Statement of Charles Fried

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To the President's Commission on the Supreme Court:

The reason the judiciary is respected, indeed almost revered, is not its reflection of democratic values or of any particular variety of political value. It is revered, rather, because it is viewed as the guarantor of the rule of law, and it embodies the notion that we are subject to law and not to any passing political regime. The judges should be men and women who care above all about faithfulness to the law. That is why we dress them in black robes and ask them to do their work in solemn and imposing surroundings. Judges have been revered in many different societies and political circumstances.[1] Judges serve justice the way scientists and thinkers serve truth. In American politics the Supreme Court has represented the very apex of the ideal of fidelity to law. This makes understandable the frequent lament that this or that political party or regime is threatening to "politicize" the judiciary. In a variety of deplorable regimes, the politicization of the judiciary has been taken as one of the hallmarks of a corrupt polity. One need only think of the practice of what came to be known as telephone justice in the Soviet Union to have a sense of what is at the very bottom of this slippery slope.

The process leading up to the final seating of a new justice has been widely deplored as increasingly politicized in a way that has undermined the public regard for the judiciary as guardians of the rule of law—although it must be said that even now the judiciary enjoys the highest public regard of all the organs of government. The confirmation process has often descended into political theater of ambush, empty platitudes and evasion that leaves the public bewildered rather than informed, and even the successful nominee embittered to a degree that cannot augur well for at least the start of a career on the bench. How then might the system of choosing Supreme Court justices be improved to give the senators and the public the basis for a sober assessment of a nominee's qualifications?

I am attracted to a reform that would limit justices to one non-renewable eighteen-year term, with nominations to be staggered in such a way that each president would have two appointments during each term. This would resemble the system used, I believe, in picking members of the federal reserve board, but more relevantly would follow the example of the widely respected constitutional courts of the German Federation and the Union of South Africa. As for reference to the framers'

[1] A medieval Islamic jurist wrote that there are three kinds of judges. One has no knowledge and judges without knowledge. He is in the fire. Another has knowledge but does not judge according to his knowledge. He too is in the fire. A third judge has knowledge and judges according to his knowledge. He is in paradise. Knowledge, of course, is knowledge of the law. This is similar to Lord Coke's response to King James I, acknowledging that the king has excellent reason, but it is the judges who have mastered "the artificial reason of the law."

original conception, it need only be noted that life expectancies today and in the late 18th century were very different.

I first learned of this idea from the work of Professor Steven Calabresi, a founding member of the Federalist Society. It would have several important advantages over our present system and go some way to guaranteeing a more professional and less politically identified Supreme Court. First, the stakes for each nomination would be lowered and that might itself lower the political temperature of the occasion. Second, it would remove the incentive to nominate younger and younger justices (itself a kind of Court packing), with the result that it would be more likely for the nomination process to focus on an experienced jurist's career and reputation with fellow judges and litigants. Yes, older jurists would have opinions, maybe strong opinions, but we should not ask that nominees have empty minds—only open minds. And a nominee's long years on the bench or at the bar would allow people who won and lost before a nominee who had been a judge, or colleagues who had sided with or against the nominee as adversaries or in a negotiation to conclude that this is a hard adversary but one who fights fair, whose word can be relied on. Finally, an eighteen-year term is long enough for a justice to hone a personal style, and also to build on years of his or her experience on the Court.

Would such a change require a constitutional amendment? Perhaps, but given bipartisan support and lack of partisan tendency, it may just be possible to put through such an amendment. There also has been a variety of suggested schemes by which no constitutional amendment would be required. I have not thought through how this might be done. But at any rate here is a sketch of what a better process leading perhaps to a better Court might look like, and perhaps its virtues might be attained by greater discipline and a greater sense of comity even within our present structure.

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