

NATIONAL REVIEW

Eight Is Enough

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1. Back in July 2007, Senator Chuck Schumer, a leading Democratic strategist, was happy with the prospect that a Supreme Court vacancy might remain unfilled for a full two terms of the Supreme Court. He declared, to applause at an American Constitution Society convention, that the Senate “should not confirm another U.S. Supreme Court nominee under President Bush ‘except in extraordinary circumstances’”—and he made clear that “extraordinary circumstances” was his shorthand for a nominee he liked.

So, had a vacancy arisen then, Schumer was very ready to have Democrats block confirmation through January 2009. That would have meant no ninth justice for the entire October 2007 term (running from October 2007 through June 2008). It also would have meant no ninth justice for any of the cases in the October 2008 term that were argued between October 2008 and the time of confirmation. Given that the new president could not have made a nomination any time before late January 2009, it’s very possible that there would have been no ninth justice before the last argument session of the term in April 2009.

2. The timing of Justice Scalia’s death virtually guarantees that, irrespective what Senate Republicans do, there would not be nine justices for any of the cases that remain outstanding in this Court term. It took more than three months for the nomination and confirmation process to take place for Sonia Sotomayor and around four months for Elena Kagan. But the time between Scalia’s death and the end of the April argument session is only about 2-1/2 months. So there would be no reason to expect a ninth justice for any of the remaining cases this term.

So whereas Schumer was happy to be responsible for an eight-justice Court for a full two terms, Senate Republicans, by keeping the Scalia vacancy open for the next president, would cause an 8-justice Court only for most or all of the October 2016 term.

3. In the broader picture, having only eight justices is no big deal. As Josh Blackman and Ilya Shapiro spell out in a *Wall Street Journal* op-ed (“Only Eight Justices? So What”), “Since World War II there have been 15 periods when the court had eight justices, and each time the court managed its docket without a hitch.”

4. Blackman and Shapiro further point out that of the 19 cases last term that were 5-4, Scalia was in the majority only six times. So the number of instances next term in which the vacancy is likely to prevent a majority disposition is likely very small. Further, these are, of course, likely to be among the most ideologically charged cases, and it is therefore all the more appropriate that the American people in November will have the opportunity to decide which president will appoint the justice to provide the fifth vote in these cases.