

Presidential Commission on the Supreme Court of the United States
Perspectives on Supreme Court Reform

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July 20, 2021

As a candidate last fall, President Joseph R. Biden said that he was “[not a fan](#)” of Supreme Court expansion.

I completely understand where he’s coming from.

I’m not a “fan” of Supreme Court expansion, either.

I had always considered myself an institutionalist. I wanted to advance change from the inside and work through the system, willing to find compromise and progress from within. For nearly 14 years, I served on the Senate Judiciary Committee, Senate floor, White House Office of Legislative Affairs and finally the White House Counsel’s Office, where I oversaw the selection, vetting, and confirmation of judicial nominations for a majority of the Obama administration. And I know that many of my colleagues then would be surprised to see me here today, testifying in support of Supreme Court expansion.

But the preservation of an institution—any institution, even the Supreme Court—cannot be an end in itself. And this Court has proved it is not worth preserving in its present form.

Instead, the end, as Harvard Law School Professor Nikolas Bowie eloquently [stated](#) before this commission last month, must be to make the United States of America more democratic. At this moment in our nation’s history, the Supreme Court reform necessary to advance democracy, justice, and equality is enactment of the Judiciary Act of 2021, in order to expand the Supreme Court to 13 justices.

The fiction of an apolitical judiciary

Criticism of the Supreme Court often centers on the concern that our courts have become overly politicized. While this concern is well-founded, it only tells half of the story: the problem is not simply that our courts have become politicized, it is that only Republicans acknowledge the politicization—and not only acknowledge it, but actively pursue it.

As Penn State Law Professor Eleanor Brown has [said](#):

“We have all been sold this notion that there is an impartial, independent judiciary working for the common good. People on the left have disproportionately bought that fiction. People on the right never bought that fiction. If people on the left buy the fiction and people on the right do not buy the fiction, it means that people on the right...are behaving in activist ways, they are always acutely aware of the stakes and the implications in a way that people on the left are not.”

I admit that until a few years ago, I bought that fiction.

From the beginning, President Obama’s judicial nominations sought to turn the page on the judicial confirmation battles. His first circuit court nominee was not a progressive firebrand, but instead a white, male district judge from Indiana who had the support of the senior-most Republican senator, Richard Lugar. Republicans filibustered him anyway, sending a message that any disarmament would be unilateral on our part.

Nonetheless, President Obama continued to seek consensus on his judicial nominees. Most of his circuit court nominees were confirmed with overwhelming bipartisan support and only token opposition, if any. Republicans responded by seeking conflict and politicization, filibustering district court nominees for the first time and blocking nominees to the U.S. Court of Appeals for the D.C. Circuit solely because they did not want a Democratic-appointed majority on the court.

Through it all, I prided myself on being able to navigate the constant escalation—from blue slips to filibusters to endless obstruction—and thought that turning down the temperature would help preserve our judiciary as an independent, apolitical institution.

Instead, the Republican politicization during my seven years in the Obama White House escalated to unimaginable heights during the five years that followed.

It is clear now that clinging to the fiction of an apolitical judiciary—while Republican dismantle it—only hastens the politicization and cannot stem it.

The Republican cycle of power and politicization of our courts

As Professor Brown said, “people on the right never bought that fiction.” Indeed, the Republican fight for our courts has been politically motivated from the start. It has its roots in Republicans’ response to the Supreme Court’s decisions in *Brown v. Board of Education* and *Roe v. Wade*, as well as in the implementation of the strategy laid out in Lewis Powell’s 1971 memo urging the Chamber of Commerce to use the courts to advance its corporate agenda.

Because Republicans are motivated by politics, they have pursued a self-perpetuating cycle in which they use their political power to force Republican judges onto the courts, who then pursue Republican goals, which in turn help Republicans amass more power, and on and on.

In the past five years, Republicans have used their political power to:

- Change the size of the Supreme Court for more than a year by stealing a Supreme Court seat from President Obama in 2016, denying his nominee even a hearing for the first time since they began a century ago;
- Unilaterally change the Senate Rules to confirm Neil Gorsuch when his record proved too ideologically extreme to gain the necessary bipartisan support;
- Discard multiple credible allegations of sexual assault and perjury against Brett Kavanaugh and confirm him without legitimate investigation, and;
- Deny the will of the voters and confirm Amy Coney Barrett in modern-day record time, even though 60 million Americans had already cast their ballots in the 2020 election.

Republicans have targeted state Supreme Courts as well. Duke Law School Professor Marin Levy, who is testifying later today, has pointed to “numerous recent efforts across the country, the majority of them [spearheaded by Republicans, to pack \(and unpack\) state courts](#).” For example, in Georgia, Democratic-appointed justices outnumbered Republicans on the Supreme Court four to three in 2017, so Republicans expanded the Court from seven justices to nine, so the Republican Governor could appoint two more justices and gain a Republican majority. In 2016, Arizona Republicans expanded their Supreme Court from five to seven justices to gain a larger advantage. When Republicans could not change the size of a state Supreme Court – such as a failed attempt at expansion in Iowa – they have found other ways to use their power to change the Court’s composition and “[upended](#) the way justices are chosen for the court.”

Republicans also exerted their political power to pack federal circuit and district courts. From 2019 to 2020, Republicans confirmed only two Obama circuit court judges—the fewest circuit confirmations in a two-year Congress since the 1800s. Overall, they confirmed only 22 judges, [the fewest since President Truman](#)—when the judiciary was one-third of its current size. Their zeal to leave as many vacancies open as possible was relentless: they blocked nominees with bipartisan, often unanimous, support from the Republican-led Judiciary Committee and even refused to confirm judges hand-picked by Republican senators.

All of the Obama administration’s efforts to find consensus were met with one final slap in the face.

Then, after Republicans ensured [108](#) judicial vacancies for President Trump to fill, they systematically dismantled every norm, standard, and guardrail possible to confirm his political ideologues. They discarded blue slips. They unilaterally changed the Senate Rules so they could confirm more judges more quickly. They ignored standards of legal experience and confirmed unqualified nominees.

I expected Republicans to pave over some of the roadblocks they erected for Obama judicial nominees. I expected two sets of rules; I did not realize there would be two sets of reality: Republicans don't deny their politicization of our courts—they revel in it.

We have all heard Senator Mitch [McConnell gleefully laugh](#) about the Republican takeover of our judiciary. And why wouldn't he? McConnell knows that he is laughing all the way to the ballot box, as Republican judges rule time and time again to benefit the Republican Party and their donor interests.

Who gets hurt when Republicans fight for the courts and Democrats don't

The net effect of this one-sided politicization of the judiciary is a Republican supermajority on the Supreme Court that is hostile to our democracy, to the rights of working people, and to civil rights for millions of Americans. Because Republicans have politicized our Supreme Court, we have a supermajority that does not reflect the values of most Americans and as a result, that supermajority is taking the country in an increasingly anti-democratic direction.

The court's most consistent victim is democracy itself.

From *Bush v. Gore* to *Citizens United* to *Shelby County* to allowing voter roll purges and partisan gerrymandering to making it harder to vote during the pandemic, the Republican justices have lined up in favor of the Republican party. Last year, Senators Debbie Stabenow, Chuck Schumer, and Sheldon Whitehouse issued a report detailing [80 partisan, 5-4 decisions](#) in which Republican justices ruled to benefit Republican donor interests. The pattern continued this term with *Brnovich*, *Americans for Prosperity Foundation*, and *Cedar Point*.

As Republicans are rewarded for their politicization of the courts with more political power, there is literally no reason for them to stop their escalation.

Instead, Republicans have made clear that they are committed to changing the size of the Supreme Court to maintain their power. Just last month, when asked [if a Supreme Court vacancy arose in 2023](#) while he was majority leader, Senator McConnell would not commit to considering

a Biden nominee. This reiterates what McConnell said in 2019, when he only committed to allowing a vote on a Democratic president's Supreme Court nominee in the "[early part](#) of a president's term," which he suggested was "the [first year](#) of a term of a president." And it is not just McConnell. In 2016, several Republican senators – including Senators [Ted Cruz](#), [Richard Burr](#), and even [John McCain](#) – vowed that if Hillary Clinton won the presidency, they would maintain the Court size at eight justices – or even fewer – and not allow her to fill any vacancies for her entire presidency.

Reform advocates must stop buying the fiction of an apolitical judiciary—and understand who is selling it

To break this cycle of Republican power and politicization, those assessing ideas to reform our courts need to stop buying the fiction of an apolitical judiciary.

The conventional wisdom has long been that Republicans simply care about the courts while Democrats do not—that Republicans somehow understand the stakes better. But that is not the problem. The problem is not that Democrats are unable to understand the impact of the courts on reproductive rights, LGBTQ+ equality, voting rights, gun violence prevention, labor, the environment, racial justice, immigration, and more. We hold our collective breath every June to see what rights the Republican justices will allow to survive another year.

The problem is not that Democrats are incapable of organizing around the courts. It's that we're actively told we *shouldn't* organize around them. That our judiciary is apolitical and, therefore, we should not treat it as a political issue. That the courts and their rulings should be beyond criticism. That, even when an 82-year-old justice refuses to retire and risks the Court falling into deeper imbalance [because he is enjoying his new power](#), his decision should be beyond reproach.

If progressives are disproportionately buying this fiction, it is because of who is selling it: legal elites, the media, and the Court itself.

The legal elite culture, fueled by Supreme Court practitioners and academics, artificially props up the Supreme Court's reputation for independence. Some practitioners may seek a strategic benefit in not criticizing justices who may rule on their cases. Many maintain the elite culture as a goal in and of itself, as Supreme Court practitioners derive their prestige, wealth, and power from their exclusivity and by perpetuating the myth that they have the keys to winning over an apolitical Court. Law professors gain status and influence by placing their students in clerkships, which limits their criticism of judges—[even in the face of allegations of sexual harassment](#)—and instead promotes fealty to our courts and the notion of their independence.

Elite journalists who cover the Court for a living then amplify this illusion, citing practitioners and professors as disinterested experts instead of self-interested sources. Because the courts derive their authority from the public trust, many in the media seem to believe their purpose is to build that trust—even when it is not earned. There is no other explanation for the annual early-June articles proclaiming that the Supreme Court has acted moderately before the searing, partisan opinions are predictably delivered just weeks later. In manufacturing public trust, the media is complicit in hiding the true political nature of the Court and its decisions.

The Supreme Court takes advantage of this environment. It refuses to televise its oral arguments or opinions—feeding the myth that only legal elites can understand it. It refuses to adopt a code of ethics—as if justices can be specially trusted and are above reproach. It delays controversial decisions until the end of June (even if the cases were heard in early October) to propel false narratives about the court and uses its shadow docket to minimize coverage of some of its most political decisions.

All the while, Republicans are happy to play along: their one-way ratchet on politicization has allowed them to create a supermajority of Republican justices on the Supreme Court, which they now are poised to control for the next 30-40 years.

The only way to reform the Supreme Court is to start with expansion

Against this backdrop, I acknowledge the irony of testifying before a Commission of legal elites. I accepted this Commission's gracious invitation because I was part of the same legal elite culture that convinced myself that holding the line on an apolitical judiciary would strengthen our courts. I am here to admit that I was wrong.

We cannot preserve an apolitical Supreme Court because we cannot preserve something that does not exist; unilaterally working toward an apolitical judiciary unfortunately is insufficient to make it so.

Understanding this reality is critical to understanding what Supreme Court reform is necessary today. The goal is not to depoliticize the Court—because we can't. Instead, the goal should be to advance democracy, and through this lens, reform must start with expansion:

- Supreme Court expansion is clearly constitutional and rooted in our nation's history: Congress has changed the size of the Supreme Court seven times before.
- Supreme Court expansion will restore balance to a Court that has become too partisan and biased in one direction. Without expansion, Republican justices will continue to strike down voting rights and democracy reforms—and other Court reforms, such as term limits or modifying judicial review, would be in danger as well.

- Supreme Court expansion is the only reform that can provide relief right away. Our rights are under imminent threat—Republican justices could overturn *Roe v. Wade* and undermine gun violence prevention measures next term. Reform can't wait.
- Supreme Court expansion would modernize the Court and add much-needed diversity of background and legal experience.
- Supreme Court expansion is the only reform sufficient to serve as constitutional hardball and disrupt the Republican politicization so that we might one day achieve balance.

You have heard many people testify about what reforms would be good or bad for the Court itself, but I fear you have not heard enough about whether the Court itself is good or bad for the people who suffer the most from its far-right jurisprudence. We need to ask not only whether a given reform proposal will help or hurt the Court as an institution, but whether it will help or hurt people who count on institutions like the Supreme Court to protect their rights.

If legal elites continue to look the other way while Republicans continue to use the courts to pursue their radical agenda, none of us in this meeting will pay the greatest price. That will be paid by voters who stand in line for hours because the Court struck down voting protections, by women who would be forced to travel hundreds of miles to the nearest abortion clinic if the Court overturns *Roe*, by workers exploited in the workplace because the Court rolled back the power of unions, by victims of discrimination who find themselves shut out of court or written out of our civil rights laws. If a given reform doesn't address the wrongs suffered by those people, then that reform doesn't rise to meet the challenge we face.

I recognize that this Commission will not make recommendations and therefore will not deliver the reforms needed to right these wrongs. Thankfully, in our democracy, our future is not meant to be decided in rooms like these alone, but in the country as a whole, where momentum is building and a grassroots movement for Supreme Court expansion is on the rise.