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## Perspectives: Does the judicial system need reform?

Trevor Burrus and Devin Watkins

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**YES: Fix the court, but justice should not be random**

*By Devin Watkins*

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Calls for "judicial reform" have too often been code for seeking changes to the courts for partisan advantage. This is why "reform" is rarely accomplished. Why would Republicans help tilt the courts in favor of Democrats or the other way around?

As things stand, there's a stalemate on judicial reform in the Senate, due to that chamber's filibuster rule requiring a two-thirds' supermajority vote to end debate on a matter. Unless there is bipartisan support, nothing will happen. But if the filibuster is eliminated, whichever side is in control of Congress and the presidency may simply create new judicial seats to push the courts in their preferred direction. That would be a terrible outcome, expanding the court system for no legitimate reason, merely to install political partisans. That sort of court packing would degrade judicial independence.

Instead of focusing on partisan advantage, legislators should focus on resolving the randomness that plagues the current system. The biggest swings in court leanings occur when a Republican appointee is replaced by a Democratic appointee or vice versa. This occurs when a judge appointed by one party randomly happens to die while the other party holds the White House. The balance of our legal system should not be based by such random chance.

Instead, after each presidential election, the president should get one single appointment to the Supreme Court per term, replacing a justice appointed by a previous president. With a four-year presidential term and nine justices this means a 36-year judicial term. The balance on the court over time would then be entirely based on the winner of presidential elections over the last 36 years. Likewise, lower federal court seats could have a staggered term so an equal fraction of seats is open each presidential election.

As to how to handle the death of justices, let the justice appoint and get Senate-confirmed an understudy. That person would take over if the justice was no longer able to do perform their duties. That person, upon elevation to a full justice, would then select their own understudy for when they need it and would serve out the remainder of the term. This would ensure their replacement would have a similar jurisprudence.

This means the jurisprudential — how the judge treats the law — makeup of the courts would not drastically change due to the death of a justice. Also, a justice would not feel pressure to stay on the court past when they are fully able to perform their duties to ensure someone of similar

views replaced them. Nor would justices be pressured to leave early when there is a current president who shares their views.

Senate confirmation would continue to ensure that the person selected to replace a justice is of a high enough caliber to be trusted with that responsibility. Delaying confirmation of qualified nominees would no longer serve an ideological purpose.

One challenge to this reform is it would require a constitutional amendment to change the lifetime appointment of judges currently to a very long fixed term of office. This wouldn't change the effective term of a justice very much, considering the longest serving justice was William O. Douglas at 36 years and 209 days. A constitutional amendment is hard to pass, but this kind of unbiased amendment could acquire the bipartisan support needed to garner a two-thirds' vote of both houses and then ratification by three-fourths of the states.

There would be some important details to work out: for instance, perhaps a pension upon retirement might only be provided if they were a judge or justice for at least 15 years. Or, should the understudy work with the justice every day as a kind of permanent clerk or live a life outside the court?

There would also have to be a transition plan from the current system to this new system. Presumably the remaining term of each justice would be determined by their seniority, with the most senior leaving after the next presidential election. Currently that would be Justice Clarence Thomas.

This would remove the randomness from our legal system without giving advantage to any party. The 36-year cycle to completely change the Supreme Court will ensure that the law remains stable and only changes slowly. The changes that do occur would be based on who is selected by the American people and not random chance.

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## **NO: Supreme Court doesn't need fixing, but everything else does**

*By Trevor Burrus*

The Supreme Court has been in a political crosshairs recently, and various reforms have been proposed to "fix" the court. But the court, especially in recent months, has proven it does not need to be fixed. What should be fixed is our continued focus on addressing our problems in Washington, D.C., rather than locally.

True federalism is one of the only ways we can begin to heal our fractured nation, and the Supreme Court can help with that provided we don't pass reforms that break what isn't broken.

President Joe Biden has proposed a commission that will look at various reforms to the court. While many significant reforms would require a constitutional amendment to pass — something that seems unlikely given our closely divided country — there are other reforms that could receive attention. Court packing, which can be done via simple legislation, has received the most attention, with Democrats threatening to increase the number of justices on the court to counteract the conservative majority.

Court packing is an unquestionably horrible idea that would permanently damage the court in a way that might be unfixable. Our independent judiciary is essential to our democracy, and the Constitution has ably protected our judges from political control by establishing lifetime tenure for good behavior and preventing judges' pay from being altered. Once confirmed, a judge has no reason to supplicate himself or herself to the president that appointed them or to any other political actor.

But court packing would irrevocably politicize the court and force justices to think not just about the law but also about the political reaction to their decisions. And, of course, court packing now may benefit Democrats, but it in no way is guaranteed to always do so. Republicans would pack the court in response when given the chance, leading to an arms race with the only outcome being the destruction of the court as an effective institution.

Our independent judiciary has proven to be one of the most effective parts of our Constitution, and that was put on display over the last two months. A Supreme Court with three Trump appointees denied the administration's attempt to have the court intervene in the election. On the 3rd Circuit, Judge Stephanos Bibas, another Trump appointee, wrote the opinion in another case denying an election challenge.

Others have called for judicial term limits, the most popular proposal being 18-year terms staggered so a nomination comes up every two years. This would require amending the Constitution, and while it's not nearly as bad as court packing, it's unlikely to do much to better the image of the court. Eighteen years is a long time, and justices will still be perceived by many as applying the partisan biases of the president who appointed them. The stakes would remain high for any nominee, whether the vacancy is the product of term limits or not. And if a Republican Senate wishes to block the nominee of a Democratic president and leave the seat open, there's really nothing to stop them.

True, term limits could make each open seat seem a little less important given that the post-1970 average tenure for a justice is 25 years, but it is hard to imagine term limits returning the court to an "era of good feelings." It's better to ask how we got to the era of bad feelings in the first place.

In a country of 50 diverse states and 330 million people, Americans have increasingly looked to Washington to solve their problems rather than state and local governments. While there are some things the federal government should have control over, questions concerning health care, education and other basic values should be given to local and state control as much as possible. California can choose its path and Alabama can do likewise.

If Congress isn't passing massive laws of dubious constitutionality, such as the Affordable Care Act, it's mostly doing nothing. Over the past decade, Presidents Donald Trump and Barack Obama increasingly tried to use executive power to get around Congress's recalcitrance. That trend will continue.

The Supreme Court is too often called in to answer questions like whether the entire ACA is unconstitutional and whether a president's massive executive order is tantamount to them passing laws by themselves. Putting the court in those situations inevitably politicizes its decisions beyond the framers' intentions. Rather than reforming the Supreme Court, we should look to how to reform the other branches.

If it ain't broke, don't fix it.

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