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## *ESSAY*

### A MODEST PROPOSAL FOR JUSTICE SCALIA'S SEAT

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THE unexpected death of leading conservative Supreme Court Justice Antonin Scalia during the final year in office of liberal President Barack Obama has had a seismic effect on the political scene. Even before President Obama could nominate a replacement, members of both parties aggressively staked out contrary positions. Part of the acrimony is surely driven by the stakes: The Supreme Court has taken on an increasingly central role in our national life, and a lifetime appointment to the Court would reshape its direction for decades to come. The prospect of a lame duck President making a choice with such long term consequences as a result of the unanticipated death of one man naturally raises meaningful concerns. But the present crisis creates a real opportunity to revisit a harmful assumption about the Supreme Court that is driving the conflict. While lifetime tenure on the Supreme Court is commonly assumed to be required by the Constitution, the Constitution grants Congress substantial flexibility in structuring the judicial branch. Congress might use this flexibility creatively, to appoint judges who enjoy life tenure but spend only part of that tenure on the Supreme Court. President Obama would then be able to fill Justice Scalia's seat without remaking the Court for decades to come. Even if

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this approach was ultimately unsuccessful, it would be an unusually constructive resolution of an otherwise difficult impasse.

As noted, the difficulty of the current partisan impasse is driven by the high stakes involved in an appointment to the Supreme Court. In recent years, the Supreme Court has decided a presidential election,<sup>1</sup> and rendered controversial, antimajoritarian decisions on the Suspension Clause<sup>2</sup> and First,<sup>3</sup> Second,<sup>4</sup> and Fourteenth<sup>5</sup> Amendments, among other constitutional provisions.<sup>6</sup> It is tempting to suggest that the stakes of appointments could and should be lowered by reducing the profile of the judicial branch. If fewer controversies were treated as constitutional questions for the courts, the staffing of the Supreme Court would be less important.<sup>7</sup> But this approach clearly depends on a particular view of the substance of the Constitution. If the Constitution is understood to impose certain judicially enforceable substantive rules (such as a rule that the government cannot interfere with a woman's decision to have an abortion, or a rule that the government cannot interfere with independent political expenditures by corporations), then the Supreme Court cannot decline to render consequential and controversial decisions applying these rules without abdicating its duties.

In any event, even if it would be helpful for the Supreme Court to take less aggressive positions substantively, there seems to be no way for Congress or the President to credibly commit the Court to that course of action—even if nominees could be made to promise particularly narrow decisions, nothing would constrain their substantive decisions

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<sup>1</sup> See *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>2</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>3</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>4</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>5</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>6</sup> Depending on the definition of “antimajoritarian,” the federalism revolution of recent years may also qualify. Some commentators have suggested that a decision that forbids the federal government from achieving a result is not antimajoritarian if the Court allows state-level majorities to achieve the same result. See Steven G. Calabresi, *The Constitution and Disdain*, 126 *Harv. L. Rev. F.* 13, 14 (2012). Sovereign immunity decisions that leave the states free to waive their protections, and decisions enforcing limits on the enumerated powers of Congress fall in this category.

<sup>7</sup> See Megan McArdle, *Replacing a Justice Shouldn't Be So Excruciating*, *Bloomberg View* (Feb. 16, 2016, 4:39 PM), <http://www.bloombergvew.com/articles/2016-02-16/replacing-a-justice-shouldn-t-be-so-excruciating> [<https://perma.cc/2A98-VCJK>].

once they were on the Court.<sup>8</sup> Controlling the Supreme Court by limiting its jurisdiction would also be difficult under current constitutional understandings, particularly if the goal of these limitations was to prevent the Court from fulfilling its essential role in supervising the judicial enforcement of constitutional rights.<sup>9</sup>

But while it would be impossible to limit the consequences of a Supreme Court appointment substantively, it may be possible to limit the consequences temporally. Commentators have already remarked that an end to lifetime appointments to the Supreme Court would suck much of the air out of the fight over Justice Scalia's replacement, before sadly stating that such a change would require a constitutional amendment.<sup>10</sup>

However, this sad qualification may not be correct. There is remarkably little textual evidence for the proposition that the Constitution requires that a judge who sits on the Supreme Court must be allowed to sit on the Supreme Court forever.<sup>11</sup> Article III, Section 1

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<sup>8</sup> Indeed, many nominees have offered a narrow vision of the proper role of a Supreme Court justice before taking steps deemed aggressive by critics after they took office. See, e.g., Geoffrey R. Stone, *Selective Judicial Activism*, 89 *Tex. L. Rev.* 1423, 1428 & n.34 (2012) (reviewing Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* (2010)) (arguing that although Chief Justice John Roberts had said that the proper role of a judge was simply to "call balls and strikes," he has acted in an activist fashion after confirmation).

<sup>9</sup> See James E. Pfander, *One Supreme Court: Supremacy, Inferiority and the Judicial Power of the United States* 7–8 (2009) (laying out scholarly consensus that although Congress has broad authority to limit the Supreme Court's appellate jurisdiction, it cannot undermine the Supreme Court's essential function, and suggesting more limited theories). A more promising approach might be to force the Supreme Court to take on more cases by re-expanding its mandatory jurisdiction, thus leaving less time and room for the philosophical and historical investigations that have characterized its recent broad constitutional rulings. But such an approach seems more likely to result in sloppy decisions than modest ones.

<sup>10</sup> See, e.g., Jonathan H. Adler, *A Question About Placing Term Limits on Supreme Court Justices*, *Wash. Post: The Volokh Conspiracy* (Feb. 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/16/a-question-about-placing-term-limits-on-supreme-court-justices/> [<https://perma.cc/PQT2-TN3S>]; Orin Kerr, *Justice Scalia's Death and the Case for Supreme Court Term Limits*, *Wash. Post: The Volokh Conspiracy* (Feb. 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/16/justice-scalias-death-and-the-case-for-supreme-court-term-limits/> [<https://perma.cc/ZV34-5UGK>]; Mark Sherman, *Some Want to Limit Justices to 18 Years on Supreme Court*, *Associated Press* (Feb. 18, 2016, 1:58 PM), <http://bigstory.ap.org/article/5e2d2e27830e4adab88a7e24f2c3fd09/some-want-limit-justices-18-years-supreme-court> [<https://perma.cc/325A-E8EW>].

<sup>11</sup> These are not new observations. The points in the text are drawn from Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 *Harv. J.L. & Pub. Pol'y.* 769, 855–71 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 *Calif. L. Rev.* 1313, 1323–34 (2007); and Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices be Term-Limited: A*

of the Constitution vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>12</sup> It then provides that in order to sit on one of these courts, a judge must have life tenure: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”<sup>13</sup> Article III itself does not specify that a judge must spend the entirety of that life tenure on one court. While the provision does refer to both “the supreme and inferior Courts,” it is easily read as a simple clarification that a judge must have life tenure to sit on a lower court as well.<sup>14</sup> The text thus allows for a statutory scheme providing for a judge with life tenure to sit on the Supreme Court only for a fixed term of years before resuming her judicial service on the inferior courts.

In other words, the boundaries between federal courts are a matter of statute and custom, not firm constitutional law. Indeed, the lines between the Supreme Court and inferior courts have always been understood as permeable. For much of the Supreme Court’s history, the Justices rode circuit, traveling about the country and deciding cases in the capacity of lower court judges. For example, the famous case of *Ex parte Merryman*,<sup>15</sup> (coincidentally, a case cited with approval by Justice Scalia<sup>16</sup>) was decided by Chief Justice Roger Taney alone in his capacity as a Justice riding circuit. The concept of life-tenured judges sitting on a particular court for only a fixed term is also not terribly novel. The judges designated to sit on the Foreign Intelligence Surveillance Court only hold that position for a period of seven years.<sup>17</sup>

Attempts to draw a sharp distinction between the Supreme Court and inferior courts using other parts of the constitutional text are also unpersuasive. The Appointments Clause of Article II specifies that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the supreme Court, and all other Officers of

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Dialogue, Findlaw Writ (Aug. 23, 2002), <http://writ.news.findlaw.com/amar/20020823.html> [<https://perma.cc/6GGK-KCYW>].

<sup>12</sup> U.S. Const. art. III, § 1.

<sup>13</sup> *Id.*

<sup>14</sup> Given that the Constitution only mandates the creation of a Supreme Court and makes the creation of lower courts a matter of legislative grace, see *infra* note 18 and accompanying text (describing the Madisonian Compromise), the clarification seems entirely warranted.

<sup>15</sup> 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

<sup>16</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting).

<sup>17</sup> 50 U.S.C. § 1803(d) (2012).

the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>18</sup>

While this text may be read as drawing a distinction between “judges of the supreme Court” and other judges, it can also be read as a simple reflection of Congress’s authority to structure the judicial branch. Under the terms of the Madisonian Compromise, reflected in the text of Article III, Congress is free to not create any lower federal courts at all.<sup>19</sup> It should not be surprising that the staffing of these possible courts is left to the residual phrases in the Appointments Clause. The Constitution also refers separately to a “Chief Justice,”<sup>20</sup> but neither does this send a terribly informative signal; the Constitution also refers to a “Speaker”<sup>21</sup> of the House of Representatives and a “President pro tempore”<sup>22</sup> of the Senate, but those references are not understood to make those officers constitutionally distinct from their fellow representatives or senators.

Functional arguments against term limits fare little better. There is little reason to think that the quality of Justices available would decrease if a term limit of, say, eighteen years were imposed. There is some risk that a Justice approaching the end of her tenure might harbor ambitions for her later career and act accordingly, but that risk is already present under existing arrangements. Chief Justice John Jay clearly aspired to higher (or at least a different) office: He resigned his judicial position to become governor of New York.<sup>23</sup> Justice William O. Douglas harbored presidential aspirations, and very nearly became a vice presidential candidate.<sup>24</sup> It is even possible to speculate that Justice Scalia’s unusual concurrence in *Gonzales v. Raich*,<sup>25</sup> a decision favoring federal over state power, may have been motivated by a desire to one day be

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<sup>18</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>19</sup> See Richard H. Fallon, Jr. et al., Hart and Wechsler’s *The Federal Courts and the Federal System* 7–9 (6th ed. 2009).

<sup>20</sup> U.S. Const. art. I, § 3.

<sup>21</sup> *Id.* art. I, § 2, cl. 5.

<sup>22</sup> *Id.* art. I, § 3, cl. 5.

<sup>23</sup> See John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* 14 (2011).

<sup>24</sup> See Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 188–93, 258–64, 317–20 (2010).

<sup>25</sup> 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring in the judgment) (holding that Congress has the power to regulate homegrown medical marijuana).

appointed Chief Justice. Life tenure is clearly not a check on ambition, or the incentives that ambition can create.

In sum, there is a credible argument that Congress could provide for a life-tenured judge to sit on the Supreme Court for a fixed term of years. This possibility offers a way out of the current impasse. The Senate could confirm President Obama's nominee to replace Justice Scalia, after Congress had passed (and President Obama had signed) a statute providing that new appointees to the Supreme Court would sit only for a fixed term of years before resuming their judicial duties on other courts. President Obama would have the opportunity to reshape the Court's direction for many years to come (but not many decades), and congressional Republicans would be able to reassure their constituents that they had found a responsible compromise that limited potentially harmful results. If the reform stuck, it would convert an unusually bitter impasse into an unusually salutary change.

Even if the arrangement were struck down, it could send a much needed message to the Supreme Court. As noted, it would be difficult for Congress to check the Supreme Court's aggressive substantive rulings. But the Court has also been remarkably high handed in its dealings with the lower courts, sometimes refusing to hear appeals and provide guidance on crucial topics even when the lower courts have issued increasingly desperate pleas for instruction.<sup>26</sup> Congress has adopted a mechanism that is intended to address this situation. The Supreme Court is *required* by statute to resolve cases that are certified to them by the courts of appeals.<sup>27</sup> But without justification, the Supreme Court has consistently ignored this statutory duty.<sup>28</sup> A reminder that the judges who sit on the Supreme Court are not so different from other judges<sup>29</sup> might have an appropriate chastening effect. A statute of this

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<sup>26</sup> See, e.g., *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring) (suggesting that the Supreme Court was ducking its responsibility to explain its holding that habeas was available to detainees at Guantanamo Bay).

<sup>27</sup> See 28 U.S.C. § 1254(2) (2012).

<sup>28</sup> See Aaron Nielson, Essay, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 *Cath. Univ. L. Rev.* 483, 489–91 (2010) (arguing that the Supreme Court has disregarded statutory duty on misguided policy grounds).

<sup>29</sup> A gentler reminder was once offered by Justice John Paul Stevens. When Chief Justice William Rehnquist presided over oral arguments at the Supreme Court, he would sometimes admonish advocates who referred to one of the Court's members as a "Judge," insisting that they should be referred to as a "Justice" instead. Justice Stevens once consoled an advocate who used the term "Judge" instead of "Justice," saying that the advocate should not feel too

2016]

*A Modest Proposal*

7

type might also provide a framework for later efforts to make a lasting change to the Constitution.

This proposal is termed modest because it is unlikely to come to pass—the relevant individuals are set on a partisan collision course that is more likely to prove destructive than constructive. But like past modest proposals, it may shed light on an area in real need of lasting reform.

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badly, since the Constitution makes the same mistake. See Jeffrey L. Fisher, *Of Facts & Fantasies: Justice Stevens and the Judge/Justice Story*, 14 *Green Bag* 2d 53, 53–57 (2010).