

Written Testimony

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Chairpersons Bauer and Rodríguez and distinguished members of this Commission, thank you for inviting me to be here today.

I am a Professor at the John F. Kennedy School of Government at Harvard University. I have a Ph.D. in Political Science, an A.M. in Statistics, and an A.B. in Economics, all from Harvard University, and a J.D. from Stanford Law School. I previously served as a law clerk for the Hon. Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. My research is quantitative in its approach and focuses in part on the politics of the nation's courts and of the legal profession. I have published 34 papers and two books on these and related topics.

I have been asked to comment on “The Court’s Role in our Constitutional System,” which I take as an invitation to consider politicization surrounding the Court and its appointments, which has been increasing over time. To this end, there is a sophisticated and growing quantitative literature documenting possible avenues of U.S. Supreme Court reform and their consequences.

In what follows, I will devote attention to what this literature tells us about two different reform approaches: (1) instituting term limits for Supreme Court justices and (2) expanding the size of the Supreme Court. I will also discuss combinations of term limits and expansions.

*Special thanks to Adam Chilton, Daniel Epps, Stephen Jessee, Neil Malhotra, and Kyle Rozema, who have agreed to the inclusion of joint research findings in this written testimony. The viewpoints expressed here are my own.

I will leave to my law professor colleagues the discussion of the legality of these reforms. I will instead focus on the pragmatic, big-picture consequences associated with these two simple reform ideas, juxtaposing them with the status quo of a nine-member Court with justices serving lifetime appointments. Ultimately, for the reasons I discuss below, I strongly encourage this Commission to consider term limits and, possibly, expansion.

Need for Supreme Court Reform

Recent headlines have observed that the U.S. Supreme Court is more popular than Congress and the executive (e.g, Frankovic, 2020). But this extremely low bar is not particularly reassuring. To give some context, in August 2002, 29% of polled Americans disapproved of the Court; 18 years later, in August of 2020, that number was 43%, an increase of almost 50% (Gallup Organization, 2021). Likewise, in a recent Reuters/Ipsos April 2021 poll, about 50% of Americans said they have “none” or only “a little” confidence in the decisions made by the Supreme Court (Ipsos, 2021). Both are indicative of a steady increase in disapproval of the Court and skepticism about its potential rulings, despite some recent high ratings.

In addition, there is evidence that disapproval now turns on partisan identity, with Democrats more likely in recent years to view the Court with skepticism. In 2019, for example, Democrats’ approval of the Court was 35 percentage points lower than Republicans’ (Gallup Organization, 2020). This trend has echoed scholarly findings that public evaluations of the Court are increasingly filtered through partisan considerations (e.g., Christenson and Glick, 2015). Although the partisan divide has lessened somewhat in the past two years, future trends will largely depend on the current Court’s rulings.

That disapproval of the Supreme Court has steadily risen in the last two decades should not be so surprising. Justices are staying on the Court longer, and appointments to the Court have increasingly taken on a strongly politicized tone. Indeed, the unpredictable nature of vacancies – often tied to the deaths of beloved public figures such as Justice Ginsburg and Justice Scalia – combined with the Court’s small size, has meant that every new vacancy sends the nation into political paralysis. In addition, any tendency of appointments from one party to retire strategically more than the other can lead to partisan imbalance, which divorces the composition of the Court from political outcomes and public preferences. Over time, this can also damage the Court’s standing among members of the public and political elites, a tendency that could further partisan divides in what people think about the Court.

Benefits of Term Limits

I would submit that the goal of reform should be to reduce partisan conflict and politicization of the appointments process. Such a goal would also have the effect of reducing partisan divides in approval of the Court and improve the Court’s reputation – if not entirely rehabilitate it – as an institution that is not driven exclusively by partisan considerations.

To this end, I first consider 18-year term limits.¹ Term limits are simple in design, strongly supported by the American public and by many scholars and Court observers, and in use by our global democratic peers.² They also address many incentives that over time could worsen the politicization of Supreme Court appointments and perceptions of the Court. I address these in turn.

First, term limits for Supreme Court justices are well supported by the American public, more so than, for example, expanding the size of the Court. In an April 2021 poll of the issues before the Supreme Court that I conduct annually with Neil Malhotra (Stanford Graduate School of Business) and Steven Jessee (University of Texas-Austin), we found that 51% of Americans agree with the idea that justices should serve 18-year terms, compared to only 18% who disagree (Jessee, Malhotra and Sen, 2021). As another example, an April 2021 Reuters/Ipsos poll found that 63% of Americans favor “term or age limits” for justices, compared to just 22% who opposed them (Ipsos, 2021).

Term limits enjoy support from both Republicans and Democrats. For example, an October 2019 poll from Marquette University found that 72% of Americans support term limits, with no discernible differences between Republicans and Democrats in terms of their support (Golde, 2019). The Reuters/Ipsos poll from April 2021 cited above finds that a solid majority of both Republicans and Democrats (59% and 71%, respectively) supports term limits. Other polls have found similar bipartisan support (e.g., Rasmussen Reports, 2021).

Term limits are supported not just by the public but also by non-partisan organizations, including the American Academy of Arts and Sciences.³ A number of law professors and social scientists, too, have written in favor of some type of term limits for Supreme Court justices (Oliver, 1986; Calabresi and Lindgren, 2005; DiTullio and Schochet, 2004; Carrington and Cramton, 2006; Chemerinsky, 2015). Others have recommended plans that carry the logic of term limits into hybrid proposals (e.g., Hemel, 2021), while others have announced support for term limits over social media and other platforms (e.g., Kerr, 2016). Related political science research has found that term limits “would increase Court responsiveness to electoral outcomes, lower the Court’s age profile and dramatically increase turnover” (Bailey and Yoon, 2011, p. 294).⁴

¹18-year term limits have garnered the most attention, but other year terms are also possible. With a nine-member Supreme Court, “staggered 9-year, 12-year, 18-year, and 36-year terms lead to four, three, two, and one appointment per term, respectively, assuming no unexpected deaths or retirements” (Chilton et al., 2022, fn. 59).

²I leave to law school colleagues to discuss the constitutionality of term limits. However, I do note that term limits can be creatively introduced in tandem with Supreme Court expansion by shifting justices to senior status. Other laudable recommendations include “decoupling” appointments and retirements by periodically adding new seats on a fixed schedule similar to the schedule of term limits regardless of the timing of retirements (e.g., Hemel, 2021).

³<https://www.amacad.org/news/make-supreme-court-less-political>.

⁴See, however, Sundby and Sherry (2019), which uses historical simulations in support of the argument that 18-year term limits could increase turnover and therefore generate more doctrinal instability.

Second, term limits are the norm in peer countries and across nearly all state high courts.⁵ Indeed, every major democracy has employed some sort of fixed term limits for those serving on their nation’s highest courts (Calabresi and Lindgren, 2005, pp. 819–820). That the U.S. does not could perhaps be construed as a case of enlightened American exceptionalism, but all signs point to newer democracies wisely adapting institutions to take into account longer lifespans and increased judicial professionalization (the latter of which has decreased the tendency of justices to pursue other post-Court career paths). In this country, the justices who were appointed between 1937 and 1950 served an average of 15.7 years, but the justices appointed since 1990 (who have retired) have served an average of 26.3 years (Chilton et al., 2022, p. 13). This means that American justices’ tenures have increased by about 70% in the last century, putting further distance between the Framers’ likely intent and actual Supreme Court service.

Third, and perhaps most importantly, term limits have the potential to reduce the political incentives that have led to high-stakes, highly politicized appointments – the kind that could damage the Court’s reputation over time. Quite simply, instituting term limits allows alternating presidents to each have a say on the Court’s composition, ensuring more regularity and predictability in appointments. Indeed, because most term limits proposals stagger justice terms, all presidential terms would see two appointments (depending on the exact proposal).

This would automatically eliminate some partisan gamesmanship, such as keeping seats open during election years, and would neutralize incentives for “strategic retirements,” or the practice of justices retiring only when a co-partisan occupies the White House.⁶ And by staggering nominations and bringing predictability to the nominations process, term limits could generally de-escalate the partisan frenzy that currently surrounds each nomination.

Term limits also have other benefits in terms of reducing partisan appearances. Here, I draw attention to a forthcoming *Southern California Law Review* article, Chilton et al. (2022), co-authored with Adam Chilton (University of Chicago Law School), Dan Epps (Washington University School of Law), and Kyle Rozema (Washington University School of Law). The paper evaluates a variety of different term limits proposals, showing that subtle differences – such as whether current justices are exempted – can have substantive consequences down the road.

For purposes of evaluation, the article uses historical political patterns as inputs to computer simulations to project what the Court might look like under various term limits proposals. The details behind the simulations turn on simple yet justifiable assumptions, and we account for uncertainty by conducting thousands of simulations using different input parameters and

⁵Only one state, Rhode Island, has lifetime tenure for its highest court (Calabresi and Lindgren, 2005, fn. 3).

⁶Of the justices who retired since 1937, 17 of them (or 59%) shared partisanship with the sitting president (Chilton et al., 2022, p. 19).

starting assumptions. As for the term limits proposals, we analyze 18-year term limits, the focus of most proposals.

As we show in the paper, the use of term limits would likely reduce the occurrence of extreme partisan wings on the Court compared to the status quo (again, if we assume that basic patterns in American politics hold). We can see this in Figure 11 of Chilton et al. (2022), which I have included in this testimony and which shows the prevalence of what we call *partisan imbalance* – or six or more Supreme Court seats being filled by presidents of a single party. Such imbalance would likely mean that the Court’s median member will be out of step with the median American voter.

The dotted horizontal line in the figure represents the observed historical occurrence of extreme partisan imbalance. Substantively, this represents the fact that 59.5% of years from 1937 to 2020 (or 50 out of 84 years) saw a Court where at least six justices were appointed by presidents of the same party. By contrast, a simulation analysis of different plans (lined up on the X axis) shows that all would have a median number of years of partisan imbalance that is less than this status quo. Substantively, then, the term limit plans would most of the time (though not always, given uncertainty) result in a Court that is less likely to be tilted heavily toward one party or another. I think this would be a good thing for the country, and it would likely put the Court’s median in closer correspondence with the average American voter.

Fourth, term limits have the potential to counter other incentives that have brought partisan gamesmanship into the selection of nominees. For example, observers have identified a pattern known as “ideological drift,” confirmed by social scientists (Epstein et al., 2007), in which some justices slowly deviate away from their original policy preferences. While not universal, worry over intellectual drift has no doubt led to the use of ideological or professional signaling in the confirmation process; news reporting suggests that individuals deemed too uncertain in their future voting on important issues have been asked to withdraw from consideration (e.g., Markels, 2020). Term limits would reduce the risks associated with ideological drift because there would be less time for individuals to “drift” in this way (Sharma and Glennon, 2013), reducing the stakes for each individual confirmation. Term limits would also lessen the pressure for party leaders to seek out younger, more intellectually rigid (and therefore likely more divisive) individuals.

Lastly, I wish to address some potential criticisms of term limits. The first concerns constitutional hardball in the U.S. Senate. If one party simply refuses to confirm the nominees of the opposing party, then the benefits of alternating, term-limited appointments may be undermined. To assess this potential risk, Chilton et al. (2022, pp. 49-50) analyzes the share of appointments under divided government that would be made in the first or last years of a presidential term – the years where there would be the lowest and highest chance of partisan obstruction, respectively. (Several popular term-limits plans would only yield

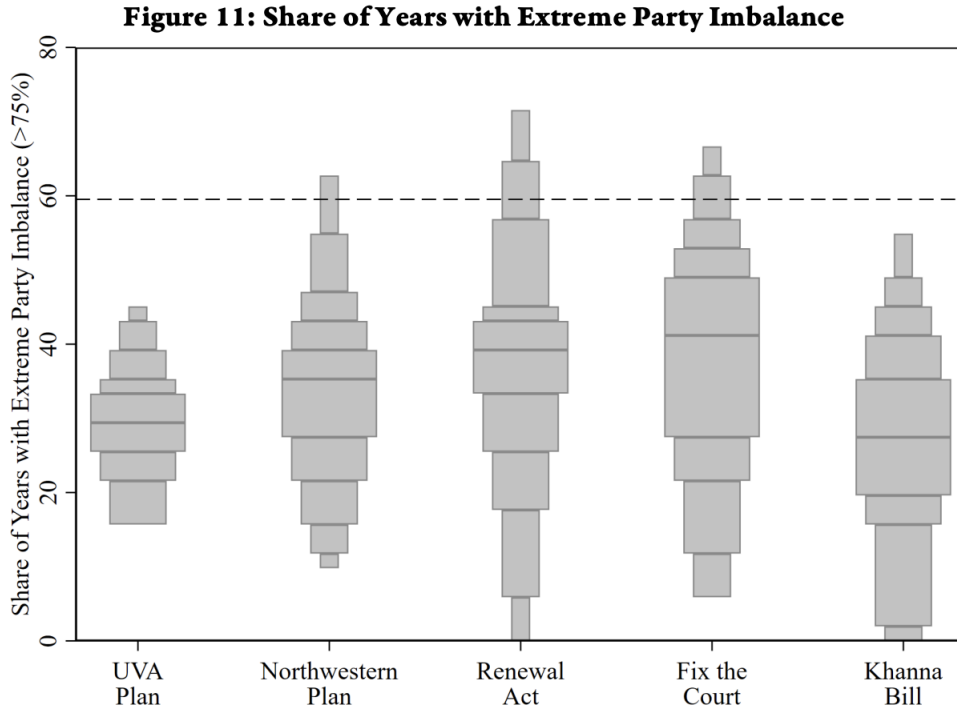


Figure 1: Letter-value plot showing the distribution of years with extreme party imbalance on the Supreme Court, defined as more than six seats being held by appointments of one party. Dotted horizontal line represents the historical status quo of 59.5 percent. X-axis labels denote different term limits proposals, discussed in further detail in Chilton et al. (2022). For all plans, the median is less than 59.5 percent, the historical benchmark. Source: Chilton et al. (2022).

vacancies in the first and third years of a presidential term.) Looking over all of the plans, the largest share of vacancies in divided government will likely occur in the first year of presidential terms (see the paper’s Figure 14). This would mean fewer unconfirmed seats given constitutional hardball, which itself would be lessened.

A second concern is that term limits will incentivize corrupt practices for justices about to exit Supreme Court service. Indeed, it is possible that justices eyeing lucrative or prestigious post-Court jobs would be tempted to cast votes in favor of a potential future employer or political donor – a very distasteful consideration, but one that must be considered. Chilton et al. (2022, pp. 54-55) analyzes this in terms of whether a justice who is about to be “term limited” would frequently be in the delicate pivotal position as part of a 5-4 party-aligned coalition. (The mere fact of a justice being in this pivotal position does not necessarily mean he or she would engage in this kind of corruption, but it does raise the possibility that such corruption would be consequential to a case’s outcome and, therefore, particularly harmful.) Using simulations, we estimate that about 42% of exits under term limits would happen with a justice being part of a five-justice partisan majority block. I consider this a

strong and somewhat remote upper bound on the risk. Not all cases break perfectly along partisan lines, and not all cases are decided on a 5-4 basis. However, the commission might consider reform that prevents justices from joining companies or governmental entities that have litigated cases before the Court in the preceding term.

A third possible concern – and the weakest in my view – is that term limits will leave the Supreme Court exposed to less qualified candidates. Similar concerns have been raised by political scientists regarding term limits for legislative office (e.g., Kousser, 2005). The criticisms in that literature turn in part on legislators inexperienced in lawmaking having to rely on lobbyists for the technical knowledge necessary for crafting highly detailed legislation. However, in my view, this is far less of a concern for appellate judges – themselves experts in appellate litigation. Influence by political contributions to the justices is not a factor, and the process of “lobbying” the Court is formalized by way of briefs.

It is possible that term limits may reduce the “prestige factor” of serving on the Court, but, as I noted, making each nomination less high-stakes would help depoliticize the appointments process and, therefore, probably be better for the country. In addition, term limits would lessen the incentives to appoint younger and younger justices, who would presumably be less experienced. Lastly, the deep bench of potential candidates ($n = 179$, if we consider all federal appeals court judgeships) makes this not much of a concern.

Impact of Expansion on the Court

For the reasons I stated, I think term limits are a well-supported type of reform that would have salubrious impacts on trends in Court politicization. However, I also consider a second class of reform – increasing the size of the Court beyond nine members. Court expansion proposals address some immediate problems with accountability and partisan imbalance but perhaps do not go as far as term limits in neutralizing the underlying incentives that have led to strategic retirements and increased politicization around nominations. However, Court expansion can be used in tandem with the logic of term limits as part of a strategy that decouples retirements and appointments (for example as suggested by Hemel, 2021).

That said, simply expanding the size of the Supreme Court is unpopular among the public. According to the public opinion survey that I conducted with Malhotra and Jessee about Supreme Court cases, about 32% of Americans agreed with expanding the Court, compared to the 42% who disagreed (Jessee, Malhotra and Sen, 2021). An April 2021 poll by Morning Consult similarly found that about 26% of Americans believe that “Congress should pass a law allowing more than nine justices to serve on the Supreme Court,” compared to about 46% percent who said that “it should allow only nine justices to serve” (Easley, 2021).

Unsurprisingly, the gap in support between Republicans and Democrats on this issue can be wide, depending on question wording. For example, the recent April 2021 Reuters/Ipsos poll that I discussed above found that 57% of Democrats favor “[i]ncreasing the size of the

Supreme Court from 9 to 13 justices” but that only 26% of Republicans do (Ipsos, 2021). I expect that these numbers will move increasingly in this direction as the issue rises in public salience and the cleavage along partisan dimensions solidifies. It would be no surprise to see support for Court expansion vary according to who occupies the presidency.

Part of the reason why Court expansion might not be as popular as term limits for justices is that it presents an institutional deviation from the status quo of nine members, a historical feature that may appear fixed to many Americans. But another reason is the possibility of Republicans and Democrats engaging in reciprocal Court expansion, taking turns increasing the size of the Supreme Court to massive proportions (e.g., Mooney, 2021; Braver, 2020). The concern has been floated by many, although it is usually given without evidence.

In Chilton et al. (2021), a working paper with Chilton, Epps, and Rozema that is undergoing peer review, we examine the likely effects of aggressive, partisan Court packing. For this, we use many of the same techniques that we used to simulate the effects of term limits, including the historical patterns of White House and Senate control, in addition to life expectancies (which we base on the longer-than-average life expectancies of federal judges) and current levels of strategic retirements.

We again made several simple yet key assumptions. First, we assume that presidents want to expand the Supreme Court only if their party’s appointments are in the minority position on the Court – that is, their party made fewer appointees than the other party. Second, we assume that the party occupying the White House would not initiate Court expansion unless it also controlled the Senate, which happens about half of the time.⁷ Both of these are necessary but insufficient conditions for Court expansion.

With these starting assumptions, we then looked at what would happen to the size of the Supreme Court over time. First, we logically reasoned that, if it could, the political party of the president would have political capital to pack the Court about half of the time. (This is high, so we manipulate this in various ways in the article.) Second, because of political costs, the president’s party would want to expand the Court only by the number of additional seats needed to secure a simple majority. For example, Democratic appointments currently occupy three seats on the Court and Republican appointments occupy six. This would mean that Democrats – if they control the White House and the Senate, as they do now – would want to expand the Court by four seats in order to have a 7-6 majority.⁸

With this in mind, Chilton et al. (2021) finds that the political conditions and alignments necessary for Court expansion are rare given patterns in U.S. political history. Specifically,

⁷https://en.wikipedia.org/wiki/Divided_government_in_the_United_States.

⁸In fact, this is exactly what the Judiciary Act of 2021, the bill sponsored by Sen. Ed Markey and Reps. Jerry Nadler, Hank Johnson, and Mondaire Jones, does: add four seats to the Supreme Court (https://www.markey.senate.gov/imo/media/doc/judiciary_act_of_2021.pdf). This adds strong support for Chilton et al. (2022)’s starting assumption.

the median number of times the Court would be expanded in the 100 years after an initial expansion would be just seven. And, in terms of the size of the Court “blowing up” – as detractors have warned – we find limited support. The size of the Court would, of course, increase, but it would not increase nearly as fast nor by as much as critics have claimed. In fact, the median simulation result suggests that the Court would increase in size to about 23 justices within 50 years, which would put it on par with the current size of the U.S. Court of Appeals for the Ninth Circuit (also 23 judges).

The worst-case scenarios are also not very worrisome. If Court packing were to continue in this sort of iterative partisan fashion, we find that the Court would have a median of 39 justices within 100 years and a 90th percentile of approximately 60 justices.⁹ To illustrate this, I have included in this written testimony Chilton et al. (2021)’s Figure 3, which shows the expected expansion of the Court under iterative partisan packing.

Additionally, as discussed in Chilton et al. (2021, pp. 16-18), expanding the Supreme Court may actually undermine the incentives for justices to retire strategically – that is, to only retire when the party of the sitting president corresponds to the party of the president who appointed them. Consider the example of a justice who is in a 5-4 liberal majority and who could retire under a friendly president and Senate. Under the status quo of no Court packing, she would be replaced by a like-minded individual, and the 5-4 liberal majority would be retained. Under the expectation of Court packing (under certain conditions), it is possible that this individual’s decision to retire would be rendered meaningless from a partisan perspective if the next president of the opposite party simply expanded the Court by two seats. The retiring justice would therefore have less of an incentive to retire given the non-zero chance that her retirement would be “undone.” Chilton et al. (2021, p. 17) explores this possibility, finding that many strategic retirements – around a quarter – would be undone in this fashion within five years.

I do wish to emphasize that an inescapable component of Court expansion is that it is a partisan activity, and control of the Court could toggle in long-term back-and-forth swings between the two parties. This would make the Court dependent on partisan maneuvering – very much unlike term limits, which would introduce regularity and, if anything, reduce the ability of party leaders to engage in partisan gamesmanship. That said, our research does show that Court expansion would probably not blow up the Supreme Court to unreasonable sizes and that it would reduce the incentives for justices to time their retirements strategically.¹⁰

⁹The analyses in Chilton et al. (2022) are substantively similar in their conclusions to simulations conducted by Jonathan P. Kastellec (Princeton) for a forthcoming book on Supreme Court nominations (based on correspondence).

¹⁰Given this, I encourage the Commission to consider proposals that combine components of term limits and expansion. Here, I consider to be some of the most promising proposals to be the ones that decouple appointments to the Supreme Court from the justices’ retirements – for example, by simply naming additional justices at staggered terms regardless of the timing of retirements (as is suggested by Hemel, 2021). This

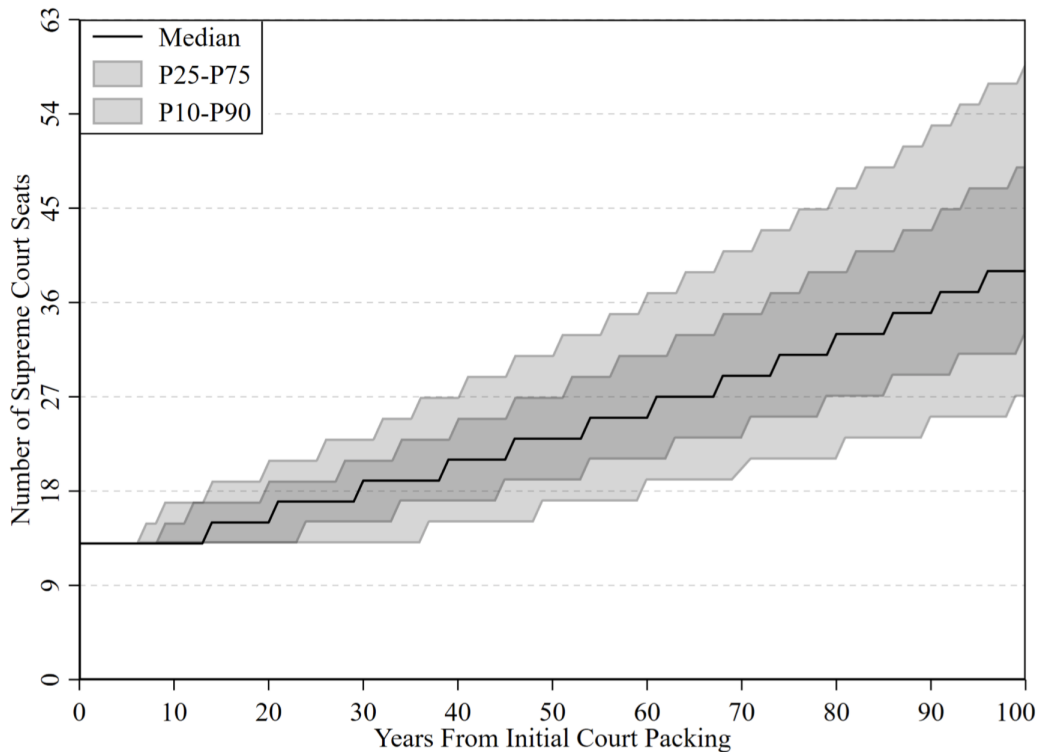


Figure 2: *Expected number of seats on the U.S. Supreme Court, assuming Court packing occurs with 50% probability only when (1) the same party controls the presidency and the Senate and (2) the same party is in the Supreme Court minority in terms of the number of appointments. Shaded regions indicate quantiles. Source: Chilton et al. (2021).*

Conclusion

I conclude by thanking the Commission for their valuable work and for inviting me to be here today.

I believe that the current moment serves as a unique opportunity to reflect on and consider ways to reduce the possibilities of partisan gamesmanship and the politicization of the Supreme Court appointments process. Research in this arena can give us valuable insights into the possible impact of such reform, and I hope that members of this Commission will draw on these insights in formulating their recommendations.

would have the effect of introducing regularity to the appointments process and reducing incentives for strategic retirements. It would, however, continue to incentivize the appointment of young justices.

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