

Commission on Supreme Court warns of political dangers in reform proposals

The president commission evaluating potential reform of the Supreme Court cautioned that increasing the size of the court might be perceived as partisan maneuvering. (Ricky Carioti/The Washington Post)

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President Biden's commission evaluating potential reform of the Supreme Court cautioned that increasing the size of the court might be perceived as partisan maneuvering, but noted there is widespread support for term limits on the justices, who enjoy life tenure.

The [Presidential Commission on the Supreme Court of the United States](#) will meet Friday to begin writing a report to the president, likely to be presented next month. Mostly made up of academics, the [draft materials](#) that the commission has collected so far, released Thursday night, read much like a textbook on history and available options, rather than a manifesto for change.

The group is not charged with divining a direction. "It is an assessment. It is not a recommendation," White House press secretary Jen Psaki said Thursday.

And, at present, it is not even a report. The released material was compiled by subcommittees on the commission, and the group as a whole has not considered the material.

Biden named the commission in response to liberal demands that something be done to "balance" the court, which has a 6-3 conservative majority. Liberals were particularly angry that a Republican-controlled Senate refused to hold a hearing on President Barack Obama's nominee to fill the seat of the late Justice Antonin Scalia in 2016. It then rushed through the nomination of Amy Coney Barrett to take the seat of the late Justice Ruth Bader Ginsburg in 2020, as the votes already were being cast to deny President Donald Trump a second term.

"Unmistakably, the overall trend over the last three decades has been toward more partisan conflict, which has affected nominations to the lower courts, as well as the Supreme Court," the draft material says.

While a subcommittee said there was no "legal obstacle" to expanding the court — its size has varied over the centuries but has remained at nine since 1869 — its report said "the risks of Court expansion are considerable, including that it could undermine the very goal of some of its proponents of restoring the Court's legitimacy."

Expansion efforts, the report says, might hurt the high court's "long-term legitimacy or otherwise undermine its role in our legal system." The report cautions that it could lead to a "continuous cycle" of expansions, citing one estimate of as many as 29 justices in the next 50 years.

"The public might come to see the court as a 'political football,' a pawn in a continuing partisan game," it said.

At the same time, term limits for justices "appear to enjoy the most widespread and bipartisan support," another subcommittee's report said.

It said a term of 18 years seemed most popular with those who presented testimony. But there is a big obstacle: Many of those who testified believe the Constitution must be amended to make such a change, a difficult undertaking.

“The United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term of years for its high court justices,” the report said.

The Constitution holds that justices and federal judges “shall hold their Offices during good Behaviour,” interpreted to mean for life, as a way to ensure the judiciary’s independence.

The report notes that there are scholars who believe Congress could limit service on the Supreme Court by statute.

Unlike other federal judges, Supreme Court justices are not bound by a formal code of conduct. Chief Justice John G. Roberts Jr. has said that all justices consult with the code for lower-court judges in assessing their own ethical obligations.

But the report notes that a voluntary system may not be the best approach. “It is not obvious why the court is best served by an exemption from what so many consider best practice.”

A written code of conduct that applies to justices, the report says, “would bring the court into line with lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the justices voluntarily consult the code.”

In several areas, the report suggests ways to enhance transparency and public understanding of the court. When justices decide to sit out certain cases because of personal conflicts, the report says, “statements from the justices explaining their reasons for recusal could enhance transparency of the recusals process” and those decisions could help guide other justices.

When it comes to potential conflicts, the commission also notes the consensus among court observers that no justices or their spouses or children should own or continue to own individual publicly traded stocks. On the current court, Roberts and Justices Stephen G. Breyer and Samuel A. Alito Jr. hold stocks.

While the subcommittee did not endorse cameras in the courtroom, long opposed by many justices, it does speak favorably of “near simultaneous” audio from the courtroom, calling it a “step forward” that makes it easier for the news media to cover the court’s work and that allows more members of the public to follow the work of the court.

The group Fix the Court said the early reports from the commission were encouraging: “Staggered, 18-year term limits are a superior reform to court expansion for democratizing and modernizing the Court; and live-streamed arguments, an ethics code and stock divestitures would improve the public’s faith in the institution.”

But liberals were unhappy.

“This was not even close to being worth the wait,” said Brian Fallon, executive director of the liberal advocacy organization Demand Justice. He added: “From the beginning, the purpose of this Commission was not to meaningfully confront the partisan capture of the Supreme Court, but rather to buy time for the Biden administration while it fights other legislative battles.”

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