

COURT REFORM AND THE BIDEN COMMISSION

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The Biden Supreme Court Reform Commission and its report have been criticized by both the right and the left. That might be a sign that it performed its job in a bipartisan way—which I think it did. But it also might be a sign that people on both sides misunderstand the nature of the commission and the report. So here I want to try to explain them, and also add my personal views, based on my experience as a Commissioner.

First, some people criticized the commission for not making recommendations. That's true, but the commission's charge was not to make recommendations, so faulting it for that is really asking for a different kind of commission. We could have had that—Biden could have decided that something was wrong with the Court and created a commission to tell him the most effective way to fix it. But that would have made sense only if he was already convinced that there was a problem that needed solving, and that he knew what it was. And then he would probably have assembled a relatively small group of people who also already agreed on the existence and nature of the problem.

Biden was doing something very different, which I think is to his credit. He was genuinely open-minded about the Court. He knew that people had concerns about it, and he wanted a commission to evaluate those concerns and the costs and benefits of different proposed solutions. For that job it made sense to have a relatively large bipartisan commission, and that's what we had. It was a sincere and good-faith attempt to get the best, most comprehensive assessment of the situation.

And I think the commission did a good job of fulfilling its charge. We surveyed the potential problems, and analyzed the proposed solutions and the arguments for and against them.

Generally speaking, we gave the drafting of particular arguments to people who really believed in them, so that they would be presented in their strongest form, and we definitely had people on both sides of every major issue. Now some political actor has to look over this report and decide which reforms, if any, they want to pursue. If that next step doesn't happen, then some of the critics may be proved right: the ones who said it was a diversion and that commissions are where reform goes to die. But I hope and believe that Biden is going to read the report and draw a conclusion about what to do.

What should that conclusion be? Ultimately, that's a political decision, but having spent almost a year as a Commissioner going over these issues, I have some thoughts. My overarching principle is that whether a reform is needed, and what that reform should be, depends on what you think the problem is. So I'm going to go through some different articulations of the problems and solutions.

First, a problem might be that the Supreme Court is handing down decisions I don't like politically. Since that's a weak objection, let's also say I think they are incorrect as a matter of constitutional law. For instance, the Court is giving religious freedom more protection than I think it's entitled to under the First Amendment. The only real way to change that now is to change the composition of the Court—expand it. So, one framing is: consider Court expansion as a solution to the problem of decisions I don't like.

Even with the idea that these decisions are legally incorrect, this is the weakest case for reform. The Court is, in our constitutional design, ultimately responsive to the elected branches, because they appoint the Justices. National majorities should be able to have some influence on the Court, over time. But I don't think the elected branches should add new Justices whenever they don't like what the existing ones are doing. They do have that power, but circumstances would

have to be very extreme for me to say the Court has gone far enough astray for it to be warranted. In some ways, Court expansion can helpfully be analogized to impeachment—neither of them should be the remedy for ordinary disagreement.

The second framing is a little different. The Supreme Court is handing down decisions I don't like because it was constituted in an unfair way. I think the decisions are wrong, and I think we're getting them because of some problem with the appointments process. What is that problem? There are two things people identify. First, if we go back to the appointment of Clarence Thomas, the longest-serving current Justice, we have four Republican presidential terms (Bush I, Bush II x2, Trump) and four and a quarter Democratic ones (Clinton x2, Obama x2, Biden). (For flavor you can throw in the fact that the Democratic candidate won the popular vote in seven out of nine of those elections, although the significance of that is less clear.) So you might think there would be a relatively even balance between Democratic and Republican appointees. But in fact under those Presidents we had 7 Republican appointments and 4 Democratic ones, and we now have a court with a 6-3 Republican tilt. (President Biden will now presumably be able to replace Justice Breyer, which will make the total appointment tally 7-5 but not affect the 6-3 tilt.) So viewed just from a statistical perspective, it looks unbalanced. Second, there's the more specific issue of the refusal to allow Obama a third appointment, and the rush to confirm Amy Coney Barrett. So the complaint here is based on the party system, and it is that the other side has manipulated the process. Again, the straightforward solution is expansion. So the second framing is this: consider Court expansion as a solution to the unfair advantage held by the Republicans.

I think this argument is perfectly fine. The Court is out of balance statistically, and that's in part because Republicans aggressively used the powers they had to increase their appointments. Court expansion is a power that Congress and the President have, and it can be used to increase

Democratic appointments. I was surprised by the resistance to this among what I would call the liberal institutionalists on the Commission—that is, people who identify as liberal but still said “this would be a dangerous norm-breaking escalation that would trigger a cycle of reprisals.”

That response strikes me as profoundly naïve and mistaken in almost every regard. First, is it an escalation? Maybe, but not as much as you might think. Saying “we will not consider any Obama nominee” is actually manipulating the size of the Court for partisan advantage. The Senate effectively took it down to eight and then back up to nine. So expansion has been done already—not by a majority controlling two branches of government but by one house of Congress composed of Senators representing a minority of the American people. Second, would it trigger a cycle of reprisals? Maybe, but the existing process is already a cycle of escalating reprisals, where each side justifies itself with sincere claims that the other is behaving worse. And to me there’s no doubt at all that Republicans would enlarge the Court if they found it necessary to maintain control. Expansion now wouldn’t trigger reprisals except in the sense that as long as the Republicans are in control they don’t need to do anything. Last, game theory suggests that if the other side takes advantage of you, the best strategy is to retaliate to show them that there will be costs if they keep doing it. In sum, I’m basically neutral on the framing that advances court expansion as a solution to an unfair Republican advantage.

But this also brings up another possible solution, which is term limits. The point of term limits is to regularize the appointments process so that each President gets two appointments per four-year term. Then we don’t have to worry about strategic retirements and chance deaths and partisan hardball, and the composition of the Court will eventually come in line with national elections, which is a far preferable system. So going in, and for much of the process, my view was

that the right answer was to say “We’re not going to try to change the current Court. But the process that got us here is broken, and we need to fix it, and term limits are the solution.”

Brief digression: I think term limits can be enacted by statute. I didn’t think this going in, because it seemed obvious to me that taking a Supreme Court justice out of the regular decision process removed that Justice from office. Surprisingly, that isn’t the way our law or our practice understand it. Current 28 U.S.C. § 371 provides two options for federal judges, including justices, who meet the service and age requirements. They may “retire from the office” under § 371(a), upon which they no longer hold the office but continue to receive an annuity equivalent to their salary at the time of retirement. Or they may “retain the office but retire from regular active service” under § 371(b) and “continue to receive the salary of the office” if they perform a different set of duties, spelled out in later sections. Retired Justices do not participate in Supreme Court decisions but may decide cases on the lower courts; senior judges do not have to decide cases at all. Yet *Booth v. United States*¹ held that these people do still “hold the office” for the purposes of Article III, section 1.

So there’s very straightforward argument for a system whereby Justices retire from active service after eighteen years. The Good Behavior Clause says that judges “shall hold their offices during good behavior.” If you want to know whether doing something to a judge violates that clause, the threshold question is whether the judge still holds the office. If they do, there can’t be a violation. And a unanimous Supreme Court has told us that senior judges still hold the office. Does the power to change judicial duties without running afoul of the Good Behavior Clause threaten judicial independence? Yes, if it can be used selectively, or as punishment—but I think that general structural principles of separation of powers prevent that, just like they prevent other

¹ 291 U.S. 339 (1934)

forms of punishment that don't amount to removal from office, like taking judicial clerks as reprisal for unpopular decisions. Consistent and lengthy fixed terms are adequate to protect judicial independence in every other democracy in the world.

Anyway, the third framing is this: "The problem is that the composition of the Court depends on chance, strategic retirement, and partisan hardball, and the solution is term limits."

I think that's pretty clearly right, and I still believe it. But I ended up going farther, too. And what drove me there really was the liberal institutionalists again, because in response to the suggestion that term limits could be achieved by statute, they said "We need to be very careful about this. We've seen democratic backsliding occur in other countries where the composition of the judiciary could be changed by an electoral majority. We don't want to open that door."

That made me think that the situation is much worse than I realized, because again, these distinguished scholars are either profoundly naïve or just in denial about what's happening. The United States is experiencing democratic backsliding. You can listen to the European think tank IDEA, which added us to its list of backsliding democracies,² or you can look at the waves of attempts to modify the electoral process, directed at both the process of voting and the process of counting votes and certifying results. This is happening, and it's happening with the active participation of the Supreme Court, in decisions like *Shelby County*³ and *Brnovich*.⁴ And like I said before, the Court is handing down those decisions because its composition was changed by one house of Congress—by Senators representing a minority of the population. They shrank the Court to eight and then they brought it back to nine. But now if you say "maybe we should try to

² See International Institute for Democracy and Electoral Assistance, *The Global State of Democracy 2021: Building Resilience in a Pandemic Era 8* (2021) (including the United States among "currently backsliding countries").

³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁴ *Brnovich v. Democratic National Committee*, 594 U.S. __ (2021).

fix the appointments process so that doesn't happen again," distinguished liberal thinkers will say "oh, no, that would set a dangerous precedent and undermine the norms that safeguard our hallowed institutions."

That's sleepwalking into authoritarianism. And it made me realize that if I want to defend democracy, the place to stand is not with the liberal institutionalists. It's farther left. So that's the final framing: the problem is that our democracy is under attack and the Supreme Court is participating. Again, court expansion is the solution. And that's where I came down in the end. This is a moment of crisis. Court expansion does strike me as extreme. It's really a confession that the ordinary system has failed. But I'm afraid that's the truth, and desperate times require desperate measures.