthecourt.today/supreme-court-may-invalidate-hr1> and <https://www.takebackthecourt.today/supreme-court-may-invalidate-dc-statehood>

¹⁹ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/13/remarks-by-president-biden-on-protecting-the-sacred-constitutional-right-to-vote/>

If this governing window closes without significant reforms to preserve and strengthen democracy, including expansion of the Supreme Court, the opportunity may never arise again. The Senate's rural and small-state bias favors Republicans,²⁰ an imbalance that is projected to grow in the coming decades. By 2040, up to 70 percent of Americans are expected to live in 15 states, represented by only 30 Senators -- meaning the 30 percent of Americans who live in small states will be represented by 70 senators.²¹ This combination of structural overrepresentation of small rural states and demographic trends stacks the deck against Democrats attaining simultaneous control of the White House and both chambers of Congress. And that simultaneous control is essential: Much as we'd all prefer preserving and strengthening democracy to be a bipartisan project, we must recognize that Republican participation in such a project is unlikely -- and we must be willing to act anyway. It would be absurd to refuse to take steps necessary to preserve our democracy until those steps are supported by the very party that has made dismantling democracy in order to govern via minority rule its central project.

Here it should be noted that, absent reform, the current 6-3 conservative majority on the Supreme Court may be the most *balanced* court for the foreseeable future. In 2016, as we all know, Republicans refused to allow a Democratic president to fill a vacant Senate seat -- and threatened to hold open any vacancies for as long as a Democrat remained in the White House.²² Lest anyone think that was an aberration, the Senate Republican Leader is now threatening that, if Republicans gain control of the Senate, they will not allow President Biden to fill any vacancies that arise.²³ There is simply no reason to assume that any Republican Senate will ever again allow any Democratic president to fill a vacant Supreme Court seat. Republicans have made their intentions clear. If Democrats do not act on their current opportunity to add seats to the Court, they may never again get the chance to fill even the existing seats on the high Court.

Court expansion is necessary to save democracy and open the door for additional reforms

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

²⁰ <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/>

²¹ <https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/>

²² <https://www.npr.org/2016/11/03/500560120/senate-republicans-could-block-potential-clinton-supreme-court-nominees>

²³ <https://www.politico.com/news/2021/06/14/mcconnell-biden-scotus-494340>

But because of the political realities of our present Court, expansion is a necessary precursor to other reforms. None of the alternatives would immediately rebalance the Court, ending the illegitimate conservative majority that threatens to derail urgently needed democratic reforms and policy solutions. Without expanding the Court immediately to correct its extremity, other reforms may be struck down by the current Court or take too long to have a meaningful impact on its composition.

Proponents of voting rule modifications propose that Congress enact a law requiring a supermajority vote of 6-3 or 7-2 in certain cases, such as those interpreting the Constitution or striking down federal laws,²⁴ (though Republicans have already acquired a supermajority through illicit partisan court-packing). Partisan balancing proposals, such as a “5-5-5” plan, would give five seats each to the two major political parties and five to justices chosen unanimously (or nearly) by the other 10 justices, forcing compromise. Jurisdiction stripping statutes would mean Congress passes legislation depriving the Court of power to hear certain issues. Many reform advocates support a code of ethics for Supreme Court justices, similar to the codes of ethics that federal judges at the district and appellate level are required to follow. Term limits, whether achieved through a Constitutional amendment or through appellate rotation, are another popular reform.

But without first expanding the Court, all of these statutory reforms are likely to suffer from the same fatal flaw: judicial review by the very body they are meant to reform. There is significant debate in academic literature on the question of whether Congress may strip the Supreme Court of jurisdiction over certain cases,²⁵ and the ultimate resolution of this question would be left to the Court itself. The current composition of justices is unlikely to cede their power to decide important cases. Supermajority requirements would also likely be subject to challenge in the Supreme Court, and there is no guarantee that the 6-3 conservative majority would not strike it down to further entrench their hold on the judiciary.²⁶ The supermajority reform also creates an additional complication: lower court rulings would be left in place if a coalition on the Court could not form a supermajority in favor of reversal, giving the Trump-packed lower courts greater power without a Supreme Court check. Likewise, partisan balancing proposals would likely be struck down by the Supreme Court in the ample window between Congressional passage of the statute and the implementation of the new system. A code of ethics might be expected to survive any reticence by the justices, but it alone can not correct the gross partisan imbalance of the present Court.

Term limits, too, could be struck down by the current Court if they prove unwilling to cede their power, or would otherwise take far too long to have a meaningful impact on the composition of the Court. Because the constitutional amendment process is long and politically infeasible, most term limit proposals focus on statutory solutions that would rotate judges onto the Supreme Court from the appellate level at fixed intervals and rotate them back down to the appellate level when their Supreme Court term ends. Restructuring lifetime appointments in such a manner may increase accountability and partisan balance of Supreme Court Justices, but the statute itself would be subject to Supreme Court approval. And even if term limits could be effectively implemented tomorrow, term limits alone would leave in place the stolen conservative majority for the foreseeable future.

²⁴ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288958

²⁵ <https://www.virginialawreview.org/wp-content/uploads/2020/12/1043.pdf> and <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2018/03/13182055/The-Origins-and-Fragility-of-Judicial-Independence.pdf>

²⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288958

Expansion remains the only reform that can rebalance the current composition of the Court and that can be implemented without being subjected to a Supreme Court challenge by the current Court, making it a prerequisite for other valuable reforms to be instituted later. Scholars have offered a range of valuable judicial reform options to restore judicial independence, but all such options except Court expansion cannot be implemented given the current political realities and the power-hungry justices that sit upon the present conservative Court.

Conclusion

American democracy is in grave danger of collapsing under sustained, desperate assault from a political faction that seeks to impose minority rule on the nation. This faction's illegitimate, undemocratic vice grip on the Supreme Court is among its most powerful weapons, and one it wields ruthlessly. Like it or not, those who value democracy are in a race against those who are trying to dismantle it.

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

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

Of course adding four seats to the Supreme Court and immediately filling them, wresting control of the Court from the narrow political faction that has dominated it for decades, would be a bold and controversial move. That is exactly what our current crisis demands. We would all prefer democracy reforms be implemented with bipartisan support in Congress. But it is absurd to expect that a political party that has made the destruction of democracy in order to govern via minority rule its central project will join us in protecting and expanding democracy. Banks don't expect bank robbers to help them design an impenetrable safe, and we shouldn't expect Republicans to help thwart the Republican assault on democracy. Nor should we refuse to do it without them. We must instead play what Syracuse University professor Thomas Keck describes as "constitutional hardball in service of democratic preservation."²⁷

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

²⁷ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476889