

October 4, 2021

Professor Bob Bauer and
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Co-Chairs, Presidential Commission on the
Supreme Court of the United States

Re: Presidential Commission on the Supreme Court of the United States; Dkt. PCSCTOUS-2021-0001-0003, 86 Fed. Reg. 31504

Professors Bauer and Rodriguez, and Commission members:

On behalf of [x] Americans who join in supporting this comment letter, we write to urge the Presidential Commission on the Supreme Court of the United States (“Commission”) to affirm the judicial independence of America’s Article III courts as designed by the framers of the United States Constitution and to reject partisan “court reform” proposals, including those that seek to expand the number of U.S. Supreme Court justices and limit judicial review by the federal courts.

Introduction.

Partisan “court reform” proposals threaten the civil liberties of all Americans, and the political manipulation of our judiciary threatens the integrity of our constitutional democracy. An overwhelming majority of Americans reject proposals to “reform” the Supreme Court of the United States by adding to the number of justices and by limiting judicial review.¹ Our own nation’s history—and the experience of other countries—offer strong cautions against restructuring the judiciary.

The current progressive legal-political movement now seeks to effectuate a seizure of our courts under the specious guise of “reforming” the judiciary. Whether by packing the Court with additional justices, stripping the Supreme Court of jurisdiction, or otherwise undermining the constitutional notion of separation of powers, the goal is the same: replacing the Constitution’s original meaning with one that reflects a progressive secularism. The current effort in support of “court reform” poses the utmost risk of subverting our freedoms and constitutional democracy.

As the Senate Judiciary Committee explained in 1937—the last time the United States considered (and rejected) political proposals to pack the Supreme Court—changing the Court is a “needless, futile, and utterly dangerous abandonment of constitutional principle.”² Why did the Senate Judiciary Committee of 1937 reject calls to pack the

¹ James Freeman, “Mason-Dixon Poll: Americans Reject Court-Packing,” *Wall Street Journal*, www.wsj.com/articles/mason-dixon-poll-americans-reject-court-packing-11619200597.

² Senate Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Congress, 1st Session, 1 (1937) (“S. Rep. No. 711-75”) at 23 (1937).

Supreme Court and why should this Commission do the same now? Because court-packing “amounts to nothing more than the declaration that when the Court stands in the way of a legislative enactment, the Congress may reverse the ruling by enlarging the Court. When such a principle is adopted, our constitutional system is overthrown!”³

Analysis.

Partisan court reform proposals threaten the constitutional rights of all Americans.

Since our country’s founding, the Constitution has stood as a bulwark against threats to liberty and fundamental rights. Time and again, courts have protected Americans—small and great alike—from government overreach and the silencing of dissent. If politically motivated schemes to reform the Supreme Court are successful, the judiciary will no longer be a safeguard of our civil liberties. Instead, it will be little more than a political tool of the executive and legislative branches used to crush the freedom of all Americans. Current discussions of “court reform” are transparent, partisan plots designed to achieve purely political objectives through the use of raw power. The Commission should reject such “reforms” that attack the integrity of our courts and open the door to the demise of our freedoms.

Today, the far Left sees judges who interpret the Constitution according to its original public meaning as substantial obstacles to restructuring society according to misguided progressive values. The political opposition to the nomination of Justice Amy Coney Barrett provides an apt example. In the minds of progressives, Judge Barrett and other judicial nominees in recent experience who adhere to the tenets of originalism are viewed with suspicion and met with cynicism. Their qualifications for office are questioned based on little or no substance. The animus so often expressed toward originalist judges is often accompanied by a promotion of an aggressive reading of the Constitution as a living document, an interpretive model which curtails historic rights while creating novel privileges, often at great cost to life and liberty. Should the far Left seize control of the federal courts, the constitutional rights we cherish as Americans—from religious freedom to economic freedom, from states’ rights to freedom of expression—would be in jeopardy.

During the 1937 debates about President Roosevelt’s court-packing plan, Montana Senator Burton K. Wheeler voiced similar concerns, saying, “Create now a political court to echo the ideas of the executive and you have created a weapon . . . that can extinguish your right of liberty, of speech, of thought, of action, and of religion.”⁴ The Senate Judiciary Committee itself asserted in 1937 that “independent courts are the last safeguard of the citizen, where his rights, reserved to him by the express and implied provision of the Constitution, come in conflict with the power of governmental agencies.”⁵ We would do well to heed these warnings from our own history.

³ *Id.* at 14.

⁴ Burton K. Wheeler, “First Member of the Senate to Back the President in ‘32-”, (Mar. 10, 1937), available at <http://academic.brooklyn.cuny.edu/history/johnson/wheeler.htm>.

⁵ S. Rep. No. 711-75 at 14.

Political court reform measures threaten the separation of powers.

The progressive-Left's "court reform" plan coincides with a blatant disregard for, if not outright opposition to, the foundational principle of the separation of powers. To maintain the constitutional balance of powers, the judiciary in general and the Supreme Court in particular should be independent and free from the encroaching manipulations of the executive and legislative branches. Proposals made to, and debated by, this Commission are a not-so-veiled attempt by the political branches of government to manipulate the constitutional decisions of the Court and attack the integrity of the courts.

The Constitution's framers viewed the separation of the three branches of government as essential to preserving our constitutional republic and the liberties we hold dear. An independent judiciary is an essential check on the power of the executive and legislative branches, guarding against the fleeting whims of the political moment. As the last safeguard of our civil liberties, the judiciary should never be subject to the changing winds of politics.

Our nation's history, as well as international experience, caution against restructuring the judiciary.

Many of the reforms (including court-packing) debated by the Commission ignore the telling examples of other countries that adopted similar destructive measures. International experience readily demonstrates the dangers posed when political branches influence or seize control of the judiciary. In Hungary, Poland, Turkey and Venezuela, governments packed their courts, weakening the judiciary and strengthening the political power of the executive branch. Such "reforms" proved fatal, eventually undermining each nation's constitutional system. As one example, in 2004 President Hugo Chavez consolidated his political power by increasing the size of the Venezuela Supreme Court from 20 to 34 justices.⁶ Soon thereafter he added another 14, thereby more than doubling the court's size.⁷ In more than 45,000 total rulings since that political expansion of the nation's judiciary, the Venezuelan high court has issued *zero* rulings critical of the Chavez or Maduro political regimes.⁸

As the U.S. Senate Judiciary reported in 1937, politically driven efforts to "reform" the Judiciary, would "subjugate the will of Congress and the Presidency and thereby destroy the independence of the judiciary, the only certain shield of individual rights."⁹ Such a proposal, the Judiciary Committee remarked, "violates every sacred tradition of American democracy" and "would . . . make the Constitution what the executive or legislative branches of the Government choose to say it is."¹⁰ The Commission would do

⁶ Alfredo Meza, "Venezuelan government's winning streak at the Supreme Court," *El Pais*, english.elpais.com/elpais/2014/12/12/inenglish/1418411741_236380.html.

⁷ Kejal Vyas and Anatoly Kurmanaev, "Maduro's Allies Stack Venezuela's Supreme Court," *Wall Street Journal*, www.wsj.com/articles/maduro-s-allies-stack-venezuelas-supreme-court-1450912005.

⁸ Pedro Rosas, "How Venezuela's supreme court triggered one of the biggest political crises in the country's history," *Vox.com*, www.vox.com/world/2017/5/1/15408828/venezuela-protests-maduro-parliament-supreme-court-crisis.

⁹ S. Rep. No. 711-75 at 23.

¹⁰ *Id.*

well to heed the warnings of the 75th Congress: politically driven court reform “is a measure which should so emphatically be rejected that its parallel will never again be presented to the free representatives of the free people of America.”¹¹

Americans reject partisan efforts to pack the court.

Americans strongly oppose any attempt by political elites to overthrow the court system through partisan court reforms. According to polling, 64% of Americans oppose adding more justices to the U.S. Supreme Court.¹² Americans overwhelmingly (69%) oppose amending the U.S. Constitution to reduce the independence and authority of the Supreme Court.¹³ Almost three-quarters (74%) of Americans reject any proposal to expand the membership of the Supreme Court and choose panels of justices by lottery selection.¹⁴ In fact, 61% of Americans surveyed rejected *any* constitutional change to the structure of the U.S. Supreme Court.¹⁵

While few Americans today see a court reform commission as necessary, 61% of Americans believe a commission to study congressional reforms may be necessary, and 51% would support a commission to study reforms to the powers of the executive.¹⁶ Most Americans (63%) view the Presidential Commission on the Supreme Court primarily as a partisan proposal to increase political power.¹⁷ Indeed, the American public regularly views the judiciary as the more trustworthy¹⁸ and reasonable of the separate and equal branches of our republic.¹⁹

A review of the most recent term of the U.S. Supreme Court ratifies the public’s trust. Far from evincing a divided court, the justices decided 43% of cases in this sitting unanimously—consistent with the average of 47% over the past decade.²⁰ Only 15% of cases decided this year can be described as polarized along ideological lines.²¹ Justice Brett Kavanaugh’s nomination to the high court was one of the most acrimonious in our nation’s history and is routinely cited as the justification for the most progressive court “reform” measures, yet he joined the Court’s majority in 97% of this past term’s decisions.²² In stark contrast to the caricature of a divided, broken court that progressives

¹¹ *Id.*

¹² Paul Bedard, “No’ to court packing, more want Congress and White House fixed first,” *Washington Examiner*, www.washingtonexaminer.com/washington-secrets/no-to-court-packing-more-want-congress-white-house-fixed-first (“By more than a 2-to-1 margin, registered voters opposed court packing, 64% to 28%.”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See generally* Gallup, “Supreme Court,” news.gallup.com/poll/4732/supreme-court.aspx.

¹⁹ *See generally* Gallup, “Congress and the Public,” news.gallup.com/poll/1600/congress-public.aspx.

²⁰ “Stat Pack for the Supreme Court’s 2020-21 term,” *SCOTUSBlog.com*, www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf.

²¹ *Id.*

²² *Id.*

often paint, the Supreme Court remains the most trusted institution of our tripartite government.²³

Conclusion.

Given such resounding trust for the Supreme Court and the judicial system, the sobering examples of other nations, and the enormous risk to our constitutional freedoms and democratic structure, partisan court reforms would be a mistake of historic proportions. As the 1937 “Report on the Reorganization of the Federal Judiciary” issued by the U.S. Senate Judiciary Committee concluded, court-packing’s “ultimate operation would be to make this Government one of men rather than one of law.”²⁴ Then, as now, politically motivated court reforms lack historic precedent and legitimacy. Now is the time for staunch, bipartisan opposition to any plan that would subject the Supreme Court to a deeply politicized and damaging packing scheme.

We urge the Commission to reaffirm the Constitution’s design of our judiciary, redoubling our national commitment to a judiciary that the Senators in the 75th Congress praised as “the priceless heritage of every American.”²⁵ May your commission’s defense of the judiciary match that of the Senators of 1937:

Let us . . . in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. We are not the judges of the judges. . . . [T]hus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.²⁶

²³ Charles H. Franklin, “Public Views of the Supreme Court,” *Marquette University Law School*, law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf (57% trusted the U.S. Supreme Court and the judicial branch the most, 22% trusted the U.S. Congress and the legislative branch the most, and 21% trusted the Presidency and the executive branch the most).

²⁴ S. Rep. No. 711-75 at 23.

²⁵ *Id.* at 9.

²⁶ *Id.* at 14.

We urge the Commission to reaffirm that “priceless heritage” designed by our Constitution to ensure an independent judiciary that has preserved the freedoms Americans have enjoyed for over 200 years and “as long as this Government stands.”

Respectfully,

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