

Court Reform Commissions, Past and Present

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KEY TAKEAWAYS

President Joe Biden created a Supreme Court Commission but did not identify a problem to address or direct that any recommendations be made.

The commission was created after demands to expand the Supreme Court so that Biden can appoint justices likely to address issues in a politically desirable way.

The lack of a concrete problem or final recommendations risks promoting the idea that judicial legitimacy depends on the desirability of judicial outcomes.

“Dissatisfaction with the administration of justice,” Dean Roscoe Pound said in 1906, “is as old as law” and has “an ancient and unbroken pedigree.”¹ Like necessity giving birth to invention, this discontent has produced ideas or proposals for changing the federal judiciary. In March 1937, Attorney General Homer Cummings began his Senate Judiciary Committee testimony on President Franklin Roosevelt’s proposal to expand the federal judiciary this way: “The question of judicial reform is not a new one. Eminent judges, lawyers, statesmen, and publicists over periods of many years have complained of the defects of our judicial system and have sought to find remedies.”²

Remedies include *structural* reforms, such as changing the number of judges on particular courts or limiting the length of their service, or *operational* reforms, such as limiting judicial jurisdiction or requiring a supermajority to find statutes unconstitutional.

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Some reform ideas come from the private sector. In 1981, for example, the Free Congress Foundation published *A Blueprint for Judicial Reform* that examined everything from congressional oversight and the withdrawal of appellate jurisdiction to legal education.³ Eight years later, the Brookings Institution released *Justice for All: Reducing Costs and Delay in Civil Litigation*, a task force report looking specifically at the federal civil justice system.⁴ Focusing on state courts, the American Bar Association's Commission on the 21st Century Judiciary offered 31 recommendations to address problems that, it said, put the "judicial systems of the United States...in great jeopardy."⁵

Court reform ideas have also originated in the executive or legislative branches of government. In 1937, for example, President Franklin Roosevelt sent to Congress a bill that would expand the federal judiciary. Though he would later vote against it, Senate Judiciary Committee Chairman Henry Ashurst (D-AZ) introduced the proposal as S. 1392, the Judicial Procedures Reform Act, shortly after Roosevelt began his second term and the 75th Congress began. This legislation would have created up to 50 federal judgeships (six of them on the Supreme Court) if judges who had at least 10 years of service did not leave the bench voluntarily when they reached 70 years of age.⁶

Also in 1937, Senator Charles Andrews (D-FL) introduced a constitutional amendment to make both structural and operational changes to the federal courts. It would, for example, require that one Supreme Court associate justice be appointed from each of the circuits comprising the U.S. Court of Appeals (10 at that time). Under this plan, judges on any federal court who had at least 10 years of service could "voluntarily retire on full salary upon attaining the age of 70 years" or "upon attaining the age of 75 years...shall automatically retire."⁷

On April 9, 2021, President Joe Biden signed an executive order creating the Presidential Commission on the Supreme Court of the United States ("Supreme Court Commission").⁸ He tasked it with submitting a report describing and evaluating "the contemporary commentary and debate" about issues involving the Supreme Court. These issues include the Court's role and operation, the process for appointing Justices, and "the merits and legality of particular reform proposals."⁹

This *Legal Memorandum* focuses on a third source of court reform proposals by looking at the current Supreme Court Commission in the context of previous groups formed to address issues related to the federal courts.

Separation of Powers and Judicial Independence

Whether established by Congress or the President, and regardless of their subject matter, commissions generally follow a consistent pattern. They address a particular problem or issue and make specific recommendations to solve or address it. Evaluating a commission's work from a basic policy perspective focuses on whether its recommended changes will effectively solve the identified problem.

Evaluating commissions that focus on the judiciary, however, requires an additional consideration. Even if a commission has recommended reforms that might constitute effective policy solutions, those reforms might significantly affect—and even undermine—the separation of powers and judicial independence.

Separation of Powers. Quoting the philosopher Montesquieu, Alexander Hamilton wrote that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”¹⁰ Similarly, Justice Antonin Scalia wrote that the Founders “viewed the principle of separation of powers as the absolutely central guarantee of a just government.”¹¹ The separation of powers, however, is not only an organizational principle for initially designing our system of government, but also an operational principle that must guide its actual functioning.

In *Bowsher v. Synar*,¹² for example, the Supreme Court held that a provision of the so-called Gramm–Rudman–Hollings deficit-reduction statute improperly gave enforcement authority (which belongs to the executive branch) to the Comptroller General, who is removable by Congress. More recently, Democratic-led committees in the House of Representatives issued subpoenas for records relating to then-President Donald Trump's private financial activities. In *Trump v. Mazars USA, LLP*,¹³ the Supreme Court emphasized that while Congress has the general authority to issue subpoenas, their purpose must be tied to the power to legislate (which belongs to Congress) rather than the power to investigate (which does not).¹⁴

Judicial Independence. The separation of powers principle means that *how* a reform proposal would achieve its objective is as important as *whether* it would do so. This principle's importance is magnified in the context of court reform commissions because, in addition to the general separation of powers, their suggested reforms can also undermine the more specific corollary principle of judicial independence.

The Declaration of Independence includes compromising the independence of the judiciary as one of the “abuses” by which King George III of

Great Britain sought to establish “an absolute Tyranny over these States.” He had made “Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The Constitution addressed these specific problems by providing that federal judges serve during “good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.”¹⁵

Explaining the Constitution, Hamilton wrote that the “complete independence of the courts of justice”¹⁶ is “peculiarly essential” for our system of government and, like the separation of powers, is both organizational and operational. Judicial independence has been called one of the “crown jewels of our system of government,”¹⁷ the “most essential character of a free society,”¹⁸ and the “backbone” of American democracy.¹⁹ The American Bar Association’s Commission on Separation of Powers and Judicial Independence identifies both individual, or decisional, independence and branch, or institutional, independence. “A truly independent judiciary,” the commission concluded, “is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches... and that is not compromised by politically inspired attempts to undermine its impartiality.”²⁰

Since retiring from the Supreme Court, Justice Sandra Day O’Connor has prioritized defending judicial independence. Speaking at the University of Florida School of Law in 2005, for example, she said that “we must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies.”²¹ In other words, attempts to manipulate or direct the substantive work of the courts—even in the guise of so-called reform—threatens judicial independence.

This is particularly relevant to the current debate over Supreme Court reform, as many of its advocates frame the changes they demand in terms of making the Court more “accountable.”²² O’Connor spoke to that point at the Denver University School of Law in 2008: “Judicial accountability, however, is a concept that is frequently misunderstood at best and abused at worst. It has become a rallying cry for those who want in reality to dictate substantive judicial outcomes.”²³

Court reform proposals, therefore, can impair judicial independence in *purpose* as well as effect. In 1937, the Senate Judiciary Committee opposed Roosevelt’s bill to expand the federal courts not because Congress lacked authority to do so, but because the bill’s *real* purpose was to apply “force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts.”²⁴

Minimizing Risk. Court reform commissions can take steps to minimize the potential risk to the separation of powers and judicial independence.

First, the authority establishing a commission can take care to identify, in former Attorney General Homer Cummings' words, the "defects" for which "remedies" are sought.²⁵ As the review below demonstrates, this identification of both problem and proposed solution is a common feature of commissions in general—but is especially important for those focused on reforms that affect the judiciary.

Open-ended discussion of "reform" in the abstract, without identifying the concrete basis or need for it, easily fosters general doubt or dissatisfaction with the courts, corroding the public's general sense of confidence in the judiciary as an institution—a perception that has been steadily declining in the past few decades. In Gallup polls, for example, the percentage of Americans who have a "great deal" or "quite a lot" of confidence in the Supreme Court has declined from an average of 45 percent during the 1980s to 36 percent in the past 10 years.²⁶

Second, as some have done, a court reform commission can explicitly recognize the separation of powers and judicial independence as important considerations informing or providing context for its work. In its final report, for example, the Commission on Structural Alternatives for the Federal Courts of Appeals stated as "undebatable" the principle that "[i]t is wrong to realign circuits...and to restructure courts...because of particular judicial decisions or particular judges."²⁷

Rather, it noted, "decisions about judicial structure and circuit alignment should be based on objective and principled considerations of sound judicial administration.... Views about the merits or correctness of specific judicial decisions or about individual judges currently serving on a court...are inappropriate bases for constructing long-range institutional arrangements."²⁸

Third, a court reform commission should be mindful that a proposal can undermine the separation of powers and judicial independence in purpose as well as effect. This is what O'Connor meant when she warned of attempts to compromise the judiciary's impartiality or "those who want in reality to dictate substantive judicial outcomes."²⁹ It also incorporates the Supreme Court's caution in *Mazars*, emphasizing that a court reform measure that Congress might generally have authority to enact might still be improper because it seeks to compromise the judiciary's exercise of its judicial power.

The Supreme Court Commission

The “genesis of the commission,” writes one reporter,³⁰ was the growing demand for what is commonly called “court-packing,” a term coined in the 1930s when Roosevelt proposed it.³¹ Court-packing requires that the same political party controls both the executive and legislative branches. Congress would enact legislation creating additional positions on the Supreme Court, and the President would “quickly fill those seats with justices” likely to provide decisions on particular issues that help advance a political or ideological agenda.³²

Court-packing, therefore, is defined by both its means and its ends. It involves creating new positions rather than filling vacancies in existing ones—and filling those new positions for the purpose of changing the Court’s composition and decisions rather than because the Court needs additional judges to do its work.

Presidents who fill vacancies as justices choose to retire are not engaging in court-packing. While his proposal to expand the Supreme Court failed, Roosevelt replaced eight of the nine justices in just four years. The same Senate that rejected court-packing approved those eight nominees in an average of just 12 days after their nomination—and only two of them had even a single vote against their confirmation.

Liberal Activists and Court-Packing. Liberal academics³³ and groups began advocating court-packing after President Donald Trump appointed Justice Neil Gorsuch to replace the late Justice Antonin Scalia. This advocacy gained traction when court-packing became an increasingly visible issue in the 2020 presidential campaign cycle. It intensified further when Trump appointed Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg shortly before the 2020 election.

Court-packing advocates frame their objective both indirectly and directly. Indirectly, they suggest that the Supreme Court is out of “balance,” measured by the party of the President who appointed each justice. On April 15, 2021, for example, Senator Edward Markey (D–MA) introduced the Judiciary Act of 2021 to expand the Supreme Court from nine to 13 seats. He said it was necessary to “restore balance” in light of the Supreme Court’s current ratio of six Republican and three Democratic appointees.³⁴ Similarly, the group Demand Justice insists that the “solution” to “a 6–3 Republican supermajority” is adding four Supreme Court seats and appointing justices who will “restore balance to the Court.”³⁵

Ideological Expectations. By itself, however, a ratio based only on the party of the appointing president is barely meaningful even in a general

sense. It implies that justices appointed by Presidents of the same party necessarily decide cases or handle issues in the same way. Examples abound, however, of justices not only defying partisan or ideological expectations, but doing so in cases raising the very issues that court-packing advocates seem most concerned about.

- ***Roe v. Wade***.³⁶ In 1973, with the same 6–3 ratio that it has today, the Supreme Court voted 7–2 to create a constitutional right to abortion. Five of the six Republican appointees were in the majority and one of them, Justice Harry Blackmun, wrote the opinion. One of the Democratic appointees, Justice Byron White, dissented and criticized the decision as “an exercise of raw judicial power” that “in my view...is an improvident and extravagant exercise of the power of judicial review.”³⁷
- ***Planned Parenthood v. Casey***.³⁸ The Court had an even larger 7–2 Republican majority in 1992 when it retained *Roe*’s “essential holding.”³⁹ The plurality opinion serving as the foundation for the Court’s decision was authored by three Republican appointees with two others, Blackmun and John Paul Stevens, who joined them in reaffirming that the Constitution protects the right to abortion.
- ***Romer v. Evans***.⁴⁰ The Supreme Court also had a 7–2 Republican majority in 1996 when it struck down a state constitutional provision barring protected civil rights status based on sexual orientation. Four Republican appointees joined the majority and, as in *Roe*, one of them wrote the opinion.
- ***Lawrence v. Texas***.⁴¹ The Supreme Court had the same 7–2 Republican majority in 2003 when it declared unconstitutional a state law prohibiting sodomy—and reversed its own contrary precedent. As they had in *Romer*, five Republican appointees were in the majority, with Justice Anthony Kennedy writing the majority opinion.
- ***Roper v. Simmons***.⁴² The Supreme Court also had a 7–2 Republican majority when it decided in 2005 that the Eighth Amendment prohibits executing persons who committed their crimes before the age of 18. Kennedy wrote the majority opinion, joined by Justices Stevens and David Souter.

- ***Christian Legal Society v. Martinez***.⁴³ The Supreme Court had a 6–3 Republican majority when it upheld the University of California’s policy of prohibiting student groups from limiting membership or leadership on the basis of religious beliefs in 2010. The 5–4 decision that this policy did not violate the First Amendment was possible because two of the Republican appointees, Justices Stevens and Kennedy, joined the majority.

Other court-packing advocates are more direct. Simply put, they want additional justices so that the Court produces more politically favorable decisions in cases that involve certain issues. The group Take Back the Court, for example, says that additional justices are needed because the current Court “weaken[s] our democracy and obstruct[s] progress.”⁴⁴ A group of nine organizations issued a statement accusing the Supreme Court of “putting our rights and our democracy itself in danger” as well as “hollowing out the middle class.”⁴⁵ Additional justices, they said, are needed to protect “reproductive freedom...LGBTQ rights” and to uphold “progressive legislation in the future on urgent crises from climate change to health care to gun safety.”⁴⁶ Their goal is to fashion a Supreme Court that will enable “progressives to enact the progressive policies supported by a clear majority of Americans.”

While many of Biden’s political supporters advocate court-packing, he had opposed it as a Senator and during the Democratic primary season. When he served on the Senate Judiciary Committee in 1983, for example, Biden said that while Congress had authority to change the Supreme Court’s size, Roosevelt’s 1937 plan to pack the Court in order to change its decisions was a “terrible, terrible mistake” and that court-packing itself is a “bonehead idea.”⁴⁷

At a presidential campaign event on July 4, 2019, Biden said that “I’m not prepared to go on and try to pack the court, because we’ll live to rue that day.”⁴⁸ During the Democratic presidential candidate debate on October 15, 2019, Biden said that, as President, he “would not get into Court-packing” because the Supreme Court “would lose any credibility.”⁴⁹

After he secured the Democratic nomination, however, Biden’s statements on the subject became more equivocal and confusing. On October 8, 2020, for example, he said that “you’ll know my opinion on court-packing the minute the election is over”;⁵⁰ on October 12, he told CNN that “I’m not a fan of court-packing”;⁵¹ and on October 15, at a campaign event in Pennsylvania, he said that he would “come out with a clear position before Election Day.”⁵² Then, in a *60 Minutes* interview that aired on October 25, 2020,⁵³ he said that he would appoint a “national, bi-partisan commission”

to “come back to me with recommendations as to how to reform the court system because it’s getting out of whack.”

Composition. Initial media reports said that the Supreme Court Commission would include “nine to 15 people.”⁵⁴ Biden’s executive order, however, created a commission with 36 members appointed by the President. These include 32 professors at 19 academic institutions (18 of them law schools), two former federal judges, and the heads of two liberal advocacy groups. The commission is chaired by Bob Bauer, who served as White House Counsel and general counsel of the Democratic National Committee, and Yale Law School Professor Christina Rodriguez.

It is not clear what Biden meant by a “bipartisan” commission when none of its members has any objective partisan affiliation. Professor Josh Blackman writes that “liberals outnumber non-liberals by about 2–1.”⁵⁵ While the commission does not include the most outspoken advocates of reforms such as court-packing, some of its members have publicly endorsed reforms that the commission will likely examine.

Co-chairman Bauer and Professors Caroline Fredrickson and Kermit Roosevelt, for example, support judicial term limits.⁵⁶ In addition, at least one-third of the commission’s members have taken public positions on other divisive political issues. These include supporting the impeachment or immediate removal of President Donald Trump and opposing his nominees, such as former Attorney General Jeff Sessions or Justices Brett Kavanaugh and Amy Coney Barrett.

Focus. The commission’s purpose appears to be discussion of reforming the Supreme Court without identifying *why* it should be reformed at all. The executive order, for example, directs the commission to describe or evaluate “the contemporary commentary and debate” about the Court and “arguments in the contemporary public debate for and against Supreme Court reform.” It does not, however, identify any problem or issue for which reform is a response. In other words, the commission will discuss prescriptions without first making a diagnosis.

In his *60 Minutes* interview last October, Biden said the commission would “not [be] about court packing” but “a number of other things that our Constitutional scholars have debated.” The White House announcement when Biden signed the executive order, however, singles out two specific reform proposals that the commission will examine: “the length of service and turnover of justices on the Court” and “the membership and size of the Court.”⁵⁷

Assignment. The executive order gives the commission a single assignment, to “produce a report for the President” that provides “[a]n account”

and “[a]n analysis” of the debate about the Supreme Court and proposals to change it. Neither the executive order nor the White House announcement make any mention of the commission providing recommendations on any of the topics or reforms that it may examine, and media reports singled this out as a peculiar characteristic of this commission.⁵⁸

CNN, for example, reported that the commission “will not make final recommendations for reform...a possible letdown for liberals hoping for President Joe Biden to push for more justices on the bench.”⁵⁹ Another reporter noted that the commission “has not been charged with delivering a specific recommendation at the conclusion of its report.”⁶⁰ The *New York Times* also reported that the commission “will avoid making any recommendations to Mr. Biden or lawmakers.”⁶¹

The same observation has already led court-packing advocates to criticize the commission. Jack Belkin, director of the group Take Back the Court, argues that, with no “promise of real conclusions at the end,” the commission is “doomed from the start.”⁶² Gabe Roth, executive director of Fix the Court, said he was “disappointed that the commission wasn’t given a mandate that says ‘come up with recommendations.’”⁶³ Others have speculated that the lack of any recommendations means that the commission either was “designed to fail”⁶⁴ or shows that Biden “really doesn’t want court reform.”⁶⁵

Even without making recommendations, the commission’s assignment, as presented in the executive order, is breathtaking in scope. The order says, for example, that the commission’s report must include the “historical background of other periods in the Nation’s history when the Supreme Court’s role and the nomination and advice-and-consent process were subject to critical assessment and prompted proposals for reform.” The first of those periods, of course, was at America’s Founding: The power and proper role of the Court and the method of appointing judges were debated extensively at the 1787 convention in Philadelphia that drafted the Constitution. That period alone has generated a vast array of scholarship and commentary.

The executive order’s wording will require the commission to make many of its own judgments about the parameters of its work. The order, for example, directs the commission to provide historical background regarding both “critical assessment” of the Supreme Court and “proposals for reform,” but limits the analysis only to the “arguments in the contemporary public debate” about those proposals.

In addition, because the commission’s assignment is untethered to any concrete problem and will not result in any recommendations, it is presumably free to decide how to address questions such as:

- What constitutes “the contemporary commentary and debate” about the Supreme Court’s operation and the process for appointing justices;
- How to present an objective “account” of this commentary and debate;
- Which historical periods to examine for “critical assessment” of the Court’s role and the appointment process;
- Which “proposals for reform” to consider from these historical periods; and
- The basis or criteria for analyzing arguments for and against Supreme Court reform as well as the “merits and legality of particular reform proposals.”

Previous Court Reform Commissions

The Supreme Court Commission is not the first group assembled to address court reform. Brookings Institution scholar Russell Wheeler identifies eight “major court commissions” in the past 50 years “charged with finding causes or at least remedies for perceived federal court problems.”⁶⁶ This brief survey looks at these eight commissions, using the same framework of origin, composition, focus, and assignment.

Study Group on the Caseload of the Supreme Court

- **Origin.** Congress created the Federal Judicial Center (FJC) in 1968 to “conduct research and study of the operation of the courts of the United States.”⁶⁷ Chief Justice Warren Burger, who chaired the FJC, appointed this study group in 1971, and it issued its report in December 1972.
- **Composition.** Harvard Law School professor Paul Freund chaired the group and its six other members included four Supreme Court practitioners and two professors.
- **Focus.** The study group’s report opens with an assessment of the “nature and dimension of the problem,”⁶⁸ asserting that the Supreme Court’s workload provides “impressive evidence that the conditions essential for the performance of the Court’s mission do not exist.”⁶⁹

The report made an important distinction between the Supreme Court and lower federal courts. Cases filed in a particular lower court jurisdiction are divided among the judges serving on that court so that increasing the number of judges on that court lowers the caseload of each individual judge. On the Supreme Court, however, every justice handles every case. Increasing the number of justices, therefore, “would make little difference in the individual workload. It would mean...that more Justices would be doing the same act.”⁷⁰

- **Assignment.** The study group was tasked with “studying the case load of the Supreme Court and [making] such recommendations as its findings warranted.”⁷¹ Given how Supreme Court justices handle cases, the report found that an “increase in membership, we are persuaded, would be counter-productive.”⁷² The clear implication is that the only reason to consider expanding the size of the Supreme Court is that it needs more members to do its work. Instead, the study group’s recommendations focused on limiting the number of cases brought to the Supreme Court, emphasizing “significant remedial measures” that could be implemented promptly. These included a National Court of Appeals, which would screen petitions or requests for Supreme Court consideration and refer the “most review-worthy” to the Court.⁷³ The study group also recommended eliminating specific categories of cases that could be appealed directly to the Supreme Court and creating a “non-judicial body whose members would investigate and report on complaints of prisoners.”⁷⁴

Commission on Revision of the Federal Court Appellate System

- **Origin.** In 1972, Congress enacted legislation⁷⁵ creating the Commission on Revision of the Federal Court Appellate System.
- **Composition.** Chaired by Senator Roman Hruska (R-NE), its 16 members included four appointed from the Senate, four from the House of Representatives, four by the President, and four appointed by the Chief Justice.
- **Focus.** The legislation directed the commission to focus on the current distribution of judicial circuits, as well as the “structure and internal procedures of the Federal courts of appeal system” that affect its caseload. The House Judiciary Committee hearing on the bill

confirmed that it was “a congressional response to the growing problem of caseloads within our circuits.”⁷⁶

- **Assignment.** “The Commission was given two major assignments.”⁷⁷ First, it was to study the current organization of the U.S. Court of Appeals’ circuits. Second, the commission was to “study the structure and internal procedures of the Federal courts of appeal system.”⁷⁸ Congress directed the commission to make recommendations on each issue, which would include a national court of appeals like that proposed by the Study Group on the Caseload of the Supreme Court. Consistent with how the lower federal courts handle cases, the commission also recommended that “Congress create new judgeships wherever caseloads require them.”⁷⁹

Committee on Revision of the Federal Judicial System

- **Origin.** In 1975, President Gerald Ford directed Attorney General Edward Levi to form a committee within the Justice Department to study “the problems confronting the federal judicial system.”⁸⁰
- **Composition.** Solicitor General Robert Bork chaired this committee of 10 members, all of whom served in the Justice Department. These included eight assistant attorneys general, including figures who would remain prominent in the national legal community such as Antonin Scalia (Office of Legal Counsel), Richard Thornburgh (Criminal Division), and Rex Lee (Civil Division).
- **Focus.** The committee’s focus was framed by the title of its report: “The Needs of the Federal Courts.”⁸¹ The federal courts, it said, “now face a crisis of overload...so serious that it threatens the capacity of the federal system to function as it should.” The first section of the report identified the problem it would address by explaining “the threat of rising workload.”⁸²
- **Assignment.** The committee “conducted numerous studies and discussed various proposals” before offering recommendations in a report released in June 1976.⁸³ It offered three categories of changes to address increasing judicial workload. “First, we must enlarge the resources of the federal courts to handle the case load.... Second, we must lighten the load of work that that falls upon the courts by

reducing the categories of matters that they must entertain and decide....Third, we must adopt measures that enhance the effectiveness and efficiency of the system.”⁸⁴

Significantly, while the committee generally acknowledged the need for more judgeships to handle the rising judicial workload, it cautioned against “[s]welling the size of the federal judiciary indefinitely.”⁸⁵ In addition, the committee opposed creation of a National Court of Appeals,⁸⁶ believing that it would actually increase the Supreme Court’s workload.

Federal Courts Study Committee

- **Origin.** In 1988, Congress enacted the Federal Courts Study Act as part of the Judicial Improvements and Access to Justice Act.⁸⁷
- **Composition.** Chief Justice William Rehnquist appointed the committee’s 15 members and named U.S. Circuit Judge Joseph Weis, Jr., as its chairman. The eight members with partisan affiliations were evenly divided. The committee, for example, had a Senator and House member of each party and (including a member appointed later to the U.S. Court of Appeals by President Bill Clinton) an equal number of Republican and Democrat judicial appointees.
- **Focus.** The statute creating the commission identified its purpose as developing a “long-range plan for the future of the Federal judiciary” including “alternative methods of dispute resolution” and “methods of resolving intracircuit and intercircuit conflicts in the courts of appeals.” The first sentence of the committee’s report refers to “the federal courts’ congestion, delay, expense, and expansion”⁸⁸ and its overview details the “impending crisis of the federal courts” caused by increasing judicial caseloads.
- **Assignment.** The statute creating this study committee stated its purposes as examining “problems and issues currently facing the courts of the United States” and reporting on “the revisions, if any, in the laws of the United States which the Committee...deems advisable.” The committee’s recommendations covered topics such as “the allocation of business between state courts and the federal courts,”⁸⁹ “non-judicial branch forums for business currently in the federal courts,”⁹⁰ and creation of a new Article III court.⁹¹

Structural and Other Alternatives for the Federal Courts of Appeals

- **Origin.** The Federal Courts Study Committee Implementation Act of 1990 included a request that the Federal Judicial Center “conduct and submit to the Congress...a study on” issues related to intercircuit conflicts and appellate structure.
- **Composition.** This project was completed by researchers within the FJC.
- **Focus.** Like the Federal Courts Study Committee, this group focused on “structural alternatives for the Federal Courts of Appeals.”⁹² The report’s introduction makes a simple, yet very important, point. Reform proposals “should be logically related to the nature of the perceived problems.” To that end, “before describing the proposals, we review the problems the committee and others have concluded afflict or threaten the courts of appeals.”⁹³ Most observers, the report states, “believe the problems of the federal courts of appeals may be traced to caseload volume.”⁹⁴ As a result, before reviewing proposals for structural change, four sections of the report closely examined the “effects of caseload volume” on various aspects of the federal appellate courts.
- **Assignment.** Congress’ request to the Federal Judicial Center included that it study “the full range of structural alternatives for the Federal Courts of Appeals.” Responding to that request, the report examined reform proposals such as “total consolidation” of federal appellate circuits into “a single court of appeals.”⁹⁵ Other alternatives included consolidating smaller circuits into “a few, perhaps five, ‘jumbo’ or ‘mega’ circuits”⁹⁶ or adding another appellate tier to the federal judicial system.⁹⁷

Significantly, the report again emphasized that proposed reforms, including changes in court size, should be related directly to “the federal system’s appellate capacity.”⁹⁸ In other words, the size of a particular court should be based on its ability to “meet the caseload challenge.”⁹⁹ The report concluded that while “the continuing expansion of federal jurisdiction without a concomitant increase in resources” puts “the system and its judges under stress,” the current situation does not constitute a “crisis.”¹⁰⁰ The group concluded that structural changes “at this time” would “likely do more harm than good.”¹⁰¹

National Commission on Judicial Discipline and Removal

- **Origin.** Congress enacted the National Commission on Judicial Discipline and Removal as part of the Civil Justice Reform Act of 1990.¹⁰² This followed the impeachment and removal of three U.S. District Judges: Harry Claiborne in 1986 and Alcee Hastings and Walter Nixon in 1989.
- **Composition.** This commission was chaired by Representative Robert Kastenmeier (D-WI), who had served on the Federal Courts Study Committee. Appointment of the commission's 14 members was distributed among congressional leaders, the President, the Chief Justice, and the association of state chief justices.
- **Focus.** As its name indicates, this commission was created to examine “the scope of the problem of judicial discipline and impeachment.”¹⁰³
- **Assignment.** The commission was given “three specific duties.” First, it was to “investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges.” Second, the commission was to “evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues.” Third, the commission was directed to submit a report “of its findings and recommendations.”

Commission on Structural Alternatives for the Federal Courts of Appeals

- **Origin.** Congress established this commission in 1997 through a section of the statute providing appropriations for the judicial branch.¹⁰⁴ Its report explains that Congress did so “in the wake of controversy over whether the court of appeals for the Ninth Circuit... has grown to the point that it cannot function effectively and whether, in response, Congress should split the Ninth Circuit to create two or more smaller courts.”¹⁰⁵
- **Composition.** The statute provided that the commission would have five members appointed by the Chief Justice. Justice Byron White chaired the commission, and its members included three federal judges and a former president of the American Bar Association.

- **Focus.** The statute directed the commission to examine the configuration or structure of the U.S. Court of Appeals, with “particular attention to the Ninth Circuit” regarding “the expeditious and effective disposition of the appellate caseload.”¹⁰⁶ The commission report notes that caseload increases have “transformed [the courts of appeals] into different judicial entities from what they were at mid-century.”
- **Assignment.** The statute creating the commission gave it two functions: (1) to study the “present division of the United States into the several judicial circuits” and “the structure and alignment of the Federal Court of Appeals system”; and (2) to “report to the President and the Congress its recommendations for such changes...as may be appropriate.”

The commission’s report outlined several considerations that informed its deliberations and recommendations. One of these, which the commission considered “undebatable,” is that it is wrong to make decisions about realigning or restructuring courts “because of particular decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.”¹⁰⁷ Rather, such decisions “should be based on objective and principled considerations of sound judicial administration.... Views about the merits or correctness of specific judicial decisions or about individual judges currently serving on a court...are inappropriate bases for constructing long-term institutional arrangements.”¹⁰⁸

Judicial Conduct and Disability Act Study Committee

- **Origin.** Congress enacted the Judicial Conduct and Disability Act in 1980, allowing any person to file a complaint alleging that a federal judge’s conduct is “prejudicial to the...administration of the business of the courts” or that such conduct shows that a “mental or physical disability” makes him unable to perform his duties. In 2004, responding to criticism, Chief Justice William Rehnquist appointed this committee to “examine the Act’s implementation.”¹⁰⁹
- **Composition.** The Chief Justice chose Justice Stephen Breyer to chair the committee, and two judges from the U.S. District Court and two from the U.S. Court of Appeals joined Breyer’s administrative assistant as members.

- **Focus.** Like the commission chaired by Representative Kastenmeier, this committee sought to balance both judicial independence and judicial accountability, which it called a “special problem”¹¹⁰ when the judiciary is involved. On the one hand, a system “that relies for investigation upon persons or bodies other than judges risks undue interference with the Constitution’s insistence upon judicial independence.”¹¹¹ But on the other hand, a system “that relies solely upon judges themselves” risks over-emphasizing “the judge’s point of view” or minimizing “the misconduct problem.”¹¹²
- **Assignment.** Rehnquist asked the committee to “report its findings and any recommendations” regarding implementation of the statute. After he was appointed to succeed Rehnquist, Chief Justice John Roberts asked the committee to complete its work.

Other Presidential Commissions

The pattern of studying an identified problem or issue and offering specific recommendations to solve or address it is not limited to commissions that address court reform. The following list includes representative commissions, on topics beyond court reform, established by presidents of both parties.

- **President Franklin Roosevelt** formed the President’s Committee on Administrative Management in 1936. Its report begins by noting Roosevelt’s instructions to “recommend measures to reorganize the executive branch.”¹¹³
- **President Harry Truman** established the President’s Committee on Civil Rights in December 1946. Executive Order 9808 directed the commission to determine “in what respect current law-enforcement measures...may be strengthened and improved to safeguard the civil rights of the people.”¹¹⁴
- **President Dwight Eisenhower** created the Commission to Inquire Into a Controversy Between Certain Carriers and Certain of their Employees in November 1960. Executive Order 10891 required a report that included the commission’s “findings and recommendations”¹¹⁵ regarding a labor dispute involving the railroads.

- **President John F. Kennedy** formed the President’s Commission on the Status of Women in December 1961. Executive Order 10980 called for the commission to “make recommendations”¹¹⁶ after studying labor and tax laws as well as “[d]ifferences in legal treatment of men and women in regard to political and civil rights, property rights, and family relations.”

Kennedy also created the President’s Advisory Commission on Narcotic and Drug Abuse in January 1963. Executive Order 11076 required the commission to issue a report “including recommendations”¹¹⁷ regarding measures “to prevent abuse of narcotic and non-narcotic drugs and to provide appropriate rehabilitation for habitual drug misusers.”

- **President Lyndon Johnson** established the National Commission on the Causes and Prevention of Violence in June 1968. Executive Order 11412 identified its functions as “investigat[ing] and mak[ing] recommendations”¹¹⁸ regarding “causes and prevention of disrespect for law and order and...public officials, and of violent disruptions of public order by individuals and groups.”
- **President Richard Nixon** established the President’s Commission on an All-Volunteer Force in March 1969. His statement announcing the commission said that it was to “develop a comprehensive plan for eliminating conscription and moving toward an all-volunteer armed force.”¹¹⁹
- **President Gerald Ford** named the Commission on CIA Activities Within the United States in January 1975. Executive Order 11828 called for the commission to make “such recommendations...as the Commission deems appropriate”¹²⁰ to ensure compliance by the CIA with certain federal laws.
- **President Jimmy Carter** formed the President’s Commission on the Coal Industry in May 1978. Executive Order 12062 assigned the commission to give him a report that included “their findings and recommendations”¹²¹ on a range of issues specific to the coal industry.
- **President Ronald Reagan** created the President’s Commission on Organized Crime in July 1983. Executive Order 12435 directed the

commission to “make recommendations”¹²² regarding the activities of, and participants in, organized crime and laws aimed at combatting it.

Reagan also formed the Presidential Commission on the Human Immunodeficiency Virus Epidemic in June 1987. Executive Order 12601 stated that the “primary focus of the Commission shall be to recommend measures to address the public health dangers...from the spread of the HIV and resulting illnesses.”¹²³

- **President George H. W. Bush** formed the President’s Commission on Federal Ethics Law Reform less than a week after taking office in January 1989. Executive Order 12668 directed the commission to “make recommendations...to ensure full public confidence in the integrity of all Federal public officials and employees.”¹²⁴
- **President Bill Clinton** named the Advisory Commission on Consumer Protection and Quality in the Health Care Industry in September 1996. Executive Order 13017 instructed the Commission to “make such recommendations as may be necessary for improvements”¹²⁵ regarding health care quality and value and protecting both consumers and workers in the health care system.
- **President George W. Bush** formed the President’s Commission on Excellence in Special Education in October 2001. Executive Order 13227 tasked the commission with making “findings and recommendations”¹²⁶ for “improving the educational performance of students with disabilities.” Bush also named the Commission on Care for America’s Returning Wounded Warriors in March 2007. Executive Order 13426 called for the commission to “examine... and recommend needed improvements” regarding the return of wounded service members to “productive military service or civilian employment.”¹²⁷

He also created the President’s Commission on Implementation of United States Space Exploration Policy in January 2004. Executive Order 13326 stated that the “mission of the Commission shall be to provide recommendations”¹²⁸ regarding a “science research agenda to be conducted on the Moon” and criteria for choosing future destinations for space exploration.

- **President Barack Obama** appointed the National Commission on Fiscal Responsibility and Reform in February 2010. Executive Order 13531 directed the commission to “propose recommendations designed to balance the budget...by 2015.”¹²⁹ Obama also formed the Commission on Enhancing National Cybersecurity in February 2016. Executive Order 13718 called for “detailed recommendations”¹³⁰ to “strengthen cyber security in both the public and private sector.”

He also created the Presidential Commission for the Study of Bioethical Issues in November 2009. Executive Order 13521 directed the commission to “recommend any legal, regulatory, or policy actions it deems appropriate”¹³¹ regarding “specific bioethical, legal, and social issues related to the potential impacts of advances in biomedical and behavioral research.” In addition, Obama named Bob Bauer to co-chair the Presidential Commission on Election Administration in 2013. Executive Order 13639 tasks the commission with “mak[ing] recommendations.”¹³²

- **President Donald Trump** formed the Commission on Law Enforcement and the Administration of Justice in October 2019. Executive Order 13896 directed the commission to “study...and make recommendations”¹³³ regarding policing practices, reducing crime, and promoting the rule of law.

Commissions that investigate events rather than study policy problems also follow this pattern. For example, Johnson appointed the Commission to Report Upon the Assassination of President John F. Kennedy in November 1963, one week after Kennedy’s death. Executive Order 11130 directed the commission to investigate both Kennedy’s assassination “and the subsequent violent death of the man charged...and to report to me its findings and conclusions.”¹³⁴

Conclusion

Whether formed by Congress, the President, or in the private sector, commissions are used to study an identified problem or issue and to make specific recommendations to solve or address it. In other words, their work involves both diagnosis and prescription. In the specific context of court reform, commissions have emphasized that the prescription, in the form of recommended reforms, should be based on the needs, *rather than the desired*

outcomes or actions, of the judiciary and should respect the separation of powers and judicial independence.

The Supreme Court Commission is not following this pattern. The Biden Administration has not identified a particular problem or issue that needs attention. It appears, therefore, that the commission will focus on prescriptions without making any diagnosis. It is a response to advocates of court-packing, a reform Biden has opposed, who want to change the Supreme Court in order to change its decisions, the very action that past commissions have warned would undermine judicial independence—and for good reason. Leading advocates of court-packing, however, have already criticized the commission. The group Demand Justice, for example, said that “[a] commission made up mostly of academics that includes far-right voices and is not tasked with making formal recommendations, is unlikely to meaningfully advance the ball on court reform.”¹³⁵

The Biden Administration, therefore, has failed to take the first step to minimize any negative impact on the separation of powers or judicial independence. Instead, the Supreme Court Commission will likely contribute to the general notion that something is wrong with the Supreme Court, and that some kind of reform is needed for some reason. As it conducts hearings and prepares a report, the commission can still contain this negative impact by emphasizing the needs of the judiciary rather than a desire to, as Justice O’Connor put it, “dictate substantive judicial outcomes.”

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