Justice Scalia's Untimely Death Should Wake Up Congress

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Release: February 16, 2016

The passing of Justice Antonin Scalia is a terrible loss for our Nation, and a reason for Republicans to rethink their approach to the judicial branch of our government. Scalia's departure leaves conservatives at a 5-3 disadvantage on the Supreme Court for all-important social issues, with the prospect of a Democratic president increasing that margin to a commanding 6-3 majority.

Nearly all the Republican presidential candidates urged the Senate not to allow a lame-duck president to fill that vacancy. They pointed out that this vacancy hangs in the balance for the upcoming presidential election.

Several GOP candidates promised to appoint a justice who will interpret the Constitution as it was written, rather than changing it as liberals want. But by now it should be painfully obvious that picking good judges is not sufficient to stop liberal activism by the courts.

Of course Senate Republicans should block President Obama from filling this Supreme Court vacancy in an election year, and they have 80 years of precedent on their side. But Republicans should go further and block nominations for all the other vacancies in the federal judiciary, too.

Obama has already placed more than 300 judges on the federal bench with little or no opposition by Senate Republicans. He has already handpicked roughly the same number of federal judges as George W. Bush did in his entire two terms.

Let's not pretend that merely electing a Republican President will repair the damage caused by liberal judges. President Reagan had three vacancies on the Supreme Court, yet placed only one conservative there, Justice Scalia, and President George W. Bush picked a Chief Justice who wrote two decisions upholding Obamacare.

Less than two years ago, the five Republican appointees on the Supreme Court had the opportunity to end the power of labor unions to collect compulsory dues from government workers such as teachers. But they blinked amid liberal objections and instead awaited a future opportunity, and now their 5-4 majority on this issue is lost for the foreseeable future.

It's fine for the Republican presidential candidates to point out that a vacancy on the Supreme Court is part of the upcoming election, and to promise to fill Justice Scalia's immense shoes with someone similar. But even if a Republican wins the upcoming presidential election, even if he picks another Justice Scalia, and even if he is confirmed by the Senate, the federal judiciary will still be stuffed with hundreds of activist judges appointed by Obama, Clinton, and even Jimmy Carter.

The Founders gave Congress everything necessary to take power away from this runaway federal judiciary. Congress can deprive the federal courts of power over immigration, abortion and marriage, and can completely defund enforcement of bad federal court decisions that are already on the books.

Congress spent months trying unsuccessfully to defund Planned Parenthood, a laudable goal, but Congress can more effectively defund enforcement of the pro-abortion and pro-homosexual marriage decisions by the judiciary without sparking a phony "war on women" debate.

Congress should also defund use of taxpayer money by the Department of Justice to push the liberal agenda in the liberal courts. Congress should cut back on the funding for the courts themselves, too, and eliminate rather than fill some of the vacancies.

While some presidential candidates promise to work with Congress, none of them promise to rein in the Supreme Court in the absence of Justice Scalia. None of them promise to stand up against an unconstitutional order by an activist court by refusing to enforce it, as the next president could do with respect to activist Supreme Court rulings on immigration, abortion, and marriage.

Justice Scalia left us with his brilliant, colorful writings both on and off the bench. One of the best was his stinging dissent from the same-sex marriage ruling called Obergefell v. Hodges.

Scalia recalled Alexander Hamilton's assurance that the judiciary would be the "least dangerous" branch of the federal government, because it "must ultimately depend upon the aid of the executive arm," and of the states, "even for the efficacy of its judgments." Scalia concluded: "With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on

law, but on the ‘reasoned judgment’ of a bare majority of this Court—we move one step closer to being reminded of our impotence.”

The answer is not gimmicks like a Constitutional Convention being pushed in some state legislatures – which Justice Scalia properly called a “horrible idea” – but a Congress and a new president who do their constitutional duty to limit the power of the Supreme Court to change our laws on immigration, abortion, and marriage.

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