



## **Create Fixed Judicial Terms to Depoliticize Supreme Court Nominations**

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Rumors continue to swirl over who President Barack Obama is considering as his nominee to the Supreme Court to replace Antonin Scalia. Whether the Senate will even hold hearings on his choice is uncertain.

Contrary to the judiciary's reputation as the least dangerous branch, judges exercise almost every executive and legislative power other than going to war. Their ability to make, transform, and distort the nation's fundamental law is why the battle over Scalia's successor is likely to be so brutal.

That wasn't the Constitution's original plan. The courts were important, but were not to supplant the other branches. Rather, judges were expected to constrain the executive and legislative branches. Alexander Hamilton, though a proponent of strong central government, expected the judiciary to play a "peculiarly essential" role to safeguard liberties and act as an "excellent barrier to the encroachments and oppressions of the representative body." Judges were not to implement the popular will, but instead to "guard the Constitution and the rights of individuals" from "the people themselves."

His great antagonist Thomas Jefferson agreed: the courts would provide a "legal check" on political majorities. James Madison, intimately involved in drafting the Constitution, explained that: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [Bill of Rights guarantees]; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they are will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."

Unfortunately, today the judiciary more often acts as a Greek Chorus demanding ever more expansive and expensive government. Indeed, the high court essentially acts as a continuing

constitutional convention, where just five votes are necessary to draft and approve sometimes far-reaching amendments. Never mind the intentions of those who wrote, debated, and voted on the original document. In the hands of a legally dexterous judge a provision like the Commerce Clause, intended to limit government meddling and promote economic freedom, becomes a warrant for virtually every imaginable federal control and regulation. Americans might be better off today without the provision.

The judges who assert these vast powers enjoy lifelong immunity from accountability. Absent extreme corrupt or illegal behavior, for which either criminal prosecution or congressional impeachment are the only remedies, jurists usually leave the bench either by resigning or dying, like Scalia. Attempts to constrain judges in other ways--by, for instance, withdrawing court jurisdiction and disobeying judicial rulings--would have even more pernicious consequences.

Which means that whoever succeeds Scalia could have enormous influence for decades. He served almost 30 years. Liberal hero William O. Douglas lasted more than 36 years, hanging on despite evident physical infirmity. The man or woman appointed today still could be writing opinions at mid-century.

Unfortunately, actuarial accident determines who serves. Interim President Jerry Ford got one appointment, which he botched. Single term President Jimmy Carter got none and President George H.W. Bush got one. Presidents Bill Clinton and George W. Bush made appointments which were more evolutionary than revolutionary. Scalia's death gives President Barack Obama an opportunity to shift the Supreme Court dramatically leftward.

Unless the Senate stops him, as it should, if necessary. The Constitution gives the Senate the power to advise and consent. That body is empowered to say no as well as yes. And the most important qualification for office is philosophical. Put simply: does the nominee believe the Constitution means anything apart from the jurists' personal preferences? If not, then the Senate should reject the nomination.

Of course, Democrats are demanding Senate approval of whomever the president names. Yet as a senator Barack Obama opposed (and backed a filibuster against) Dubya's nominees. Sen. Chuck Schumer (D-NY) advocated refusal to accept any Bush II nominee. And the Senate Democratic caucus shamelessly filibustered other federal court nominees deemed to be insufficiently enthused with enshrining the liberal zeitgeist as the nation's fundamental law.

Nevertheless, no one really benefits from politicizing judicial nominations and refusing to fill vacancies for partisan reasons. If nothing else, the process reinforces the popular sense that judges are merely robed politicians, hence public demonstrations demanding particular outcomes in particular cases, irrespective of the actual law. Moreover, judges actually perform a critical role. Vacancies disrupt decision-making. The Supreme Court may suffer a series of indeterminate tie votes.

There is an obvious answer: appoint jurists for a set term in office, perhaps ten years. Allow them to be reappointed once, though reconfirmation would be required. No longer would the state of American medicine determine which president gets to fill the high court. No longer could ailing justices hang on, hoping to die on the watch of a friendly president.

Jurists still would be independent. While in office they would be largely immune from political pressure or otherwise accountable. If they hope for reappointment they might be more hesitant to sign onto controversial opinions. But then, that also means they would be less likely to rewrite the Constitution to suit their personal preferences.

Most important, bad justices, especially those determined to turn America into their own image, would be gone in ten years. While on the bench they could give a jurisprudential nudge in a particular direction. But they could not crusade decade after decade to create a new extralegal order.

Set terms also would ensure a steady stream of new justices. While some jurists, such as Scalia, remain intellectually vibrant until the end, others burn out, relying mostly on court clerks and ideological boilerplate for their opinions. More new appointments likely would result in a more diverse membership in terms of career, background, and perspective.

Most important, there might be more philosophical variety. Unfortunately, "mainstream" justices from the left uniformly back the steady expansion of the state, treating the Constitution as creating only small islands of liberty in the midst of a vast ocean of government power. Yet even Democrats tend to avoid appointing true defenders of civil liberties, such as criminal defense attorneys.

Justice on the right also do poorly, too often sacrificing individual freedoms for state interests. Nevertheless, their principles, when consistently applied, sometimes force them to protect liberty. For instance, Scalia stood behind constitutionally-rooted protections for criminal defendants and voted against penalizing flag burning as protected by the First Amendment. While term limits would not guarantee better jurisprudence, a larger number of appointees would increase the likelihood of at least a few advocates of an active court dedicated to enforcing the Constitution's liberty guarantees.

Finally, fixed terms would moderate battles over Supreme Court appointments. Losing the fight over Scalia's replacement would not mean the possibility of 30 or more years of hostile decisions. After ten years a new president could appoint and a new Congress could confirm someone else. Indeed, with staggered appointments every president would have an appointment every couple of years.

Of course, this process also would prevent a great justice from spending a lifetime on the court. But today's increasingly bitter partisan fights over nominations make such choices less likely. Among recent members, who is most notable? All have been qualified, but only Scalia and

Clarence Thomas, whose jurisprudence has been equally vibrant if quieter in rhetoric, stand out. Presidents look for safe, confirmable choices, people with nondescript views or no paper trail. Even when offered the legal opportunity of a lifetime some people are unwilling to turn their lives inside out and risk the politics of personal destruction. Given the risk of making a mistake that lasts a lifetime, a president may prefer to choose the safe and sound, if not particularly distinguished.

Judicial terms would require a constitutional amendment. However, the issue could unite right and left. Neither side benefits by turning judicial appointments into partisan witch-hunts. Fixed terms for jurists would both preserve independence and impose accountability, while encouraging presidents and legislators to work together to fill vacancies.

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