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How to Fix the Supreme Court After the ObamaCare Judgment

One suggestion to fix the Supreme Court is to raise the number of justices from the current number of 9 to 19.(Photo credit: Wikipedia)

Until March it apparently didn't occur to anyone on the legal Left that the actual Constitution was still relevant to government. Judges had been zealously ignoring the nation's basic law while aiding and abetting the expansion of the state for decades, so why should they start interpreting the Constitution now? Then came the legal challenge to ObamaCare.

Skeptical questions from justices during the oral arguments in March alerted even advocates of a liberal "everything goes" jurisprudence that this court was no longer willing to simply rubber stamp every government attempt to do more. Swing Justice Anthony Kennedy acknowledged that the Obama administration's health insurance mandate "changes the relationship of the federal government to the individual in a very fundamental way."

Upon learning that the justices were not guaranteed to vote left, President Barack Obama led a chorus of denunciations of judicial "activism." For years liberal political activists relied on jurists to impose liberal values and policies whenever the electorate resisted—like *Roe v. Wade*, which struck down every abortion law in the nation based on vacuous emanations from newly discovered penumbras of long established constitutional provisions. It was an extraordinary performance, with the high court acting like a continuing constitutional convention which could simultaneously propose and ratify amendments. There could have been no more "activist" a decision, but the legal Left largely cheered the result. Over the years the high court has tossed out hundreds of federal and state enactments.

Now, however, the same activists are shocked, shocked to think that the same jurists might strike down ObamaCare as exceeding the federal government's power. That prospect led to a cacophony of wailing and howling, with demands for judicial reform.

Everyone wants to put more of "their" justices on the high court. Jonathan Turley of George Washington University Law School suggested increasing the size of the high court from nine to 19. David R. Dow of the University of Houston Law Center proposed impeaching errant justices. The Right once campaigned against arrogant judges exceeding their authority. Now the Left denounced unelected jurists who dared to overturn legislation "passed by a strong majority of a democratically elected Congress," as President Obama put it.

Despite the unashamed hypocrisy of the Left's philosophy of "judicial activism for me but not for thee," there is a problem with judicial invulnerability. Jurists should be independent in order to play their role in the system of federal "checks and balances." However, they ultimately should be accountable for their decisions as are the other two branches.

The first step is to treat judicial nominations seriously. For years presidents used their appointment power to advance everything but a sensible jurisprudential philosophy. Richard Nixon used judges to win political support as part of his "southern strategy." The most enduring legacy of Jerry Ford's presidency was the disastrously careless nomination of John Paul Stevens, who rarely let the Constitution get in the way of what he believed to be a good judicial opinion. George W. Bush chose the woefully under-qualified Harriet Miers for associate justice; she soon withdrew her name from consideration.

President Bush did better with his other two choices. Barack Obama also took his task seriously, though he nominated two people who appeared to believe that the Constitution should be interpreted as they want it to be, not as it is. Whoever is elected president in November needs to take the same care in filling future judicial vacancies. Today there are few more vital appointments than federal judges, especially to the Supreme Court.

Second, Jonathan Turley's idea deserves a serious look. To have momentous cases decided by a five-four vote carries more than a hint of arbitrariness. Happenstance in one appointment three or more decades before could effectively set important areas of government policy today.

A larger court—Turley proposes adding justices slowly, to prevent any single president from dominating the institution—would reduce the likelihood of decisions by a small, idiosyncratic majority. Where a true consensus developed, the Supreme Court would speak with a large and authoritative majority. A larger court also would allow more diverse membership. Today the high court is dominated by former appellate court judges. That's good training, but the body would benefit from a greater mix of backgrounds.

Third, so long as the federal courts do so much more in practice than interpret the law, non-lawyers should be considered for appellate appointment. Federal district courts hold trials, which require management by a trained attorney. But cases before the federal

appeals court are decided by argument before groups of three and occasionally larger panels. The Supreme Court sits as a full body of nine.

The jurist pool should be leavened with a few judges who understand economics, history, and more. They would need to become conversant with the law, but the average bright college graduate could do far better than some past Supreme Court justices in interpreting the Constitution.

Fourth, members of the high court should be appointed for a fixed term of five or ten years. Lifetime appointment is intended to shield jurists from political currents, but it also ensures that bad jurists are able to inflict themselves on the American people for decades in some cases. The greater their perceived insulation from reality, the greater will be the attacks on justices for their decisions. Other than impeachment there is no way today to discipline a judge determined to exceed his or her role.

The best long-term accountability for the Supreme Court as an institution always has been the ability of presidents to appoint new members. The natural churning of justices would be more orderly and less arbitrary if they served fixed terms. No single set of jurists could impose their political vision for long since the membership renewal process would be automatic.

It still would be important to appoint judges who believe that the law and Constitution are relevant to their work. Unless the starting point is what the relevant text was intended to mean, interpretation is but a sophisticated fraud, an eloquent rationalization for one ideology or another. There always will be disagreements, even among jurists with similar philosophies, but a commitment to the rule of law rather than the rule of man is critical.

Fifth, members of the other branches of government also should act as if the Constitution mattered. Presidents routinely claim the right to unilaterally initiate wars in direct contradiction to the nation's governing law. President Nixon asserted that the chief executive could magically transform illegal acts into legal ones. President George W. Bush signed into law a campaign "reform" measure he believed to be unconstitutional and said that he could arrest American citizens on American soil and lock them away without legal due process. President Obama argues that he may kill U.S. citizens on his say-so. Never mind what the Constitution says.

Congress, too, should take its constitutional obligations seriously. Members have come to believe that their power to legislate is well-nigh absolute. House Speaker Nancy Pelosi responded with shock—"are you serious?"—when questioned about the legislature's authority to force every American to buy health insurance. Majority Whip James Clyburn (D-SC) went even further, admitting that "There's nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do." That should change.

Until it does, federal judges will bear the bulk of the burden in enforcing the Constitution. But reforming the high court would better empower the institution to do its job. While the high court should be independent, it should not be omnipotent.

The challenge to ObamaCare, however the justices rule, demonstrates that the Constitution still lives, that the document's clear limits on government power retain some meaning. The case became so controversial because the legal Left thought it long ago had trampled down those barriers. That illusion dissipated when the Supreme Court took the case seriously. Now is the time to transform the high court to better prepare it for the next controversial challenge.