



Standoff over Supreme Court vacancy intensifies – but some see future fixes

Francine Kiefer

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Democrats are upping the pressure on Senate Republicans over their refusal to consider a US Supreme Court nominee until the next president, accusing the GOP of obstruction and reportedly vetting nominees with ties to Republican leaders.

Republicans say they're not budging, and the intensifying standoff portends increased polarization over the nomination process and politicization of the court.

But some point out that the scenarios may not be as dire in the years ahead.

One way to ratchet down the hyper-partisanship over this issue might be to change the way justices are nominated so the result will tend more toward "consensus" nominees, says Trevor Burrus, a research fellow at the libertarian Cato Institute's Center for Constitutional Studies in Washington. Others highlight the internal dynamics of the court itself. The chief justice, for example, is known to be troubled by the public's sinking approval of the court.

Still, Mr. Burrus acknowledges, the "battle is going to be pretty epic" in the months ahead, with the White House and GOP control of the Senate at stake – not to mention the configuration of the court itself.

No question, the political pressure on Republicans is increasing dramatically. A new CNN/ORC poll shows that 66 percent of Americans – including a majority of Republicans – want the Senate to hold a hearing for whomever President Obama nominates to replace conservative Justice Antonin Scalia, who died in February.

The Senate GOP has said it will not meet with, hold hearings on, or vote on a nominee while Mr. Obama is president. A presidential election year is no time to decide a lifetime appointment, Republicans say. Instead, voters should decide.

Sensing Republican vulnerability, Democrats are charging ahead, focusing on their messaging about an obstructionist GOP and crafting an election strategy to unseat vulnerable Senate Republicans and take the White House.

Sen. Charles Grassley, chairman of the Senate Judiciary Committee, is one Republican who could face a serious election challenge. In a surprise move, Iowa Democrat Patty Judge, a former lieutenant governor and state agriculture secretary, will seek her party's nomination to vie for Senator Grassley's seat. She's a formidable candidate and he's now in the hot seat as the head of the committee that holds nomination hearings.

Also, the White House is reportedly vetting Jane Kelly, an appeals court judge from Iowa, as a potential nominee – and Grassley has praised her in the past. US District Judge Ketanji Brown Jackson, who is related to House Speaker Paul Ryan (R) of Wisconsin, is also reportedly being looked at.

While Republicans may be feeling the heat for their stance, they see the alternatives as worse. Their base can be expected to react angrily if they take even a step toward an Obama nominee, and if they do, they could find themselves in the embarrassing position of voting against a woman, a minority, or someone they have voted for before.

“The path they have taken is the best choice among a list of bad options. I don't think polls are going to move them off their current positions,” writes Jennifer Duffy of the independent Cook Political Report in an e-mail.

The standoff raises the prospect of an ever more contentious judicial nomination process, as the next president may have to fill not only this vacancy, but perhaps three more, given the age of some of the justices. The stakes are incredibly high, with a president potentially able to shape the tilt of the court for a generation.

But over the longer term, Burrus of Cato sees an opportunity to ratchet things down, principally by changing the nomination process. Aside from the broad parameters, details of that process are not spelled out in the Constitution. According to Article II, Section 2 of the Constitution, the president has a duty to nominate and appoint justices with the Senate's “advice and consent.”

Let's say divided government continues – one party wins the White House, but does not control the Senate. One way to make the nomination process easier would be for the president to create a bipartisan committee of, say, four senators and an equal number of White House staffers to put forward a slate of potential nominees. That list might be thrown to another bipartisan Senate gang to whittle down.

The dynamics of divided government would favor such a solution, and bipartisan groups of senators have worked through crises in the past. “What you will get from this is more moderate justices, essentially. You won’t see more Scalias,” Burrus says.

But here’s another scenario. Perhaps one party controls both the White House and the Senate, though not enough seats to overcome a filibuster blocking a nominee. Having seen Democrats do away with the filibuster for other nominees (the so-called nuclear option), the party in power might decide to get rid of it for Supreme Court nominees. Only a majority vote would then be needed to confirm justices.

That would also ease the process and allow the party in power to pass through more ideological justices. The downside would be the howls of protest from the minority party and opposing outside groups – and the opportunity for the minority party to put through its people when it’s next in power. Another effect would be a more politicized court.

That’s something that worries Chief Justice John Roberts.

“We know that the chief sincerely yearns for a public perception that the court is apart from partisan politics,” wrote Garrett Epps in the [Atlantic last month](#).

Given the potential for a 4-4 split on the court now and for months ahead, the court may put key cases aside for re-argument later. There is precedent for this when, in 1985, Justice Lewis Powell missed a third of arguments because of health issues.

The internal dynamics of the court, as it sees itself being dragged into polarized politics, have to be considered, Mr. Epps maintains.

“Politics in Washington, writ large, is increasingly predictable,” he writes. “But history suggests that inside the Supreme Court, it may be a good deal less so.”