Biden's Supreme Court Commission Releases Discussion Materials

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Should there be more than nine Supreme Court justices? Term limits for justices rather than lifetime appointments? In April, President Biden established a commission to study these and other potential changes to the high court, and on Thursday, the panel made public its discussion materials examining the possible reforms.

The draft comes as the Supreme Court is under heightened political scrutiny and has begun a term filled with divisive issues, including abortion, the Second Amendment and religious liberty. The highly academic materials, broken into five categories, do not endorse or reject arguments, and White House press secretary Jen Psaki characterized the draft as an assessment rather than a list of recommendations.

In discussion materials focused on expansion of the high court, the commission acknowledged it does "not believe there is a formal legal obstacle to" adding seats. But it seemed to cast doubt on the possibility of expanding the court.

"Commissioners are divided on whether court expansion would be wise," the preliminary report states. "Court expansion is likely to undermine, rather than enhance, the Supreme Court's legitimacy and its role in the constitutional system, and there are significant reasons to be skeptical that expansion would serve democratic values."

On the issue of imposing term limits for justices, though, members of the commission appeared more open to the idea, writing term limits "may help strike a more appropriate balance" between judicial independence and long-term responsiveness of the judiciary to the people.

A system of term limits, the commission wrote, "would advance our Constitution's commitments to checks and balances and popular sovereignty" and can "enhance the court's legitimacy in the eyes of the public."

The commission also wrote a code of ethics for the high court — adopted internally or imposed by Congress – would bring it "into line with the lower federal courts and demonstrate its

dedication to an ethical culture." While there is a code of conduct for the federal judiciary, it does not apply to the Supreme Court.

Composed of 36 legal scholars, lawyers and former federal judges, the Presidential Commission on the Supreme Court has held more than 17 hours of discussions across three meetings in a five-month span. The commission will convene Friday to deliberate on the five-chapter report before a final meeting on The final report is expected to be delivered to President Biden on November 14.

Conservatives now hold a 6-3 majority after President Trump's three appointments. For progressive groups that have been pushing for significant changes to the court, the commission's findings may be a letdown, as commission co-chair Cristina Rodriguez declared at its first public meeting in May that "we're not charged with making specific recommendations [to the president], but rather we are to provide an evaluation of the merits and legality of particular reform proposals being debated today, many of which have historical antecedents."

"You wouldn't have a climate change commission with climate skeptics. Here we have a Supreme Court commission with people who don't think the Supreme Court is broken," Chris Kang, chief counsel of Demand Justice, a progressive judicial advocacy group that favors expanding the Supreme Court, told CBS News. "They're arguing first principles as opposed to what reforms are necessary."

Kang said he is "not that optimistic" the report will be a "cold, hard, fair look at the reality of the court today," in part because the commission is not empowered to make recommendations, and it lacks a mandate.

Psaki told reporters Wednesday that Mr. Biden won't comment on the commission's findings until he reviews its final report, to be delivered November 14.

"Our objective here is to allow for this process, made up of a diverse range of experts and voices, to move forward and represent different viewpoints," she said.

The path for many of the proposed changes to the Supreme Court will run through Congress, though the slim Democratic majorities in the House and Senate make it unlikely legislative proposals, namely one that adds justices, would pass.

Here are the top reforms debated before Mr. Biden's commission:

Court Packing

The commission reviewed calls by progressives to expand the current size of the Supreme Court; this is an effort backed by some Democrats who want to to counteract Republicans' obstruction of Obama Supreme Court appointee Merrick Garland's nomination process and afterward, the GOP's swift confirmation of three conservative justices during Mr. Trump's presidency.

The commission arranged a separate 16-person committee of Supreme Court lawyers and former solicitors general who collectively have argued more than 400 cases before the high court, to share their views on the proposals for major changes to the court.

This group "unanimously oppose[d] proposals to enlarge the court" because "increasing the number of justices represents an escalation of the problem, not a solution, and a larger bench could make arguments less productive, deliberations more difficult, and yield even more opinions with less clarity in the law," Maureen Mahoney, the committee co-chair and a partner at Latham and Watkins, told the commission.

Expanding the court would "would lead to further partisan, poisonous, mutual acrimony," Stanford Law School professor Michael McConnell told the commission in June. "I don't think there's any doubt that it would be viewed, rightly or wrongly — I think rightly — by all Republicans as an illegitimate move, a manipulation, and an abuse of power, and an attempt to undermine our constitutional system. I suspect that the public would come around to that point of view as well."

However, others advocated expanding the court. Chris Kang, of Demand Justice, told the commission "the size of the court has been changed seven times before, and this is the constitutional response to a political court, and it is the only way to restore balance and provide relief right away."

When the Supreme Court was established in 1790, there were six justices — one chief justice and five associate justices. Congress changed the number of justices six times before 1869, when it added two justices, bringing the total up to nine.

President Franklin Roosevelt's 1937 push to expand the Supreme Court from nine to 15 justices was the last major effort to alter the size of the court, and it was driven by his frustration with some of the high court's decisions, which had struck down several New Deal laws. But even though Congress didn't pass the court expansion, the presidential threat may have produced favorable results for those concerned about the direction of the Supreme Court at that time, according to Laura Kalman, a research professor at the University of California, Santa Barbara, who testified before the commission.

FDR's "constitutional hardball" was a "good gamble," Kalman said, because the "possibility of court expansion changed the political conditions under which the court created legal doctrine" for his prized New Deal legislation.

Mr. Biden said last October he was "not a fan" of expanding the Supreme Court.

Term Limits For Justices

The Constitution vests justices with lifetime tenure, but some court watchers have called for setting term limits of 10 to 22 years.

The 16-member committee of Supreme Court litigators unanimously opposed proposals to set term limits by statute, warning it would face constitutional challenges and lead to instability, as future Congresses could alter the number of years justices can serve.

John Malcolm, a legal scholar at the Heritage Foundation, a conservative think tank, told the Supreme Court commission that imposing term limits would likely require a constitutional amendment.

Still, some scholars believe 18-year terms would help de-politicize the court. Even Justice Stephen Breyer, who has resisted calls to retire, has said he favors term limits.

“There are only a handful of officials anywhere in the world with true lifetime tenure: the Pope, the Dalai Lama, 28 monarchs, and 9 justices of the Supreme Court. And while some of those other officials exercise only symbolic power, the Supreme Court justices in our country have very real power,” Tom Ginsburg, a law professor at the University of Chicago, told the commission.

Ginsburg advocated for term limits of at least 10 or 12 years, but Professor Akhil Amar of Yale University has a proposal for 18 years of active service, followed by a lifetime of “relaxed” service, in which justices perform other Supreme Court functions.

“My proposal is easily and obviously constitutional as a mere statute. It does not require a constitutional amendment. It recognizes a single office, and it simply modifies the duties of that office purely prospectively,” Amar told the commission.

The “Shadow Docket”

The “shadow docket,” a term coined by University of Chicago law professor William Baude, who is also a commission member, refers to the summary judgments and orders issued by the court without full briefing and oral argument.

In its regular course of business, the Supreme Court may take on dozens of cases each term, accept several rounds of legal briefs, hear formal arguments from lawyers representing both sides, and issue rulings with lengthy written opinions that are signed. But a shadow docket decision can drop in the middle of the night and with no reasoning from the court. These orders often do not show how each justice voted.

This aspect of the Supreme Court’s work has generally garnered little attention, but it became a subject of criticism — and two congressional hearings — after the court declined to block a new Texas law that bans abortion when embryonic cardiac activity is detected, usually at about six weeks and often before a woman is aware that she is pregnant.

Steven Vladeck, a law professor at the University of Texas, told the commission in June that procedural and substantive shifts in how the Supreme Court decides cases should “meaningfully feature in any detailed conversation about court reform.”

He lamented that in many recent shadow-docket rulings, the Supreme Court has sacrificed procedural regularity, "because the current court is far more willing to depart from regular order, at least in this context, than any of its predecessors."

Sharon McGowan, chief strategy officer of Lambda Legal, also advocated for limiting use of the court's shadow docket to shift legal doctrine without full briefing, participation from outside parties and oral argument.

But the committee of 16 lawyers rebuffed a proposal for congressional intervention and instead called on the court to alter its own procedures.

"Many of us on the committee, if not most of us, felt that the criticisms of the court's so-called shadow docket are a bit overstated. Even the name shadow docket, it seems unfairly to suggest some impropriety," Kenneth Geller, a lawyer with Mayer Brown, told the commission. "In fact, the Supreme Court, like every court, is required on a regular basis to act quickly without full briefing and oral argument on applications for stays and injunctions pending appeal."

Justice Samuel Alito has also balked at complaints about the shadow docket and laid out a multi-pronged defense of how the Supreme Court addresses emergency applications during a lecture at the University of Notre Dame.

Fixing The Nomination Process

Others argued before the commission that it is not the Supreme Court that needs fixing, it's the nomination process. And the body responsible for shepherding nominees — the Senate — is in an "institutional crisis," Jeff Peck, former chairman of the Tiber Creek Group and former general counsel to the Senate Judiciary Committee, told the commission.

Peck cited interviews with 13 Republican and 12 Democratic Senate staffers who worked on the 17 Supreme Court nominations between Sandra Day O'Connor in 1981 and Amy Coney Barrett in 2020 to construct "new rules" for the Senate Judiciary Committee.

One idea they discussed was a requirement that "all nominees receive a Senate Judiciary Committee hearing, a committee vote, and an up-or-down vote on the merits in the Senate" to avoid gamesmanship from the majority party. Garland's Supreme Court nomination would have benefited from a rule like this — then-Senate Majority Leader Mitch McConnell blocked Garland from receiving a hearing.

A new memorandum of understanding "should clarify the FBI's role" in maintaining independence in the nominating process, adopting "protocols" for FBI communications with the sitting White House, and detailing the parameters of the FBI's investigation process of nominees "so that matters that have historically come to light later in the process are more likely to be uncovered on the front-end," Peck added. Questions about how involved the FBI should be in looking into the background of nominees contributed to the rancorous confirmation process of Justice Brett Kavanaugh.

Ilya Shapiro of the Cato Institute took a more extreme view, telling the commission that Senate confirmation hearings should be abolished altogether as “they’ve served their purpose but now inflict greater cost than any informational benefit.”