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Delay Scalia replacement? Yes, let the people decide

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“A larger than life presence on the bench,” said President Obama shortly after Justice Antonin Scalia’s death was reported. And so it seems he’ll be in death as well, as his legacy looms over the battle already underway to fill his seat. The constitutional vision Scalia left us is so opposed by the president that any nominee he finds agreeable should be summarily dismissed by the Senate’s Republican majority.

Could there be any better example than the court’s unanimous decision a term ago that the president cannot make recess appointments to offices requiring Senate confirmation when the Senate is not in recess, and the Senate decides when that is? Scalia’s concurring opinion in that case, *NLRB v. Noel Canning*, went properly beyond Justice Stephen Breyer’s opinion for the court, reading the constitutional text as it was written. But on either opinion, a constitutional end-run of the kind Obama tried there is now foreclosed.

The constitutional indifference that brought Obama before that unanimous court was hardly an anomaly. Time and again the president and his administration have acted as if above the law. Last week, for example, the court put a stay on the Environmental Protection Agency’s Clean Power Plan until opponents have their day in court. And last month the court upheld a lower court’s stay of Obama’s unilateral effort to rewrite our immigration law. Those are but two recent checks on an administration that, between January 2009 and June 2015, has lost unanimously before the court 23 times — and many more times by a divided vote. Is it any wonder that Obama wants to change the court’s composition?

But the lawlessness Obama exhibits reveals a fundamental rejection not simply of congressional actions but of the Constitution itself, starting with the separation of powers and the limits that principle places on both Congress and the president. Indifferent to constitutional limits on Congress’ powers, for example, Obama pressed that body, through Obamacare, to compel people to buy insurance pursuant to its power to regulate interstate commerce — he argued that the power to regulate commerce implied a power to compel people to be in commerce. The court rejected that argument, yet the four Democratic appointees, including his two, were perfectly comfortable with that expansive reading of Congress’ power.

On the rights side, where several of Obama’s agencies have been regularly rewriting Obamacare since it was passed, he’s still trying to force people with religious objections to conform to its rules, despite court setbacks. In fact, a case brought by the Little Sisters of the Poor and others, objecting to Obamacare’s contraceptive mandate, is before the court now.

If the presidential debates have indicated anything, it’s how deeply divided the nation is, and on no issue is that more clear than whether the Constitution authorizes effectively unlimited

government or instead is a check on government. To listen to Bernie Sanders — with Hillary Clinton only a step behind — there is virtually nothing that the federal government can't provide for its citizens — free college, free health care, free lunch. By contrast, Donald Trump aside, the Republican candidates point to constitutional limits on government and the devastating economic consequences for us and our children that have resulted from our having abandoned those limits, especially during our seven years under Obama.

It's because those limits have been abandoned — for decades — that the court plays so prominent a role in our political affairs. With so much government, the court is called upon repeatedly to adjudicate issues that under a properly read Constitution would never have come before the court, because they would have been left for private parties to sort out in their private capacities.

Before the country in this election year, therefore, is the fundamental question of whether we are going even further in the direction of ever more government — with a court as handmaiden to that — or whether instead we are going to start restoring the restraints the Constitution places on government, as Scalia so often did. That decision is too important to be left to a lame-duck president who has already done so much damage to the rule of law. The people need to decide which direction we will take.

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