Comments of the Regulatory Action Center

RE: Presidential Commission on The Supreme Court of The United States

Docket ID No. PCSCOTUS-2021-0001

October 4, 2021

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rulemaking process of government agencies to which they are entitled to contribute.

On behalf of the below signed individuals and our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the request for public input to the Presidential Commission on the Supreme Court of the United States.

On April 9, 2021, President Biden created by Executive Order the Presidential Commission on the Supreme Court of the United States. The Commission, created to assuage--at least temporarily--the left’s demands for Supreme Court “reform,” is composed almost exclusively of law professors (33 of 36 members) and is co-chaired by President Obama’s White House counsel.

The change to the Supreme Court the left most loudly clamors for is to increase the number of justices from 9 to 13. The current number, set by Congress, has been unchanged since 1869. The last time “court packing” was an issue was in 1937, when President Roosevelt--upset about the Court’s rulings against his Administration’s priorities--proposed adding up to six judges. Demands from the left to pack the court surged last year, when President Trump exercised his constitutional prerogative to fill a vacancy.

With regards to President Roosevelt’s ill-fated court packing scheme, then-Senator Joe Biden proclaimed that “it was a bone-head idea...It was a terrible, terrible mistake to make it and to put it into question for an entire decade the independence of the most significant body...the Supreme Court of the United States.”

Packing the court in support of the Biden agenda is no less “bone-headed” than it was in the Roosevelt Era. Proponents of court packing presume that adding seats to the Court, thus allowing President Biden to appoint four new Justices at once,

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would shift the ideological balance to the left and reverse the way the Court would rule on a given case. History shows, however, that a Justice’s vote on a particular case does not necessarily reflect the ideology of the President who appointed him or her. Chief Justice Earl Warren presided over an activist Court, expanding criminal defendants’ rights and striking down prayer in public schools. Justice William Brennan was a leader of the Court’s liberal wing. Yet both were appointed by President Dwight Eisenhower, a Republican who reportedly deemed their appointments his two worst mistakes in office. Justice Harry Blackmun, appointed by President Richard Nixon, authored *Roe v. Wade*, which created a constitutional right to abortion. Justice David Souter, appointed by President George H.W. Bush, became a reliable member of the Court’s liberal wing and cast the deciding vote to reaffirm *Roe*.

But let’s assume that the new Justices President Biden nominates and the Senate confirms are reliably liberal, voting consistently with the three liberal Justices now on the Court. What happens when control of the Executive and Legislative Branches changes from Democratic to Republican? Republicans would be hard-pressed not to expand the Court again, adding Justices to shift the Court’s rulings in a conservative direction. These seismic shifts would destroy Americans’ faith in the ability of the judiciary to safeguard fundamental rights from intrusion by the political branches of government. The Supreme Court would become just another political branch.

Court packing, and other left-wing “fixes” to the Supreme Court such as the imposition of fixed terms for justices or guaranteeing each President one or two nominees regardless of Court vacancies, would blast to oblivion the very foundation of our unique system of government: separation of powers, checks and balances, and three co-equal branches. The American judicial system’s independence is critical to maintaining the role of the judiciary as a co-equal branch.

And that independence is a shining example for the world. As noted above, there are many momentous decisions where Supreme Court justices have ruled against the political interests of the President who appointed them. Threatening that independence for any reason—especially because of the political leanings of duly appointed and confirmed judges—smacks of the actions of petty dictators in less-developed countries. Do leftists really want our country to follow the examples of Venezuela and Argentina?

Americans look to the Supreme Court as the ultimate protector of the freedoms guaranteed to them under our Constitution. They rely on the Court to rein in the excesses of the legislative and executive branches. As Justice Stephen Breyer put it, “If the public sees judges as ‘politicians in

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2 410 U.S. 113 (1973).
robes,’ its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court’s power, including its power to act as a ‘check’ on the other branches.”

The late Justice Ruth Bader Ginsberg, never one to mince words, echoed this sentiment, stating “If anything would make the court look partisan, it would be that--one side saying, ‘when we’re in power, we’re going to enlarge the number of judges, so we would have more people who would vote the way we want them to.’”

That is exactly what these leftist schemes will do: undermine Americans’ confidence in the rule of law and make the court a partisan body. And from there, it is not far to travel to Venezuela or Argentina.

Respectfully submitted,

Beverly McKittrick
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[3855 co-signers omitted]

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