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A Better Way to Give Trump More Judgeships to Fill

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Recently, a prominent conservative law professor and his former student created a stir when they urged Republicans to create over 200 new judgeships for President Trump to fill. This proposal, I wrote, was "ill-considered and should be discarded." And indeed it was: The authors removed the proposal from the Internet and are revising it.

There is, fortunately, a far easier way to give President Trump many new vacancies to fill. According to my calculations, there are over 100 judges appointed by Presidents Ronald Reagan, George H. W. Bush, and George W. Bush who can *immediately* open up new vacancies by announcing a plan to leave active service, either upon the confirmation of their successor or on a future date. They should be encouraged to do so over the next year.

Under Article III of the Constitution, federal judges can continue to serve "during good Behaviour" — effectively life tenure — without any reduction in salary. Judges who reach the age of 65 have the option of retiring with a 100 percent pension for the rest of their lives. Alternatively, these judges can stay on the bench through "senior status," so long as they satisfy the "Rule of 80," meaning their age and their years of active judicial service sum to that number or higher. For example, a 65-year-old judge with 15 years of service can assume senior status, as can a 70-year old judge with ten years of service.

The bottom line is that senior judges who maintain a minimum caseload can keep — in addition to their guaranteed salary — their chambers, staff, and law clerks indefinitely. But once a judge takes senior status, the president can nominate, and the Senate can confirm, a replacement. Further, it is a fact of life that judges appointed by Democratic presidents are more likely to take senior status when a Democrat is in the White House, while judges appointed by Republican presidents are more likely to take senior status when a Republican is in the White House. Like Supreme Court justices, lower-court judges can and do schedule their retirements around elections. Given this stark reality, my analysis will focus on the nominees of Republican presidents.

Today there are 30 appellate judges eligible for senior status who were appointed by Presidents Reagan, George H.W. Bush, and George W. Bush. (Judge Alex Kozinski, a Reagan appointee on the Ninth Circuit, would be especially well-advised to take an early retirement.) [**Update**: He did.] Between now and the end of 2018, five more of President George W. Bush's circuit-court nominees will be eligible for senior status, only two of whom have announced plans to take it. The federal district courts — the trial courts of our federal system — have far more judges who

are eligible to take senior status: twelve from the Reagan administration, ten from the first Bush administration, and nearly 50 from the second Bush administration.

There is one significant difference between senior status for the circuit and district courts. Trial judges *always* hear cases solo. Thus, even in senior status, their full docket continues without any changes. Circuit judges who take senior status forfeit the right to hear cases *en banc*, whereby all of the judges on the court assemble to resolve the case. This concern, while not trivial, is overstated. Nearly 99.7 percent of all appeals are handled by three-judge panels; very few are reheard by the entire court. For example, in 2010, the 13 federal courts of appeals heard only 45 cases *en banc*, out of more than 30,000 cases that were resolved on the merits. It is true that the rare cases that go *en banc* are the most pressing and contentious. An eligible judge, however, can have a far greater impact on the law of the circuit by taking senior status — and thus allowing a new judge to enter the rotation for panel assignments — than by participating in a fleeting number of *en banc* proceedings.

There is an important subtext of this analysis that I cannot put too bluntly. If the Democrats take the Senate in 2018 — which became more likely after the recent election in Alabama — I fully expect Chairman Dianne Feinstein to deny hearings to virtually all of President Trump's judicial nominees. This form of political hardball is to be expected after Republicans refused to hold a vote for Judge Merrick Garland, used the nuclear option to confirm Justice Neil Gorsuch, and held confirmation hearings without the return of "blue slips." As I predicted in a series of speeches in late 2014 and early 2015 — before Justice Scalia's passing — going forward, judicial confirmations will be possible only when the presidency and Senate are controlled by the same party. Look no further than the fact that Justice Don Willett of the Texas supreme court — who is eminently qualified for the federal bench by all objective measures — did not receive a *single* Democratic vote. Long gone are the days when Republican-appointed judges could be confirmed by a voice vote, or with solid bipartisan support.

Forward-looking steps taken today can alleviate future stress on the judiciary by preventing prolonged vacancies. Judges intent on taking senior status can make the process even smoother by providing advance notice. For example, in April 2017, Judge David McKeague of the Sixth Circuit announced that he would take senior status upon the confirmation of his successor. President Trump's nominee was confirmed on November 1, 2017 — the same day that McKeague entered senior status — and thus there was only the slightest vacancy on the court. The transition was seamless. Judge Alice Batchelder, also of the Sixth Circuit, and Judge Edith Brown Clement of the Fifth Circuit have taken a similar approach. Many district-court judges have done the same. Alternatively, a judge can announce the date he or she will take senior status far in the future to give the White House and Senate plenty of time to select a nominee. Indeed, the confirmation vote could be scheduled for that date certain, and the hearing before the Judiciary Committee could be held beforehand.

This approach to retirement is not novel, and follows an important precedent. On July 1, 2005, Justice Sandra Day O'Connor conditioned her retirement from the Supreme Court on the confirmation of her successor. Justice Samuel Alito would not be confirmed until January 31, 2006. Justice O'Connor's ability to continue her service during that tumultuous period, which included the death of Chief Justice William Rehnquist, ensured continuity on the High Court.

If the Senate flips in 2018, the Reagan, Bush, and Bush judges who held out — with an average age of 73 — may not have their replacements confirmed until 2021 *at the earliest*. And that's

assuming the president and the Senate are of the same party. The next twelve months present a unique opportunity for a series of smooth transitions within the federal judiciary. Waiting beyond this time will occasion prolonged vacancies and contentious confirmation battles.

Indeed, these dynamics may provide some food for thought for Justice Kennedy as he ponders retirement. A Supreme Court vacancy that arises in a divided government could last two, four, or even six years. As law professor Jonathan Adler observed, "Whether or not Justice Kennedy likes the idea of President Trump picking his successor, he may like the idea of his seat remaining vacant for an extended period of time even less. This would mean the time is now."

President Trump's most lasting legacy will be the judiciary. And he may have less than a year to complete it.

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