Supreme Court compromise: the case for a temporary justice

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Senate Republicans seem to face an almost apocalyptic choice: either confirm a lifetime appointment to the Supreme Court that could shift its ideological balance indefinitely, or continue to be labeled as an obstructionist party keeping a ninth vote off the Court.

This is a false dilemma. Congress can give the president his choice of a Supreme Court justice *without* allowing that justice to remain on the Court indefinitely. Such a short-term justice would be the best compromise available to both sides of a dispute that currently seems intractable.

Federal law currently allows both district courtjudges and retired Supreme Court justices to temporarily serve as circuit court judges, known as "sitting by designation." My proposal is simple: Congress should pass a bill allowing the president, when a seat on the Supreme Court has been vacant for more than six months, to immediately assign either a circuit court judge or a retired Supreme Court justice to sit on the Supreme Court by designation.

Such a temporary "justice by designation" would hear cases and vote just like any other justice. However, the assignment of this temporary justice would be limited to four years, or until a permanent justice is confirmed, whichever occurs first.

First, the political question. Why should a Republican Congress consider passing such a bill, and why should a Democratic president consider signing it? For Republicans, a four-year-long filibuster of a Supreme Court nomination maintained by at least 41 senators is not politically viable. It increasingly appears that their best option among the probable alternatives is a lame-duck confirmation of Merrick Garland (as one Republican senator has already admitted).

Since Republicans have this option of confirming a judge considered relatively old and moderate, why should they prefer the temporary promotion of any judge of Barack Obama's choosing?

First, the relative age of a Supreme Court appointment is not nearly as important as the fact that lifetime appointees can *time their own retirement*. Justices clearly prefer to be succeeded by someone of their own judicial ideology. As two leading legal scholars have recognized, this gives any life-tenured justice an incentive "to time his or her departure with one eye on the political calendar and one finger in the political wind."

The last five retirements from the Court have all fit this pattern, and the late Justice Scalia himselfadmitted that he "would not like to be replaced by someone who immediately sets about undoing everything that I've tried to do for 25 years." It is not the tenure of a single lifetime appointee, but rather his *indefinite chain of like-minded successors*, that risks shifting the balance of the Court for decades. For Senate Republicans, a justice by designation who must leave the Court after the 2020 election would be vastly preferable.

Second, although Judge Garland has the reputation of a judicial moderate, disputes among members of the Court's ideological wings (especially its liberal wing) rarely change the outcome of the Court's decisions.

It was widely assumed that Elena Kagan would be a more moderate justice than Sonia Sotomayor.Yet the two have only disagreed in 7 of the 87 cases decided by a 5–4 margin since Justice Kagan joined the Court. Thus, their disagreements have changed the outcome in only 7 out of 419 total cases (1.7%) decided in the last six years. Senate Republicans should care much less about the relative differences between left-leaning appointees, and much more about *how long* their appointments will reverberate.

Given these benefits for Senate Republicans, why should a Democratic president consider signing such a bill? If the political wisdom is that Senate Republicans will eventually be forced to confirm a justice, why not simply wait them out?

The answer is that this political wisdom remains true only so long as Senate Republicans are perceived to be wholly responsible for the Court's continuing vacancy. Passing a bill that guarantees no high court vacancy will ever last longer than six months (one similar to a billintroduced by Democratic Sen. Pat Leahy in 2010) would immediately change this dynamic. Should the president refuse to sign the bill (or should Senate Democrats filibuster it), he would be refusing the ability to install someone on the Court *even faster* than the normal confirmation process.

Senate Democrats have avowed that speed is of the essence in filling the Supreme Court vacancy; such a bill would put these assurances to the test. Further, the bill would allow the president to choose—temporarily—a liberal "dream candidate," meaning he would face significant pressure from his own base to take the opportunity as one of his final "legacy-defining" acts.

There is a real chance, then, that such a bill could actually become law. But we must also address a second important question: would it be constitutional?

Two clauses of the Constitution are relevant to this question. First, all federal judges "shall hold their Offices during good Behaviour"—in other words, for life tenure. But temporary service by a federal judge on a *particular* court is nonetheless constitutional, so long as that judge continues to hold life tenure on *some other* court. This is shown by the longstanding practice of allowing

judges to sit by designation. (Indeed, active Supreme Court justices frequently sat by designation on circuit courts until 1891, a practice known as "riding circuit").

The proposed bill would satisfy the Good Behaviour Clause by limiting temporary appointments to circuit judges (who would return to their previous court after their assignment ends) and retired Supreme Court justices (who remain life-tenured members of the federal judiciary).

Second, the federal judicial power "shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Even if temporary assignments are acceptable for the lower courts, would a temporary justice on the *highest* court violate the requirement of "one Supreme Court"? This is unlikely, because there have *already been* 12 temporary justices on the Supreme Court.

Each of these 12 justices has reached the Court through the Recess Appointments Clause, which allows the president to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." These 12 justices each served in a temporary capacity for one to two years, until they were either confirmed or rejected by the Senate.

The One Supreme Court Clause thus only requires that there be one identified set of justices with final adjudicatory power *for any given case*, not that all such justices be permanent members of the Court.

The death of Justice Scalia has been a perfect storm sent to reveal the weaknesses in the current system of Supreme Court succession. In the long term, the best solution may be a constitutionalamendment giving justices a single 18-year term. But in the meantime, we need a short-term solution to get us through the current impasse, perhaps until two justices of competing ideologies can be simultaneously appointed as part of a grand bargain. A bill to allow a justice by designation is the best such short-term solution available.

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