



**STATEMENT OF WADE HENDERSON, INTERIM PRESIDENT AND CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**PRESIDENTIAL COMMISSION ON THE
SUPREME COURT OF THE UNITED STATES**

JULY 20, 2021

Members of the Presidential Commission on the Supreme Court of the United States: Thank you for holding this important meeting. My name is Wade Henderson, and I am the interim president and CEO of The Leadership Conference on Civil and Human Rights, a coalition of more than 220 national organizations working to build an America as good as its ideals. The Leadership Conference is encouraged by the Biden administration's commitment to seriously consider ways to modernize our nation's highest court and the work this commission is undertaking.

The Leadership Conference is the nation's oldest and most diverse coalition of national civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, The Leadership Conference seeks to build a democracy that works for us all through legislative advocacy and public education. Our coalition has marshaled our shared power to advance advocacy efforts on behalf of every major civil rights law since 1957. We continue that legacy today through our 11 task forces, which drive the coalition's priorities and play a vital role in debates on Capitol Hill about actions affecting civil and human rights. The Fair Courts Task Force, co-chaired by the National Women's Law Center and People For the American Way, brings together organizations committed to civil and human rights to work on issues related to our federal courts, including judicial nominations and court modernization efforts, in order to build an equal justice judiciary that protects the rights of all.

I have been asked to join the commission today to discuss the U.S. Senate's process for fulfilling its constitutional role to provide "advice and consent" after the president nominates individuals to serve on the U.S. Supreme Court, and the role that this process plays in debates over whether and how to reform the Supreme Court. These questions are important. The means by which the Senate considers nominees who, if confirmed, will serve in lifetime appointments fundamentally shapes how our democracy functions, and the decisions made by judges and justices are central to our ability to live free and full lives where our civil and human rights are respected. My testimony will cover the role that the Supreme Court and lower courts play in recognizing our civil and human rights, the Senate's advice and consent responsibility and how it should inform this discussion, and our recommendations for the commission. We hope these comments will inform the commission's work to ensure the Supreme Court lives up to its promise of equal justice under the law.

I. Role of Courts in Recognizing Civil and Human Rights

As the late Congressman John Lewis once said, “Democracy is not a state. It is an act. It requires the continued vigilance of us all to ensure that we continue to create an ever more fair, more free democracy.”¹ Like each pillar of our federal government, the judiciary has a responsibility to heed the call to safeguard our democracy and honor our nation’s highest ideals of justice, fairness, and inclusion. And because the Senate plays a critical role in who serves on our federal judiciary, like the president, senators must also be vigilant in how they staff the judiciary to fulfill the promise of justice.

Federal courts have sweeping power, and perhaps none more so than the Supreme Court, which hears only a handful of cases each year but has significant impact over every aspect of our lives. Over our nation’s history, federal courts have acknowledged and protected our civil and human rights, including ending legal apartheid in education,² recognizing marriage equality for interracial and LGBTQ couples,³ honoring the right to privacy,⁴ ensuring disabled people can receive care in their communities,⁵ and upholding the right to bodily autonomy and abortion.⁶ For securing the recognition of fundamental rights and “equal dignity in the eyes of the law,” the role of our federal courts is critical.⁷

However, the federal courts have also done tremendous harm by denying people their humanity, equal voice in democracy, and civil rights. In both *Plessy v. Ferguson* and *Korematsu v. United States*, the Supreme Court chose to maintain racial apartheid systems to subjugate Black and Asian Americans under the guise of promoting the rule of law.⁸ More recently, in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, the Supreme Court eviscerated key provisions of the Voting Rights Act, the landmark civil rights law that prohibits racial discrimination in voting.⁹ In 2018, five justices diminished the power and freedom of working people to come together to form strong unions.¹⁰ The Supreme Court also created the doctrine of qualified immunity, which has shielded police from being sued for misconduct that disproportionately impacts Black and Brown people in America and makes it nearly impossible to hold officers accountable for brutality, violence, and other violations of our constitutional rights.¹¹ It is particularly cruel how so many of the Court’s decisions have significant consequences for people of color and other communities who have historically been excluded from the ranks of power and decision-making.

Some of the Supreme Court’s decisions like *Plessy* and *Korematsu* are now universally accepted as stains on our nation’s history. Yet, threats to a free and fair democracy via our judiciary continue. During the

¹ Brennan Center for Justice Brief for the Honorable Congressman John Lewis in Support of Respondents and Intervenor-Respondents, *Shelby County v. Holder*, 570 U.S. 529 (2013), 2013

² *Brown v. Board of Education*, 347 U.S. 483 (1954).

³ *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷ *Obergefell* at 681.

⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021).

¹⁰ *Janus v. AFSCME*, 1 138 S.Ct. 2448 (2018).

¹¹ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

last administration, the White House and Senate majority viewed the judiciary as a tool to unravel civil and human rights and democratic safeguards. The well-funded and long-term strategy to roll back and curb future progress on civil and human rights was two-pronged: pursue litigation against civil rights protections and stack the courts with ideologues.¹² Decisions like *Trump v. Hawaii*, which upheld President Trump’s Muslim ban,¹³ are products of this intentional strategy to reverse progress toward a more perfect America and deny communities of color equal power. Today, we see the results of President Trump, Senator Mitch McConnell, and others’ attacks on the independence of the judiciary, as ideological extremists go to court to undermine civil rights and are met with sympathetic judges, even at our nation’s highest court.

The discussion about the future of the Supreme Court — and all our federal courts — is not an academic or theoretical one. Rather, it is fundamentally about humanity and dignity. It is about who our courts serve and recognize as worthy of having their rights protected. And it is imperative that members of this commission approach their inquiry by centering the people whose lives and civil rights are most impacted by the Supreme Court, and by considering the very real consequences that Court decisions have in people's lives. Federal judges and justices are the final arbiters of our laws and Constitution, and the decisions they make 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.

That is why institutions like the judiciary that we entrust to safeguard our democracy must work for everyone. We are now at an inflection point. Our nation must reconcile what we say we are as a democracy, and what we actually are. In this perilous moment, we must acknowledge that the Supreme Court has a long way to go to fulfill the promise of equal justice under law. The Supreme Court is regarded as an important, and often last, check on the other two branches of government. The Court’s ideal independence and integrity stand in stark contrast to how many view the divisive branches of government where bitter political divides have caused impasses to progress. But now, the process for selecting and confirming nominees to serve on the Court has become so rancorous as to further erode the public's faith in the very independence and integrity that set the Court apart. Our elected leaders must decide how this institution can be made more fair, more just, and serve more people today and in future generations. 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?

II. The Nominations Process and the Role It Plays in Debates Over Supreme Court Reform

Article II, Section 2 of the Constitution empowers the president to appoint nominees for lifetime seats on the federal bench, and the Senate to provide “advice and consent” on those nominees.¹⁴ Some of the most

¹² Senators Booker, Cory; Stabenow, Debbie; Whitehouse, Sheldon; Blumenthal, Richard; Brown, Sherrod; Cardin, Ben; Van Hollen, Chris. “[What’s At Stake - Equal Justice Under Law: How Captured Courts Tilt the Playing Field Against America’s Most Vulnerable](#).” *Democratic Policy & Communications Committee*. October 2020.

¹³ *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

¹⁴ U.S. Const. art. II, § 2.

solemn constitutional responsibilities of the president and Senate are the selection and confirmation of federal judges who serve lifetime appointments. The process for their selection and confirmation has been driven for decades by rules, traditions, and norms. It is vital that as we consider the process, we understand who these guidelines have served and why. And, as we explore potential structural changes to the Supreme Court, we must be sure the nomination process promotes the identification, selection, and confirmation of jurists who are fair and independent, possess a commitment to the protection of the rights of all of us, and reflect the vast diversity of our country.

While this commission may not grapple with the question of who occupies each seat on the Supreme Court, it is nonetheless of serious consequence, not only to the direction and future of the Court but also to people's lives. Each person who serves on the Supreme Court decides issues of monumental importance to the endurance of our democracy. It is worth exploring and understanding how a vacancy on the Supreme Court is filled, especially while the commission considers structural reforms like whether to add more seats to the bench, limit the number of years one can serve as a justice, or change what kinds of cases the Court reviews.

Presidents have approached the process differently, and often presidents enunciate the priorities and characteristics they are looking for in judicial nominees, especially those considered for the Supreme Court. After all, making appointments to the federal courts is one of the president's most enduring acts. Because it is of such consequence, the White House, together with the Senate, must ensure the judges and justices who serve on our courts are reflective of America and responsive to the needs of all communities.

We are overdue for change: Since our nation's founding, nearly all Supreme Court justices have been white, male, and privileged with wealth and educational opportunity. Of the 115 justices, only five have been women and three have been people of color.¹⁵ There is an altogether abysmal lack of representation across race and ethnicity, gender, faith, sexual orientation and gender identity, disability status, educational background, professional experience, and more.¹⁶ While some presidents, particularly President Jimmy Carter and most recently President Joe Biden, have made experiential and demographic diversity a priority in their selections of judicial nominees to the lower courts, it is long past time to expand our understanding of what qualifies a person to serve on our nation's highest court. We are encouraged that President Biden has pledged to nominate the first Black woman to serve on the Court if there is an opening, the significance of which cannot be overstated.¹⁷

The role the Senate plays is crucial: Senators are the only elected officials besides the president who play a constitutional role in determining who will serve on the federal bench — including the highest court in the land — for life. When it comes to Supreme Court nominations, after the president makes a formal announcement of their selection, the Senate begins the vetting process. The nomination is referred to the Senate Judiciary Committee, and senators who serve on the committee have a responsibility to research nominees' records and review the nominee's questionnaire, FBI background checks, and other resources,

¹⁵ ["Biographical Directory of Article III Federal Judges, 1789-present."](#) *Federal Judicial Center*. Accessed July 2021.

¹⁶ Campisi, Jessica & Griggs, Brandon. ["Of the 114 Supreme Court justices in US history, all but 6 have been White men."](#) *CNN*. September 26, 2020.

¹⁷ Neidig, Harper. ["Biden pledges to nominate black woman to Supreme Court."](#) *The Hill*. February 25, 2020.

including letters of support or opposition from individuals and organizations.¹⁸ In addition, senators will also usually host courtesy meetings with Supreme Court nominees, allowing senators to meet the nominee and speak candidly with them. The committee holds a hearing, the only public opportunity for committee members to question the nominee, and typically the only opportunity for the American people to hear from a nominee directly.¹⁹ Senators can later follow up with written questions that the nominee must answer. The committee will then consider the nomination, usually in a meeting where it reports out the nomination, which can be done favorably, unfavorably, or without recommendation. At that point, the nomination goes to the full Senate for consideration.

To understand the Senate's advice and consent role, it is important to ground the conversation in both why and how the confirmation process has changed for all judicial nominees, including nominees for district and circuit court seats. Over the past decade, Senate Republicans changed the once-bipartisan process. This calculation was part of a larger strategy developed decades ago to change the composition of the Supreme Court — and the lower courts — to short-circuit other democratic methods of change, largely in response to progress made by the civil rights movement.²⁰ And their reasons for rigging the system are clear: The American public widely supports issues like police accountability,²¹ racial justice,²² access to reproductive health care and bodily autonomy,²³ LGBTQ equality,²⁴ gun control,²⁵ environmental protections,²⁶ making the right to vote fair and accessible,²⁷ and humane immigration laws,²⁸ among others. Much of the Republican Party's agenda can't survive in the arena of popular opinion, so they devised a way to rig the system by stacking the courts.

Importantly, even when there has been bipartisan support for popular civil rights policies and legislation, the Court has been used to dismantle such policies. For example, the Voting Rights Act and subsequent reauthorizations were passed with bipartisan support, including an overwhelming vote in the House of Representatives and a unanimous vote in the Senate in 2006.²⁹ Yet, in 2013, five justices of the Court gutted a key provision of the Voting Rights Act.³⁰ And only a few weeks ago, six justices of the Court

¹⁸ [“Committee on the Judiciary FAQ.”](#) *Committee on the Judiciary*. Accessed July 2021.

¹⁹ *Id.*

²⁰ See, e.g., Powell, Lewis F. [“The Powell Memorandum: Attack on American Free Enterprise System.”](#) August 23, 1971; Bennett, Dalton et al. [“Pathways to power: The conservative movement transforming America's courts.”](#) *The Washington Post*. May 21, 2019.

²¹ See, e.g., [“Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct.”](#) *Pew Research Center*. July 9, 2020.

²² See, e.g., Long, Steven and McCarthy, Justin. [“Two in Three Americans Support Racial Justice Protests.”](#) *Gallup*. July 28, 2020.

²³ See, e.g., Hartig, Hannah. [“About six-in-ten Americans say abortion should be legal in all or most cases.”](#) *Pew Research Center*. May 6, 2021.

²⁴ See, e.g., Avery, Dan. [“Three-quarters of Americans support LGBTQ nondiscrimination laws.”](#) *NBC News*. March 23, 2021.

²⁵ See, e.g., Newport, Frank. [“American Public Opinion and Gun Violence.”](#) *Gallup*. April 2, 2021.

²⁶ See, e.g., Tyson, Alec and Kennedy, Brian. [“Two-Thirds of Americans Think Government Should Do More on Climate.”](#) *Pew Research Center*. June 23, 2020.

²⁷ See, e.g., Younis, Mohamed. [“Most Americans Favor Voting by Mail as Option in November.”](#) *Gallup*. May 12, 2020.

²⁸ See, e.g., Krogstad, Jens Manuel. [“Americans broadly support legal status for immigrants brought to the U.S. illegally as children.”](#) *Pew Research Center*. June 17, 2020.

²⁹ Hulse, Carl. [“By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act.”](#) *The New York Times*. July 21, 2006.

³⁰ See *Shelby County*.

weakened the landmark legislation again.³¹ Further, as demographics shift in the United States, this right-wing campaign to reshape the federal courts has sought to shrink the electorate, silence the voices of Black people and other communities of color, and secure Republicans' hold on the levers of power.

We saw the marked shift in the Senate's advice and consent role during President Obama's second term, when then-Senate Majority Leader Mitch McConnell and Senate Republicans doubled down on obstruction and obfuscation. In the final two years of President Obama's tenure, Senator McConnell stalled and held open more than 100 lower court vacancies in the hopes that he would have the opportunity to stock them with conservative extremists — and he later did. This kind of obstruction reached a disgraceful peak in 2016 when Senator McConnell demonstrated the lengths to which he would go to grab power. After Justice Antonin Scalia passed away, Senator McConnell refused to let the Senate consider President Obama's Supreme Court nominee, U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland. At the outset, then-Senate Judiciary Committee Chairman Chuck Grassley considered scheduling a hearing for Garland.³² Other Republican senators also expressed interest in reviewing Judge Garland's record.³³ But it was widely reported that Senator McConnell quickly silenced his caucus and refused to advance any deliberation on the nominee.³⁴ Indeed, Judge Garland did not receive courtesy visits with many senators, nor did he ever have a hearing. Senator McConnell took the unprecedented and unprincipled position that no president should have their nominee considered during a presidential election year — a position that he would abandon as soon as a Republican won the White House.³⁵ Senator McConnell himself boasted, "One of my proudest moments was when I looked at Barack Obama in the eye and . . . said, 'Mr. President, you will not fill this Supreme Court vacancy.'"³⁶ Ultimately, Senator McConnell prevented the Senate from even considering Judge Garland's nomination and twisted the confirmation process into an unprecedented partisan power grab.

The following year, President Trump consulted his curated shortlist of names selected by the Federalist Society and Heritage Foundation to pick then-U.S. Circuit Court of Appeals for the Tenth Circuit Judge Neil Gorsuch for that seat. To succeed in confirming the nominee, Senator McConnell had to again change the rules and reduce the threshold of votes needed to end debate on a nomination from 60 votes to a majority vote.³⁷ By holding hostage a seat on the Supreme Court for nearly one year and altering the filibuster for Supreme Court nominations, Senator McConnell fundamentally undermined the nature of the advice and consent process, and fixed the composition of the Court for decades to come.

³¹ See *Brnovich*.

³² "[Grassley Statement On The President's Nomination Of Merrick Garland To The U.S. Supreme Court](#)," *grassley.senate.gov*. March 16, 2016.

³³ Moe, Alex. "[GOP Senators Meet with Garland on SCOTUS Nomination](#)," *NBC News*. April 5, 2016.

³⁴ See, e.g., Demirjian, Karoun. "[Republicans refuse to budge following Garland nomination to Supreme Court](#)," *The Washington Post*. March 16, 2016.

³⁵ Wheeler, Russell. "[McConnell's fabricated history to justify a 2020 Supreme Court vote](#)," *The Brookings Institution*. September 24, 2020.

³⁶ Silverstein, Jason. "[Here's what Mitch McConnell said about not filing a Supreme Court vacancy in an election year](#)," *CBS News*. September 19, 2020.

³⁷ Kim, Seung Min; Everett, Burgess; and Schor, Elana. "[Senate GOP goes 'nuclear' on Supreme Court filibuster](#)," *Politico*. April 6, 2017.

After putting Justice Neil Gorsuch in a Supreme Court seat that should have been filled by President Obama, President Trump had the opportunity to fill a second Supreme Court vacancy in 2018. To confirm then-judge on the U.S. Court of Appeals for the District of Columbia Circuit Brett Kavanaugh, Senate Republicans once again fundamentally changed the nominations process to their partisan advantage, all in the hopes of advancing their decades-long takeover of the courts to reverse the progress of civil rights. From beginning to end, Justice Kavanaugh's confirmation was riddled with unprecedented breakdowns of rules and bipartisan traditions. First, instead of taking the time needed to carefully vet Justice Kavanaugh, Chairman Grassley and Senate Republicans willfully hid pieces of his troubling record and refused to release the nominee's records from his time as White House staff secretary.³⁸ Then, after multiple allegations of sexual assault against Justice Kavanaugh came to light and a very limited investigation began, Senator McConnell and Senate Republicans scheduled a vote on his confirmation.³⁹ Instead of dedicating the full consideration a lifetime position to the Supreme Court requires, Republican leadership ushered Justice Kavanaugh through as though his confirmation was inevitable.

The moral floor then dropped even lower. Last year, immediately following the death of Justice Ruth Bader Ginsburg, Senator McConnell shrugged aside his own "election year" rule and rushed to fill her seat mere weeks before Election Day, and at a time when millions of people were already voting. Instead of addressing the many urgent challenges gripping the nation — from the global pandemic to the racial reckoning that followed George Floyd's murder to rampant election disinformation — President Trump nominated then-U.S. Circuit Court of Appeals for the Seventh Circuit Judge Amy Coney Barrett at an event that became the source of a COVID-19 outbreak.⁴⁰ The Senate majority similarly ignored the desperate crises that demanded congressional attention and rushed her nomination through. In a reckless and incomprehensible move, the Senate majority even decided to hold a hearing despite the fact that multiple members of the Senate Judiciary Committee tested positive for COVID-19.⁴¹ The hearing threatened the health and safety of senators and staff.

Because of the enormity of the stakes involved in filling the vacancy created by Justice Ginsburg's passing, President Trump and his Senate allies engineered a shameful confirmation process designed to add Justice Barrett to the Court as rapidly as possible without adequate deliberation. And they did so by pushing the fastest confirmation timetable in nearly half a century.⁴² The average length of time between a Supreme Court nomination and the nominee's hearing has been approximately seven weeks. The Senate held a hearing for Justice Barrett barely two weeks after the announcement of her nomination, a dramatic departure from past timetables. Also, in recent years, the average length of time between the creation of a Supreme Court vacancy and a nominee's hearing has been nearly four months. The time between Justice Ginsburg's passing and Justice Barrett's nomination hearing was just over three weeks. The fast-tracked confirmation process for Justice Barrett was a clear abdication of the Senate's constitutional advice and

³⁸ Kranish, Michael. "[The story behind the withheld documents of the Kavanaugh hearing.](#)" *The Washington Post*. September 4, 2018.

³⁹ Lopez, German. "[The FBI investigation of Kavanaugh was doomed from the start.](#)" *Vox*. October 5, 2018.

⁴⁰ Clark, Dartunorro. "[Fauci calls Amy Coney Barrett ceremony in Rose Garden 'superspreader event.'](#)" *NBC News*. October 9, 2020.

⁴¹ Zengerle, Patrick. "[Coronavirus risks shadow Barrett's Supreme Court confirmation hearings.](#)" *Reuters*. October 12, 2020.

⁴² Tillman, Zoe. "[Republicans Are Moving Judge Amy Coney Barrett's Nomination Faster Than Any Supreme Court Nominee Since 1975.](#)" *BuzzFeed News*. September 28, 2020.

consent function. It also went down as one of the most infamous acts of political hypocrisy in American history.⁴³ And even so, Senator McConnell's hypocrisy plunged further: Just a few weeks ago, he announced that he would again block a Supreme Court nominee in 2024 if Republicans take control of the Senate, citing 2024 as an election year.⁴⁴ It appears that this "election year rule" applies only when it politically benefits Senator McConnell.

There is no dispute that the Republican Party, led in the Senate by Senator McConnell, has focused on the Supreme Court and dramatically changed the process to ensure nominees selected by a Republican president would be confirmed. For traditions and norms to exist, there must be a mutual understanding and even-handed application. This is no longer the case, and will not be for the foreseeable future as Senator McConnell forecasts what we already know: He will use any means necessary to stack the Court with justices who he believes will serve the interests of the wealthy and powerful. So while the process has now changed, parties cannot operate using different rules.

III. The Path Forward

The raw power grabs have clarified for many of us what we have long known: The Supreme Court has sweeping impact and the process for selecting and considering Supreme Court nominees not only demands a closer look, but also necessitates change. Our coalition has been deeply involved in Supreme Court and lower court nominations because it has real consequences for the civil and human rights of everyone in this country. While this may be portrayed as a bitter partisan fight, the focus must be on the future of our democracy and the most impacted communities.

a. Priorities of the Fair Courts Task Force

Our nation needs judges who will deliver equal justice for all people in America and who will protect the rights of everyone — no matter their race or background. The Leadership Conference has pushed every president since our founding in 1950 to nominate only those people who possess a commitment to civil and human rights, who are fair-minded, and who represent and reflect the vast diversity of our country, across background and professional experience. This has been an enduring priority precisely because court decisions matter so much to our lives. Judges and justices have tremendous influence over the issues that matter most to communities represented by members of the Fair Courts Task Force, including voting rights, working people's rights, reproductive health, educational equity, humane immigration laws, disability rights, environmental protections, and more. The task force members have long considered various avenues to make our courts fairer, and they carefully selected priorities to guide our work.⁴⁵

⁴³ See, e.g., Hulse, Carl. "[How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation.](#)" *The New York Times*. October 27, 2020; Levine, Marianne. "[McConnell fends off accusations of hypocrisy over holding Supreme Court vote.](#)" *Politico*. September 21, 2020.

⁴⁴ Hulse, Carl. "[McConnell suggests he would block a Biden nominee for the Supreme Court in 2024.](#)" *The New York Times*. June 24, 2021.

⁴⁵ "[The Leadership Conference on Civil and Human Rights Transition Priorities.](#)" *The Leadership Conference on Civil and Human Rights*. November 24, 2020.

First, it is vital for the federal judiciary to be made up of fair-minded judges and justices who are committed to the civil and human rights of all people and who possess diverse backgrounds and experiences that will inform their role on the bench. Communities depend on the federal courts and the judges who sit on them to administer justice and, importantly, to recognize injustice from the perspective of many — not the narrow perspective of one.

To ensure the federal courts reflect America, the Fair Courts Task Force urges the president and Senate to make judicial nominations an immediate and enduring priority, and to nominate people for federal judgeships who show a demonstrated commitment to civil and human rights, who are fair-minded and possess a progressive vision of the law and Constitution, and who represent the vast and rich diversity of our country. This diversity should include race, sex, gender identity, sexual orientation, disability status, ethnicity, national origin, socio-economic status, and experiential and professional background.

Courts rely on public trust for legitimacy, and diversity among judges and justices helps improve both public trust and balanced judicial decisionmaking.⁴⁶ Diversity also helps ensure that rulings reflect a wide variety of viewpoints, especially from perspectives and communities that have historically been excluded from the judiciary, including Black, Brown, and Asian American and Pacific Islander people; women; LGBTQ people; and people with disabilities.

Unfortunately, there is much work to be done to improve diversity on the federal bench. By abandoning decades-old norms and safeguards, Senate Republicans during the Trump administration managed to confirm 234 lifetime judges to the federal courts during President Trump’s tenure — more than 85 percent of whom were white and 65 percent of whom were white men.⁴⁷ Until June 2021, it had been 10 years since the Senate confirmed a Black woman to serve on an appellate court.⁴⁸ In the past five years, the Senate has confirmed only one Latino/a to serve on an appellate court.⁴⁹ And of the total lifetime judges confirmed by the Senate during the Trump administration, less than 6 percent were Asian Americans, less than 3 percent were LGBTQ people, and zero were Native Americans.⁵⁰ As Justice Thurgood Marshall said, we condemn the courts to “one-sided justice” when we deprive the legal process of “differing viewpoints and perspectives on a given problem.”⁵¹

Since President Biden took office, we are encouraged that his administration is correcting course and carving a new path to make our courts fairer with judges who will recognize the rights of us all. Before President Biden took office, Dana Remus, who now serves as White House counsel, sent a letter to Senate Democrats urging them to prioritize potential judicial nominees who are public defenders, civil rights lawyers, and legal aid attorneys — positions that are vastly underrepresented on the federal bench.⁵² She

⁴⁶ Sen. Maya. “[Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, Over Time.](#)” 2017 Wis. L. Rev. 367 (2017).

⁴⁷ “[Biographical Directory of Article III Federal Judges, 1789-present.](#)” *Federal Judicial Center*. Accessed July 2021.

⁴⁸ “[Senate Advances Judge Ketanji Brown Jackson, the First Black Woman to Serve on a Federal Appeals Court in 10 Years.](#)” *The Leadership Conference on Civil and Human Rights*. June 10, 2021.

⁴⁹ Alder, Madison, and Ye Han, Jasmine. “[Trump Nears Post-Nixon First: No Black Circuit Judges.](#)” *Bloomberg Law*. June 24, 2020.

⁵⁰ “[Biographical Directory of Article III Federal Judges, 1789-present.](#)” *Federal Judicial Center*. Accessed July 2021.

⁵¹ Tushnet, Mark V. “Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences.” 2001. Pg. 243.

⁵² Alder, Madison. “[Biden Seeks Democratic Senator Input to Move Judges Quickly.](#)” *Bloomberg Law*. December 30, 2020.

also underscored that President Biden will nominate “those who represent Americans in every walk of life.”⁵³ Since taking office, President Biden has followed through on his promise to set a new course, marking a brighter day for our federal judiciary. The slate of historic nominees the Biden White House has put forth for consideration reflect a deep commitment to civil and human rights, as well as the rich diversity of our country. And, over time, we hope to see more fair-minded nominees committed to civil and human rights who are Latino/a, disabled, LGBTQ, and other people whose perspectives are vastly underrepresented on the federal bench. We once again have an opportunity to see what the judiciary can and should be — one reflective of our communities and inclusive of diverse experiences that will improve judicial decision-making.

Furthermore, the Fair Courts Task Force urges Congress to pass legislation to modernize and reform our federal judiciary by shoring up ethics and transparency reforms, such as extending the Code of Conduct for United States Judges to apply to Supreme Court justices. In addition, we urge reconsidering the structure of the federal judiciary, including the expansion of our lower courts where the caseload, changing population, and numerous other factors merit authorizing more federal judges, as well as consideration of structural reforms to the Supreme Court.

Our democracy — including our federal judiciary — is in peril. It is crucial that this commission, the public, and our elected leaders discuss all avenues to make our courts fair for all people. Beyond obvious and common-sense changes like extending the Code of Conduct to apply to Supreme Court justices, all options to potential structural changes to the Court should be thoroughly explored. And they must be examined by understanding how the current institution — and the process for selecting those who serve on our highest court — fails to serve all of us, especially communities historically excluded from protection of the rule of law.

b. Guideposts for Considering Changes to the Supreme Court so It Works for All of Us

As we collectively confront and discuss this issue, there are a few guideposts we encourage the commission to follow. First, engage and center the people historically marginalized by the Supreme Court. Discussions must include people most impacted by the Court’s decisions, and any future changes made must ensure that everyone who enters a courtroom or who is affected by a court decision is treated with dignity. Judges and justices must recognize the full humanity of all people in America. This is what drives our coalition: We are bound by our determination to create a nation as good as its ideals, and a nation where the promise of equal justice under law includes all of us, not just a powerful few.

Second, we urge the commission to focus not on what is necessarily expedient, but what would allow all people in America to participate in our democracy and have their rights recognized. Our institutions have evolved since the founders created them, and as traditions and laws change, it is incumbent on all of us to see the path forward as one that enables full participation in our democracy and ensures that institutions recognize, understand, and protect our civil and human rights. Change is not only possible, it is necessary

⁵³ *Id.*

to protect our imperiled democracy. We must ensure that any changes to the courts make them more independent and fair for us all.

In the context of the Senate's advice and consent process, we have seen just how dangerous it is for democracy when the Senate abides by a different set of rules depending on who is in the White House and who controls the Senate. It is not just procedurally unacceptable and morally unsound — it is a direct threat to the rights of millions of people in America. The Senate should commit to a fair and full process for considering Supreme Court nominees to ensure they are qualified and would be fair-minded justices with a commitment to our civil and human rights. That begins with ensuring the Senate — and the public — have time and opportunities to hear from the nominee and have access to their record.

It is a travesty for our democracy, and for future generations, that the Senate majority in 2016 blocked a Supreme Court vacancy that occurred during President Obama's tenure, and instead held it for President Trump to fill when he took office. It is a travesty that the Senate majority in 2018 barreled ahead with Justice Kavanaugh's confirmation despite the enormous stakes for civil rights and accusations of sexual assault that rattled the nation. And it is a travesty that the Senate majority in 2020 rushed through Justice Barrett's nomination within weeks, while people across America struggled under the devastating impacts of a global pandemic, a racial reckoning over police violence against Black Americans, and an election marred by disinformation and attempts to silence voters. And it is a travesty that this coordinated campaign to capture the courts has succeeded in creating a judiciary that too often works only for the powerful few, at the expense of the rest of us.

When the system fails to work for the people, it fails our democracy. We urge the commission to seriously consider all ways in which people most impacted by the Court's decisions could be better served by the institution that is tasked with administering justice. In addition to our work to ensure future justices are fair-minded, committed to the civil and human rights of all people, and possess diverse backgrounds and experiences that will inform their role on the bench, we must not only reimagine the system, but create one that fulfills the promise of equal justice for all.

IV. Conclusion

Thank you for the opportunity to inform the important work of the Presidential Commission on the Supreme Court of the United States. I am pleased to answer any questions you may have, and if you would like to discuss these topics further, please contact Lena Zwarenstejn, senior director of the Fair Courts campaign, at 202-466-3311. Thank you again for your consideration, and I look forward to working with members of the commission to ensure that our Supreme Court upholds the promise of equal justice under the law.