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### Yearning for an Independent Federal Judiciary

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**OPINION**

# Yearning for an Independent Federal Judiciary | Opinion

**A. BENJAMIN SPENCER**, *DEAN OF WILLIAM & MARY LAW SCHOOL*

ON 9/30/20 AT 11:41 AM EDT



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OPINION

SUPREME COURT

RUTH BADER GINSBURG

JUSTICE

The passing of Justice Ruth Bader Ginsburg has brought about a vigorous debate over whether President Donald Trump should get to name her

successor. All of the back-and-forth over the proper timing of filling Ginsburg's seat has overshadowed what should be the real focus: What type of judge should be appointed to the seat?

For more than a generation (at least), we have all become accustomed to hearing about "liberal" or "conservative" justices or judges. The president has labeled judges pejoratively as "Obama judges," and commentators frequently note the party of the appointing president as indicative—and predictive—of how a judge or justice will rule in any given case. Indeed, for one fleeting moment when I was being considered for a judicial position, I was asked directly whether I was on the "blue team" or the "red team."

For decades, I have vehemently believed that the right answer to that question—which is the answer I gave—is that I'm on neither team. My father was a federal judge for over 30 years, appointed by President Ronald Reagan, and broadly supported by Republicans and Democrats. His wife—my stepmother—was a Virginia state court judge for 20 years appointed on a bipartisan basis. From each of them I learned that the proper role of a judge is as an independent thinker, who brings no bias or political objectives to the bench. The judicial robes that they wore meant that their personal views on matters were left at the door. It is from employing this approach that they each came to be revered and deeply respected jurists in the eyes of those lawyers who practiced before them.

Unfortunately, this model of judicial temperament is not what I see prevailing today. Members of both parties unapologetically announce that they want judges who will rule in ways that will favor their respective policy preferences. These politicians each pretend that their articulated desired judicial philosophies happen to be the ones that will result in judicial decisions they prefer. And many judges, future judges, and now judicial law clerks and law students flock by the

thousands to align themselves with organizations that tout seemingly neutral principles but—in reality—are well known to be the judicial philosophical enclaves of the right and the left.

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This is not as it should be.

As the dean of America's first law school, I see my responsibility as training leaders who will make this country better by being informed and engaged citizens who advocate for equal justice under the law. Rather than having my students rush to take a side by affiliating with one or the other ideological echo chambers, my task is to point them in the direction of independent, critical thinking. As they look to a future in which they might get to choose or even become judges themselves, their lodestar should be blindfolded Lady Justice, exuding an impartiality that truly lets the chips fall where they may, not the many pre-committed partisans in robes who place a predictable thumb on the scales.

James Madison warned of the deleterious effects of "factions," which he understood to be "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed [*sic*] to the rights of other citizens, or to the permanent and aggregate interests of the community." Although he was interested in safeguarding against the effects of factions in the political sphere, we should be even more concerned with ensuring that factionalism does not infect our judiciary. When every judicial vacancy—particularly those at the highest level—touches off titanic and existential battles among the political parties, that is one of the surest signs that we've lost our way.

I don't know that someone like my father—nor I, for that matter—could be appointed to the federal bench today. Although many will speak of desiring restrained and independent judges who won't "legislate from the bench," our political leaders (on all sides) in reality want allies they can count on in judicial garb. That approach must be abandoned, and we must find a way to pursue the ideal of an independent judiciary.

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A first step in that direction would be to restore the ability of senators to filibuster a nominee, which would require 60 of the senators to agree and would likely result in more consensus candidates for the federal bench. A second practice that might advance this goal would be a return to the tradition of blue slips, which permits senators to object to nominees for federal judgeships in their home states. Finally, it would be helpful if jurists and future jurists took to heart the spirit behind a Judicial Conference committee's recommendation to avoid formal affiliations with ideologically oriented membership organizations. Doing so would reduce the appearance of partiality and bolster public confidence in our judiciary.

Ultimately, voters will have to value and press for an independent judiciary, as politicians are largely responding to what their respective bases desire. Hopefully, the fierce battle to replace Ginsburg will reveal the folly of placing our faith in the appointment of judges that will rule a particular way. Only by demanding truly independent judges can we ever hope to escape these epic confirmation battles that have long become the American norm.

*A. Benjamin Spencer is dean of William & Mary Law School, the nation's first law school, in Williamsburg, Virginia.*

*The views expressed in this article are the author's own.*