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Here Come the Leftie Judges

Doug Bandow

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Joe Biden hasn't even taken the oath of office yet, and the Left is preparing to emulate President Donald Trump by appointing true believers as judges. For them that means those committed to the principle that the proper standard for interpreting the Constitution is what those of the socialist-lite faith fantasize that it should say. The judicial wars are likely to grow even more intense.

The American Constitutional Society (ACS), headed by former U.S. Sen. Russ Feingold, has turned over a list of more than 100 names of progressive legal thinkers to the Biden transition, so the latter is ready to start filling the courts on day one of the Biden ascendency. Nan Aron of the Alliance for Justice explained, "The process started earlier so we would be ready." Too bad the ACS didn't make its list available during the campaign, as did the Federalist Society, which provided then-candidate Trump a roll of possible Supreme Court nominees in the 2016 campaign.

It would be interesting to see which judicial liberals made the cut, and then ask them what their favorite new constitutional rights would be. What do they see as just waiting to be discovered by the most innovative, imaginative, creative, and courageous jurists?

Perhaps to have no minimum voting age. Or to apply the right to an abortion retroactively to children already born. Possibly to receive two votes if assessed to be a "two-thirds world"

person. Or to receive a "living" wage from employers. Maybe to collect reparations for life if possessing Elizabeth Warren's degree of Native American blood. Or to be authorized to steal as much of your neighbor's property as necessary to equalize your wealth — and to repeat the process every year. There are so many possibilities. The opportunities resulting from progressive jurisprudence, untethered by text, intent, history, or anything else other than a passion for social engineering, are truly endless!

The process of filling the courts is likely to be bloody. Justice Stephen Breyer already is being asked by eager progressives if he might retire. Activists also have identified about 100 lower-court liberal jurists eligible to retire, that is, to take senior status. These judges also are likely to be encouraged to "do the right thing" for the progressive team and create a vacancy Biden to fill, lest a Republican win in 2024.

Aron opined that "The Democrats will need to fight for the judges they want." If the GOP maintains Senate control one can expect some tough horse-trading. The *New York Times* observed, "Both sides believe that any movement will be mainly transactional, with the two parties negotiating packages that lead to confirmations sought by each side."

But the two Senate runoffs on January 5 create the possibility of a wild left-wing takeover of the federal government, complete with real court-packing, ending the filibuster, adding new states (no reason to stop at D.C. when the states of Detroit, Newark, and Boston also are waiting to be born!), and implementation of the rest of the Left's agenda. But West Virginia Sen. Joe Manchin, coming from a bright red state, might block such a process. He opposed the nomination of Amy Coney Barrett, but only on procedural grounds — "this nomination should have waited until after the election," he explained — and said he would not vote to eliminate the filibuster.

The ultimate judicial problem is left-wing jurisprudence, which basically means making everything up as one goes along. As a result, the Constitution and laws as written are irrelevant,

since this legal vision can — and frankly should — be implemented ex nihilo. That is, it would be more honest to forget formal lawsuits and just let judges meet and decide what new rules they want to implement that day. What injustice must be remedied? What practices should be proscribed? What conduct should be mandated? After all, their job is to turn mountaintop musings into practical dictates for the average folk living below the clouds in what is commonly known as the real world. There's no reason to require something called a constitution or law to make such decisions.

Of course, there would be an obvious PR problem in admitting to the public that what legislatures do is just Kabuki theater, helping tee up lawsuits where the real policymakers, the judges, do their work. People without sufficiently well-developed progressive consciousness might object to being governed by robed politicos serving for life without the slightest accountability (except for those local and state judges who are elected). Sometimes the Great Unwashed make the crusade for social justice unnecessarily difficult, but such is the cross that must be borne by principled progressives today.

Thus, progressive judges must pretend to interpret what is written. They must write opinions that make at least an occasional reference to some text, even if only to cite its penumbras, emanations, whispers, and vapors. There obviously is no need to admit that they would make same ruling even if no such text existed. After all, why risk a serious popular backlash if the public realized that traditional law-making really is irrelevant, since judges don't feel bound by constitutions or laws as written? That also would risk a popular demand to treat judges like other politicians, spoiling the good life as lifetime appointees with a job that involves excessive respect and minimal heavy lifting.

While there are divisions among judicial "conservatives," most notably between emphasizing text or original public meaning of the text (I believe the latter should prevail where there is a conflict, as in *Bostock v. Clayton County*, which involved the application of the Civil Rights Act

to sexual orientation, earlier this year). But all believe that the job of lawmaking is interpreting, not creating. If you want to make law, run for the legislature. If you want to be a judge, then limit yourself to doing your best to implement laws passed by other people.

If the GOP retains Senate control, though, or if centrists like Manchin moderate the impact of Democratic control, it would be worth exploring the possibility of making bipartisan reforms that might bring a measure of judicial peace to Washington. It won't be easy. In the 1960s and 1970s liberal Democrats gloried in an activist Supreme Court that overrode democratic decisions. For example, *Roe v. Wade* discovered a never-before-recognized right to abortion and voided the laws of every state. Progressives were ecstatic: Glory, hallelujah, a new judicial age had arrived!

These days they proclaim themselves to be shocked and saddened when rightish judges block democratic decisions, which they claim results in appalling injustice. No doubt if they regained a Supreme Court majority they would do another political pirouette and pronounce themselves pleased to find jurists overriding legislatures and the people at every possible opportunity, just as the judiciary was, they would insist, always meant to do.

Still, it might be possible to set some limits, political guardrails of sorts, to the process. Consider a constitutional amendment to create a new judicial framework:

- Reduce requirements to amend the Constitution. For instance, allow a 60 percent vote of Congress to propose an amendment and two-thirds of the states to ratify it. Also allow 26 state legislators to call for a convention to amend the Constitution while limiting any proposed amendment to a single specified subject. Two-thirds of the states would have to ratify the result.
- Set a fixed number of justices for the Supreme Court. The current membership of nine would be easiest. In fact an increase would be desirable, but would have to be phased in to win support from both parties, since neither would want the other side to select a large number of justices at once.
- Move from life tenure to fixed terms for Supreme Court justices. The same could be done for federal appellate and trial judges — in many states judges at all levels serve set terms and even run for election. But the high court is the focus of Washington's judicial wars. The most common suggested term is 18 years, which would allow two appointments per presidential term. Even better would be 12-year terms, with reappointment possible but

subject to another confirmation vote. Unless current justices were forced to retire, the system would have to be phased in over many years.

- Make the chief justiceship a separate office for a set term and rotate the position among the nine justices. Selection could be by lot or seniority, with the choice made from those who had not yet held the office, before considering a repeat candidate.

The U.S. Constitution is difficult to amend, as it should be. The nation's fundamental law shouldn't be trifled with. Many states and foreign countries seem to change their constitution every other day. The supreme law of the land ends up scores of pages long and covers just about everything. States also have this problem. Alabama's constitution has been amended nearly 1000 times and runs more than 300,000 words, about 44 times as long as the U.S. Constitution.

Still, making the document almost impossible to change leads to a different ill, frustrating people over the difficulty of adopting even popular changes. Then people begin looking for informal hacks and quick fixes. Judicial law-making has become the answer. Ask judges to reinterpret the document and voila! The problem is solved. Of course, once jurists start acting like lawmakers, ever more people bring forth their petitions for their preferred constitutional changes. And the nation's fundamental law breaks down. Now the Constitution is barely secondary, if that, to lawmaking. Collect five Supreme Court votes and the legal system is yours.

Making it easier to amend the Constitution would help push amendment of the nation's fundamental law back to the political process where it belongs. That alone won't be enough. But attempting to reverse judicial lawmaking without easing requirements for formal amendment has little chance of success.

The purpose of setting court membership would be to prevent genuine court-packing, that is, increases for the sole purpose of shifting philosophical control of the panel. There would be no quicker way to politicize the high court and ruin its reputation. And to ensure retaliation by the other side when it exercised full political control. This provision would more firmly root the

Supreme Court in the Constitution to ensure that that its membership could not be changed for partisan gain.

Increasing the size would allow a broader membership — including legal backgrounds and training. Moreover, the Court would be more likely to "look like America." While that serves little direct legal purpose, it would strengthen public support and enhance the institution's credibility, especially when ruling on difficult and political explosive issues.

Setting terms would have multiple advantages, which would increase as the term shortened. One benefit would be to reduce the value of each appointment, at least moderating the tendency to make high court appointments into a mini-political Armageddon since the impact of any nomination would be a predictable number of years, rather than a lifetime, which with appointees in their 40s could mean three or even four decades on the bench.

Moreover, terms would prevent some presidents from ending up with extraordinary influence over the court's direction and others with none — compare the legacies of three recent one-term presidents, Jimmy Carter (zero Supreme Court appointments), George H. W. Bush (two), and Donald Trump (three). This approach also would slow changes in court direction, making them more evolutionary.

Regular appointments would ensure a steady infusion of new blood and different perspectives on the body. Serving on the federal appellate bench obviously is good training, but it might be useful to add members from district courts, which try cases; state supreme courts, which reflect state concerns; the criminal defense bar, which well understands the importance of constitutional protections; civil practice, which is concerned about the enormous economic impact of government rules; and academia, which offers broader historical and philosophical training.

Further, judicial terms would moderate some of the ugly quirks of life tenure. One would be to reduce the temptation of justices to hang on despite ill health and time their retirements for

political advantage. So, too, this reform would end macabre health watches, such as for Justice Ruth Bader Ginsburg over the last year. Under the new system, if a justice died his or her replacement would only complete the unfulfilled term. Premature death would be less likely for younger justices, and the advantage gained from such unplanned appointments would be relatively small.

Finally, making judicial appointments regular and routine would help set less partisan norms likely to prevail in any but the most exceptional circumstances. After all, "what goes around comes around" would be a powerful discipline, knowing that your president will have two appointments just like their president, and that tactics you employ may be used against you in just a couple years if the White House changes hands.

With shorter judicial tenures, older and wiser nominees could be selected without fear of prematurely "losing" the position to the other side. A Supreme Court appointment could be the capstone of a great career, rather than the beginning of an unknown future. The tendency to look for younger nominees also afflicts circuit and district courts. Presidents should be considering legal qualifications rather than birthdates in filling positions.

This set of changes would not be a panacea. Partisanship already has deeply pervaded the appointment process and would not disappear easily or swiftly. Even shorter-term appointments would be worth some political fight. More frequent membership changes would create a less stable court, which could result in more frequent legal changes. Such a body might lose some gravitas and credibility with the public.

Nevertheless, no one benefits from today's judicial wars. The ultimate solution would be to reduce the role of judges by returning them to the more limited role of interpreting rather than making the law. If courts are going to act like continuing constitutional conventions where five

people can sidestep the Constitution's complicated amendment process and change the nation's fundamental law, they inevitably will be the fulcrum of bitter political disputes.

But changing the process might ease the bitter feuds of recent years. And the time to try is at the start of a new presidency with a closely divided Congress and before another Supreme Court vacancy. Perhaps that would begin a move of the judiciary to better reflect Alexander Hamilton's description of it as the "least dangerous" branch of government.

Doug Bandow is a Senior Fellow at the Cato Institute. A former Special Assistant to President Ronald Reagan, he is a graduate of Stanford Law School and a member of the California and D.C. bars. He is the author of The Politics of Plunder: Misgovernment in Washington.