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Uniting the bench and bar to advance the rule of law through education, leadership, and nonpartisan advocacy
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COMMENTS OF THE FEDERAL BAR ASSOCIATION TO THE COMMISSION ON THE SUPREME COURT OF THE UNITED STATES

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The Federal Bar Association (FBA) appreciates the opportunity to share its unique and nonpartisan insight with the Commission pursuant to Executive Order 14023, which instructed the Commission to seek public comments on the debate regarding the role and operation of the Supreme Court in our constitutional system and the functioning of the current judicial nominating process.

FBA encourages the Commission to study the role of the Supreme Court in our legal system in light of the fundamental constitutional principles identified below. Most simply, we encourage the Commission to ask: (1) would a proposed change improve the administration of justice; (2) who has the power to make this change; and (3) how should that power be used?

FBA's Perspective on the Supreme Court's Role and Operation

With more than 15,000 members, including more than 1,800 federal judges, the FBA is the foremost national bar association devoted to strengthening the federal legal system and the administration of justice in the federal courts. It is focused on the interests of the federal practitioner, both public and private, the federal judiciary, and the public. With over a century of public engagement FBA represents a diverse membership of attorneys engaged in federal civil and criminal practice, from small to large firms, corporations, and federal agencies. FBA members have testified before Congressional committees and other public bodies on a variety of issues.

This unique perspective of an organization of legal professionals focused solely on the successful functioning of the federal courts means FBA's interests are virtually identical with those of the courts, the Congress, and those in and out of government concerned with the administration

of justice. These interests obviously extend to seeing that the Supreme Court continues to play its critical role in our constitutional system, safeguarded from changes driven principally by prevailing political winds.

Constitutional Principles Should Guide Analysis of Supreme Court Reform Proposals

The U.S. Constitution and its fundamental principles should frame the consideration of any proposed changes to the work of the Supreme Court. The Commission should view each proposal in terms of three essential principles, in particular: (1) separation of powers and checks and balances; (2) the rule of law and deference to an independent judiciary; and (3) popular sovereignty. The application of each of these constitutional principles is more fully articulated below.

1. Separation of Powers and Checks and Balances

Constitutional principles of separation of powers and the related concept of checks and balances among the three co-equal branches of the federal government militate against any changes to one of the branches motivated principally by short term, political and partisan ambitions. When state assemblies debated ratification of the U.S. Constitution, both those supporting ratification and those opposing it agreed with James Madison's warning in Federalist 47 that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Madison's solution for preventing such an accumulation of power is provided in Federalist 51: "[C]ontriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Or, as he put more succinctly later in the same essay, "[a]mbition must be made to counteract ambition."

This separation of powers was never meant to be absolute. In Federalist 48 Madison argued that "unless these departments be so far connected and blended, as to give each a constitutional control over the others, the degree of separation (required) as essential to a free government, can never in practice, be duly maintained." There must be, as former Associate Justice Robert H. Jackson artfully stated, "separateness but interdependence, autonomy but reciprocity."

As a result, few question that Congress has the authority to alter the size of the High Court bench, as it has done several times in U.S. history. But when shall it be done and by whom? In 1800, John Adams's Federalist allies in Congress reduced the number of justices on the Court from six to five, to deny the incoming Jefferson administration a chance to appoint a politically friendly justice. Jefferson's Democratic-Republican party quickly increased the number back to six when it came to power and then added a seventh justice in 1807. Other changes to the bench were made in the 1840s and 1860s, often for immediate, partisan reasons.

The most well-known of the attempted expansions of the Court by a President was Franklin D. Roosevelt's attempt to add justices in 1937. Not only did the attempt fail in Congress, but the Senate Judiciary Committee's final report, written by a majority of Roosevelt's own party, called the proposal an "attempt to impose upon the courts a course of action, a line of decision which, without that force, without that imposition, the judiciary might not adopt."

The lessons to be gleaned from this experience, we suggest, are that changes made to the composition of the Court for partisan reasons can be easily undone for partisan reasons, and that doing so has never resolved the underlying political disagreements. Mindful of this history, and the constitutional principles embraced by the Founders, FBA recommends that the Commission's analysis of any proposed changes to the number of justices on the Supreme Court should focus solely on improved judicial administration and the delivery of justice.

2. Deference to An Independent Federal Judiciary and the Rule of Law

As essential to the constitutional structure created by the Founders as it was to assign separate powers to different departments of government, equally crucial was the ability of each of those departments to successfully carry out its assigned responsibilities. Chief Justice John Marshall famously declared in writing his opinion in *Marbury v. Madison* that it is the province and duty of the courts to say what the law is. But saying it and having others abide by it are different challenges.

When Alexander Hamilton wrote in Federalist 78 that the judiciary "may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend on the aid of the executive arm for the efficacy of its judgments" he was noting both its greatest weakness and sole power; the power of the courts, including the Supreme Court, to bind partisan actors who may possess the power of "the sword or the purse" to a decision contrary to their original aims.

The independence of the courts of justice is indispensable to a limited constitution and the rule of law. Parties before the Court will not long abide by its rulings if they do not believe that it can ultimately be trusted to be non-partisan, unintimidated, and unbiased. This is the reason Article III of the U.S. Constitution guarantees that federal judges both hold "their Offices during Good Behavior" (i.e., lifetime appointments) and "receive for their Services, a Compensation, which will not be diminished during their Continuance in Office."

But these constitutional protections would be irrelevant if justices were seen to be appointed to achieve a partisan balance on the Court or for other political purposes. All decisions written and joined by such jurists would be seen as having been reached for the purpose of serving an ideological goal, not justice. And no amount of pointing out what Madison in Federalist 48 called "a mere demarcation on parchment of the constitutional limits of the several departments" of government would relieve concerns that the non-partisan and unbiased nature of the Court has been breached.

3. Popular Sovereignty

Although the Constitution established a republican government of representative, not direct, democracy, it should be remembered that, as Madison explained in Federalist 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived." The process established in Article VII of the Constitution by which it was to be ratified and brought into existence, by ordinary citizens meeting in state conventions, was meant to underline this truth.

The Constitution ratified by those conventions made no mention of the size of the Supreme Court bench, and it, at least by implication, gives power to Congress to make that decision. For this reason it could be argued that popular sovereignty plays no role in determining the number of justices on the Court, that it is purely a matter of legislative authority. But the FBA believes this would be shortsighted.

The Constitution that those conventions, that those citizens, voted to ratify and give legal effect promised in many parts, and certainly in Article III, to establish a judiciary that would do unbiased justice. The protections already mentioned of lifetime appointments and undiminished compensation promised a judiciary that would not be intimidated by political pressures. Criminal cases tried by jury in the place where the crimes were committed promised judgment by one's

peers and not a party with other interests inimical to the defendant. Even conviction for treason requiring testimony of "two Witnesses to the same overt Act, or on Confession in open Court" meant those suspected of the ultimate criminal act would be given legal protection.

Nothing in the Constitution ratified by the people in convention promised a Supreme Court with an ideological balance representing whatever the political beliefs of the moment might be. It was a system of justice being created. Political disputes were left to the other two branches of the new government.

We recognize the wisdom of George Washington:

> "If, *in the opinion of the people*, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." (Emphasis added.)

The FBA recommends that our nation honor this sound constitutional principle, rooted in popular sovereignty, in accord with the counsel of our nation's indispensable Founder.

Conclusion

The history of the federal courts has been one of evolution and experimentation. Numerous innovations have been tried to improve the administration of justice, such as senior judge status, inter- and intra-circuit judicial assignments, special courts, and the like. These adaptations have sustained and improved judicial administration, while adhering to the Constitution and its promise of unbiased justice through the courts. The same creativity may be profitably applied to the Supreme Court, which has changed comparatively little since its creation.[1] But such changes should honor fundamental constitutional principles and flow from the pursuit of better judicial administration in accord with the will of the American people, not from the use of the Court as a partisan instrument.

[1] See attached appendix of changes to the U.S. Supreme Court that have been proposed. This matrix is provided as a convenience to the Commission and identifies constitutional considerations for the current proposals that generally may be divided into three categories: (1) Supreme Court composition and tenure of Justices; (2) Supreme Court jurisdiction; and (3) Supreme Court internal administration and procedures.

APPENDIX
REFORM PROPOSALS: PATHWAYS AND CONSTITUTIONAL CONSIDERATIONS

Federal Bar Association
Voice of the Federal Bar and Bench

Focus of Reform	Proposed Change	Pathway for Change	Constitutional Considerations
Supreme Court Composition and Tenure	**Increase Number of Justices**	Congressional Legislation or Constitutional Amendment	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Decrease Number of Justices	Congressional Legislation or Constitutional Amendment	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	18-Year Terms (may be combined with the proposal below)	Constitutional Amendment	"Good Behavior" Clause. U.S. Const. art. III, § 1.
	Each President During Term Chooses Two Justices	Congressional Legislation or Constitutional Amendment	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Age Limits for Justices	Constitutional Amendment	"Good Behavior" Clause. U.S. Const. art. III, § 1.
	Increase Pensions (to encourage retirement)	Congressional Legislation	Popular Sovereignty.
	Lottery for Selecting Justices	Constitutional Amendment	"Presidential Appointments" Clause. U.S. Const. art. II, § 2.
	Bipartisan Commission for Selecting Judges	Constitutional Amendment	"Presidential Appointments" Clause. U.S. Const. art. II, § 2. Popular Sovereignty.
	Re-instate Circuit Rides (to encourage retirement)	Congressional Legislation or Constitutional Amendment	Separation of Powers. Popular Sovereignty.

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Supreme Court Jurisdiction	**Removing Supreme Court Jurisdiction (i.e., "Jurisdiction Stripping")**	Constitutional Amendment or Congressional Legislation for exceptions to Appellate Jurisdiction	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Supermajority Voting Requirements for Unconstitutional Laws	Constitutional Amendment or Supreme Court Rule	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Separation of Powers.
	Delimit Appellate Jurisdiction	Constitutional Amendment or Congressional Legislation for fixed limitations to Appellate Jurisdiction	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Changing Panels From Federal Appellate Court Judges	Constitutional Amendment	"Presidential Appointments" Clause. U.S. Const. art. II, § 2. Popular Sovereignty.
	Limit Statutory Decisions (i.e., Congress overrules certain Supreme Court statutory interpretation)	Constitutional Amendment or Congressional Legislation for exceptions to Appellate Jurisdiction	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Expanding Jurisdiction to Include Review of Random Cases from Final Judgments of Lower Courts	Congressional Legislation or Constitutional Amendment	"Judicial Power" Clause. U.S. Const. art. III, § 2. Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Create a New Court for Certain Cases	Constitutional Amendment or Congressional Legislation for exceptions to Appellate Jurisdiction	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Popular Sovereignty.
	Mandatory Review Over Death Penalty Cases	Congressional Legislation or Constitutional Amendment	"Judicial Power" Clause. U.S. Const. art. III, § 2. Separation of Powers.

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Supreme Court Internal Administration and Procedures	**Eliminate Supreme Court Power to Choose Its Cases**	Congressional Legislation (i.e. amend the Certiorari Act) or Constitutional Amendment	"Judicial Power" and "Appellate Jurisdiction" Clauses. U.S. Const. art. III, § 2. Popular Sovereignty.
	New Ethical Rules for Greater Court Transparency Regarding Recusal	Supreme Court Rule or Constitutional Amendment*	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	New Ethical Rules for Greater Court Transparency re Gifts, Teaching, Travel, etc.	Supreme Court Rule or Constitutional Amendment*	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Special Rules for Emergency Motions	Supreme Court Rule or Constitutional Amendment*	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	New Rules Regarding How Court Appoints Counsel	Supreme Court Rule or Constitutional Amendment*	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.
	Require Disclosure of Funding for Amicus Briefs	Supreme Court Rule or Constitutional Amendment*	Separation of Powers. Judicial Independence & Rule of Law. Popular Sovereignty.

*Congressional Legislation is possible, but the Supreme Court would decide constitutionality of the change.