Comments of the American Civil Liberties Union on Supreme Court Reform

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Bob Bauer and Cristina M. Rodríguez, Co-Chairs
Presidential Commission on the Supreme Court of the United States
The White House
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Dear Commissioners Bauer Rodríguez:

Thank you for inviting the American Civil Liberties Union (ACLU) to offer comments for your commission evaluating proposals for reform of the Supreme Court. The ACLU, founded in 1920, has devoted more than one hundred years to advocating in defense of civil rights and civil liberties. In that capacity, it has appeared before the Supreme Court, either as counsel or amicus, in many of the nation's most important constitutional rights decisions, including *Gitlow v. New York, Whitney v. California*, *Powell v. Alabama*, *Hague v. CIO*, *West Virginia v. Barnette*, *Shelley v. Kramer*, *Mapp v. Ohio*, *Gideon v. Wainwright*, *New York Times v. Sullivan*, *Miranda v. Arizona*, *Brandenburg v. Ohio*, *Tinker v. Des Moines Indep. School District*, *Goldberg v. Kelly*, *Cohen v. California*, *Roe v. Wade*, *Buckley v. Valeo*, *ACLU v. Reno*, and more recently, *Bostock v. Clayton County*, and *Mahanoy Area School Dist. v. B.L.* The ACLU appears more often in the Supreme Court than any other nongovernmental organization.

Because so many different reforms have been proposed, our comments are addressed to the larger principles that we believe should govern assessment of any particular reform proposals. These principles are premised on our understanding that the federal judiciary serves as the primary guarantor of the Bill of Rights. Pursuant to the Constitution, the Supreme Court has the authority to invalidate state and federal law on constitutional grounds. The justices were granted life tenure to insulate them from political pressures and permit them to serve as a countermajoritarian check on the political branches. This independence is especially important when it comes to civil liberties, because those in

need of protection will virtually always be unable protect themselves through the political process: dissenters, persons accused of crimes, religious minorities, and members of racial and ethnic minority groups. The Supreme Court serves one of its highest functions when it protects civil liberties. To do so, it must be able to withstand political and partisan pressures, because protecting civil liberties and civil rights will often require rejecting or restraining the actions of political officials or bodies responding to majoritarian sentiment.

For these reasons, the ACLU is as a general matter skeptical of proposals for court reform that would risk further politicizing the Court or the processes for the selection of justices, such as proposals to increase the Court's size. We support proposals for reform that would increase the legitimacy of the Court by depoliticizing its selection, and by ensuring that its composition is both excellent and broadly representative of the nation. And we support reform proposals that promote accountability for the justices and the Court.

The ACLU believes the nomination and appointment of federal judges, including Supreme Court justices, should be structured to minimize partisan, strategic behavior. Consistency and respect for the rule of law are essential norms, and derogation from these norms undermines the legitimacy of the judiciary. In addition, judges should be seen as fair, neutral, and broadly representative of society. Their decisionmaking process should be transparent. To protect the integrity and legitimacy of the federal judiciary, the ACLU believes the following principles should guide any assessment of reform proposals.

1. The federal judicial nomination and appointment process should be structured to promote excellence and an equitable, inclusive, and diverse judiciary. Priority should be placed on identifying and selecting highly qualified candidates from underserved or marginalized communities. Consideration should also be given to candidates with diverse legal backgrounds and careers.

2. Presidents should appoint s bipartisan commission to identify potential candidates for Supreme Court nominations. Such commissions should meet on a regular basis to identify a pool of highly qualified potential candidates. While nomination is the President's prerogative, the President should give high priority to any candidates recommended by the bipartisan commissions.

3. Once candidates have been nominated by the President, the Senate has a constitutional responsibility to consider the candidates and vote

on their nominations. As part of this process, the Senate has an obligation to undertake a thorough examination of nominees' qualifications, including their views on the function and role of the judiciary in protecting civil liberties and constitutional rights. The Senate should develop a nonpartisan and transparent procedure that ensures consistent treatment of nominees regardless of which political party holds the Senate majority or leads the Executive Branch.

4. Fairness, equity, and respect for the judiciary's role in protecting constitutional rights and civil liberties are essential criteria for assessing potential changes to the structure of the federal judiciary. Any changes should be nonpartisan because the judiciary's independence from politics enables it to better protect the rights of marginalized groups.

5. While the Constitution affords life tenure to federal judges, term limits may be appropriate for the Supreme Court given its unique role in our constitutional system, and the much longer lifespans of justices today. Whether term limits could be imposed consistent with the constitutional requirements of life tenure, if justices were permitted to serve senior status for life once their term expired, is beyond the scope of these comments. But any term limits imposed should be sufficiently long to preserve judicial independence, should be implemented consistent with the Constitution, and should be structured to avoid strategic manipulation by political actors. Term limits should be structured in a manner that reduces the stakes for any particular nomination and contributes to a depoliticization of the nomination and confirmation process.

6. While the number of justices on the Supreme Court has fluctuated throughout history, the Court has been comprised of nine justices since 1869. Decisions to change the size of the Court should be structured in a manner that reduces the stakes for any particular nomination and contributes to a depoliticization of the nomination and confirmation process. Proposals by one party to increase the size of the Court when it happens to enjoy sufficient political power to do so should be viewed skeptically, as they are likely to spark a reciprocal response from the other party and further politicize the Court.

7. Judicial proceedings should be transparent, and legal decisions should indicate how judges voted and their reasoning. The use of accelerated procedures by the Supreme Court, commonly referred to as the "shadow docket," should be limited to truly exigent circumstances,

and the Court should be obliged to provide reasons for its decisions even when acting on an emergency or expedited basis.

8. The federal judiciary, including the Supreme Court, should be subject to consistent and transparent rules on conflicts of interest and recusal.

We hope these high-level principles are of assistance to the Commission as it considers the implications of various proposals for Supreme Court reform.

Sincerely,

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