



Biden Supreme Court commissioners slam 'partisan' framing of draft, allege it is biased against court-packing

One commissioner alleged draft 'distorts' debate on court-packing, another alleged current SCOTUS is 'enabling' GOP to steal power with election laws

Tyler Olson

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Some members of President Biden's Supreme Court commission Friday railed against the framing of wide-ranging discussion materials it released Thursday night on court-packing, alleging that it focused too much on partisan politics rather than institutional confidence, as others alleged it's "biased" against court-packing.

"This entire discussion is framed in the context of partisan politics. And I actually think that is a disservice to the exploration of this issue," NAACP Legal Defense Fund President Sherrilyn Ifill said about the chapter on court-packing. She said that many of those who favor court-packing have "genuine concerns" about rule of law and other issues.

"There are many reasons why one might support the idea of expanding the court that don't have to do with your being beholden to a particular partisan agenda," she added. "You've basically allowed people to check out from the arguments that actually relate to the legitimacy of the Supreme Court."

"Although my guess that Commissioner Ifill and I probably disagree on the merits of court expansion, I couldn't agree more with her comment about the way the issue is framed," replied former D.C. Circuit Judge Thomas Griffith, who was appointed by former President George W. Bush and opposes court-packing.

"It's framed in this partisan way of looking at this as Democrats vs. Republicans ... too much of this discussion draft reinforces the assumptions of many that the justices are partisans just

looking for ways to advance the policy agendas of the president who appointed them," he continued. "It's inaccurate... The Supreme Court has played well its vital role. It has repeatedly demonstrated a commitment to the rule of law... This is the time to build confidence in this report. Too frequently elements of this draft report do just the opposite."

Other liberal commissioners, including Harvard Law Professor Andrew Crespo, said that they simply think the draft materials were unfairly biased against court-packing. He alleged that the discussion materials' framing "distorts" the debate because it does not seriously consider "the most salient and most viable intervention on the table" in court-packing.

Crespo alleged that Republicans packed the Supreme Court "twice" in recent years with political hardball tactics, despite the fact the widely-accepted definition of court-packing is Congress adding justices to the court out of dissatisfaction with unfavorable rulings to the party in power. Duke Law School Professor David Levi responded to this point later in the discussion, saying that it is unfair to call leaving a seat open ahead of a presidential election – as Republicans did in 2016 – court packing. He noted that ahead of an election it is normal for a Senate of the opposite party of the president to decline to confirm nominees for lower courts, and that is not considered court-packing.

Former U.S. District Judge Nancy Gertner, who was appointed by former President Bill Clinton, meanwhile, alleged that the Supreme Court is "enabling" Republicans to "secure a tactical advantage" in elections with state-level election laws.

The discussion materials presented a mixed view on court-packing, which ahead of the meeting drew backlash from some progressives who believe Biden and Democrats in Congress should pack the court with multiple liberal justices after Republicans confirmed three justices during former President Donald Trump's tenure.

Co-Chairman Bob Bauer, who a former White House Counsel under former President Barack Obama, opened the Friday meeting by pushing back on the criticism of the discussion materials.

"The commission has not edited the material and the material should not be understood to represent the commission's views or those of any particular commissioner," Bauer said. "To this point and particularly in light of some confusion and uncertainty since the posting of these materials, we refer you to the front page of each of the drafts that have been publicly posted that clearly set forth these points."

Bauer added that the materials are "not the commission's drafts nor a draft report of the commission."

The meeting opened at 10 a.m. with discussion of the reason many are calling for court reform. Most of the substantive discussion on court-packing happened from 11:10 a.m. and 12:50 p.m. as the commissioners deliberated "Membership and Size of the Court," according to the public agenda of the meeting.

"It turns out that a vocal minority of commissioners aren't willing to let court-packing go," Cato Institute Vice President Ilya Shapiro told Fox News in response to the discussion. "Larry Tribe evocatively called it a 'break the glass' moment, where we effectively need to break norms to remedy alleged broken norms. The final report will thus likely reflect less of an anti-court-packing lean."

Shapiro added: "Adam White's description of a 'heckler's veto theory of legitimacy' is evocative: so much of the current call for reform is driven by upset (and even outrage) over the direction of political and legal developments."

Later in the day the commission will also debate potential reforms related to term limits for justices, potential rotation of justices, case selection and the Supreme Court's broader role within the United States' system of government.