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The Left Loves Activist Judges — Unless They Rule Right

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The Trump administration is transforming the courts. So far the president has made two Supreme Court appointments and won confirmation of another 30 judges to the 13 circuit courts, which are the final arbiters in most federal cases. After Democratic Senate Majority Leader Harry Reid dispensed with the filibuster to push through President Barack Obama's lower federal court appointments, his Republican successor Sen. Mitch McConnell returned the favor, speeding up the approval process and lifting the filibuster on high court nominations.

Suddenly left-wing activists noticed that courts sometimes thwart legislatures and presidents. These progressives were shocked and saddened to realize that democracy was being undermined. Never before had they imagined that judicial review might stand in the way of them imposing their preferred policies on the American people. Obviously, conservatives must be playing politics with the courts. Complained Joan McCarter of the Daily Kos: "the Senate's constitutional advise-and-consent role has been thrown entirely out the window by McConnell."

Of course, the Obama administration loaded the federal bench with liberals. He placed Sonia Sotomayor and Elena Kagan, his solicitor general, on the Supreme Court. He added 55 appellate judges and 268 district court judges. In the main, Republican senators disliked his nominees, but nevertheless voted for many of the latter.

Moreover, the Left attempted to subvert the then-soft conservative majority on the Supreme Court. Liberals played to Chief Justice John Roberts' inflated view of his duty to protect the Court from political pressures, even when doing so undermined sound constitutional decision-making. In 2012 he flipped from anchoring a 5-4 majority to overturn Obamacare to creating a similar majority to uphold the law, treating the constitutional issue as a political question. His opinion bizarrely upheld the law based on its minor tax provisions, which were barely mentioned during oral arguments. However, that case proved sui generis. Although distrusted by the Right, Roberts continued to mostly vote with his right-leaning colleagues.

Still, the Left didn't give up. In reviewing a new book by Joan Biskupic, The Chief: The Life and Turbulent Times of Chief Justice John Roberts, Michael O'Donnell lauded the jurist: "Roberts is the most interesting judicial conservative in living memory because he is both ideologically outspoken and willing go to break with ideology in a moment of great political consequence. His response to the constitutional crisis that awaits will define not just his legacy, but the Supreme Court's as well." National Review's David French wrote that "the legal Left is beckoning" Roberts "by putting him at war with himself — setting up a conflict between Roberts the 'institutionalist' and Roberts the 'originalist;' between Roberts the jurist and guardian of the legacy of the Court and Roberts the 'ideologue.'"

Nevertheless, even if Roberts succumbed to the progressive legal Sirens, he would not likely deliver renewed progressive hegemony. For that the Left needs additional appointments. However, Democrats have no idea when they will get to make their next nomination. If Donald Trump is reelected, he might have an opportunity to make several more additions to the high court.

So a gaggle of liberals is proposing that the next time Democrats control the White House and Congress, the new masters of Washington should engage in an orgy of court-packing. For instance, Brian Fallon, a former Hillary Clinton adviser who now runs the group Demand Justice, argued: "Democrats cannot sit back and accept the status quo of a partisan Republican five-seat majority for the next 30 years." Ezra Levin of the activist group Indivisible said his organization "is strongly against packing the courts — which is why we think we need to expand the courts, to undo all the packing that has been done in recent years."

Aaron Belkin, a professor at San Francisco State University and executive director of the group Pack the Courts, said, "The strategy is to make the 2020 candidates understand that if they don't come up with an agenda to deal with the courts, everything they are talking about is going to be dead on arrival." Yale Law School's James Forman Jr. contended that Democratic presidential candidates should commit themselves to changing the character of the court and offer the names of possible nominees, rather as Trump did in 2016. McCarter would open up some spots by highlighting "the possibility of impeaching judges."

Political figures also are pushing the idea. Former Attorney General Eric Holder, who considered a presidential run, said court-packing should be "seriously considered." Presidential candidates Kamala Harris, Elizabeth Warren, and Kirsten Gillibrand also are advocating the addition of multiple Democratic justices. So did South Bend Mayor Pete Buttigieg, though at least he advocated creating a partisan balance of sorts among the justices.

Whatever the specifics, by next year's presidential election the idea of court-packing could be mainstream in the Democratic Party.

Of course, Democrats were less concerned about "democracy" when they were putting their friends onto the courts. Liberal academics, activists, and politicians alike celebrated jurists willing to override popular majorities. Indeed, that was said to be the judges' most important role, to defend fundamental liberties, expansively defined, against the intolerant, ill-educated, populist mob. From the late 1950s to early 1970s the Warren Court tossed out precedent and imposed social change. Liberals expressed outrage at Republican proposals to impeach errant jurists, strip the Supreme Court of jurisdiction, and more. Admitted New York Times legal journalist Emily Bazelon, "Liberals have generally celebrated the Warren Court's version of counter-majoritarianism as necessary and even heroic."

Ironically, this left-wing surge was bolstered by GOP appointments. Chief Justice Earl Warren was chosen by President Dwight Eisenhower, who later lamented that the nomination was his biggest mistake as president. Another Eisenhower appointee was Justice William Brennan, who became a left-wing icon for imposing a progressive agenda before people called themselves progressives. On a variety of issues, including religion and government, criminal procedure, and desegregation, the Court overrode policies passed and implemented by the democratic branches of government.

Indeed, even after Warren left the Court a liberal majority persisted, wreaking havoc with established law:Roe v. Wade was perhaps its most celebrated act of "judicial activism." Richard Nixon's four appointees had little impact on the direction of the Court, other than tempering its worst excesses. Harry Blackmun was another GOP nominee who shifted left.

Frustrated Republicans and conservatives abandoned more extreme proposals and focused on using the appointment process to transform the judiciary, but with only indifferent success. For instance, Anthony Kennedy, chosen by President Ronald Reagan, famously became a swing vote; David Souter, a George H.W. Bush nominee, joined the liberal wing. George W. Bush did better, despite later frustrations with John Roberts. But President Trump turned the appointment process into a judicial assembly-line. Given another term, he could cement a right-leaning conservative judicial majority.

Love or hate the nominees, the process occurred democratically. Republican presidents were elected. A majority of elected senators approved Republican judicial nominees. A narrow but generally conservative Supreme Court majority emerged. Which convinced the Left that a democratically approved majority is, well, undemocratic.

Progressives view left-wing activism as objective, inevitable, and just, the only acceptable basis for constitutional jurisprudence. The alternative is conservative obstructionism. Complained Bazelon, their philosophy "has led conservative judges largely to positions they ideologically favor." Does she believe the Warren Court majority secretly disliked civil liberties and the Burger Court that decided Roewas filled with anti-abortion activists? Liberal justices could have patented the jurisprudence of personal preference.

Democrats once before faced jurists who blocked their programs and in response considered court-packing to legalize Franklin Roosevelt's New Deal. The president pushed legislation to allow the appointment of six new justices. He presented his measure as a means to help existing justices handle their burdensome caseload. However, even many Democratic legislators opposed politicizing the judiciary. The operation of actuarial tables soon allowed Roosevelt to transform the high court through the appointment process. The new majority did what was expected of it, ratify the massive expansion of government intervention in the economy. The Constitution suffered, but the court as an independent body survived.

These days the rhetoric of the judicial battle is largely activism versus restraint, which allows both sides to denounce the other for striking down policies which the critic likes. However, the debate should be over fidelity to the law. "Activism" often is necessary to vindicate constitutional provisions which defend individual liberty or restrain government power. Jurists should act on and enforce — actively — the law as written, not as they wish it had been written.

Obviously, there always will be some ambiguity, hard cases, and challenges in applying old general rules to new, unforeseen circumstances. However, not all interpretations are equal. The Constitution is not infinitely malleable, its meaning is not infinitely flexible. So conservative jurisprudence and liberal jurisprudence are not equal. The meaning of laws should have more than a passing relationship to what those who drafted, approved, and implemented the provisions meant them to mean. Otherwise, why bother with a constitution at all? Just have judges vote however the zeitgeist moves them and eliminate the hypocrisy of forcing them to offer a strained constitutional justification.

In fact, for the Left "law" increasingly is merely a political weapon. For instance, Bazelon makes no pretense of judging the substance of decisions she does not like. Of conservative justices who blocked economic regulation in the late 19th century and early 20th century, she declared that "the court turned again to protecting the interests of the powerful few — this time, wealthy corporations," without displaying the slightest interest in what the law required in any particular case.

In contrast, when the Warren Court ignored the democratic consensus, she wrote, it "was the difference between benefiting corporations, which easily wielded political power, and safeguarding rights for minorities like African-Americans, whose votes were being suppressed." Again, not the slightest recognition that an honest interpretation of the law might require one outcome or another irrespective of the litigants. The question for judges is not whether a provision advantages one group or another, but whether it protects who and what it was intended to protect.

The judiciary may inevitably be a political institution. However, that doesn't mean giving up protecting the judiciary from a political takeover. Rather, both parties should look for a mechanism to relieve some of the political pressure. Fixed terms for judges, at least Supreme Court justices, might be the answer. Yale Law School professor Bruce Ackerman has offered one proposal; numerous variants are circulating.

Jurists would be nominated for a term — 12 and 18 years have been suggested. Terms would be set to ensure that all presidents could expect to make a couple of appointments. Justices nominated to fill an unexpected vacancy — due to death or resignation — would complete the term but be eligible for reappointment. The transition from the current system would be tricky but worth the effort. The main problem would be defenestrating incumbents and staggering terms.

Such a system would reduce the value of any particular nomination, since it would not be for life. Political factions would be less likely to respond to every choice with total political war. Moreover, there would be no "court packing" by one side or the other, since nominations would occur regularly. And judicial review could not be said to undermine democracy, since nominations would naturally follow elections. Finally, judicial terms would reduce the lofty status of Supreme Court justices, maintaining their independence without the pretense of godliness.

If there is one signature success of the Trump administration, it is nominating a large number of judges who realize that they are jurists, not legislators. Leftists who want to "pack the courts" should stop whining and learn from the Trump experience — win elections and nominate good candidates. If instead they formally turn the judiciary into another arm of politics, their opponents are likely to return the favor, with predictably disastrous results for all.

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