

White House pans Cruz pitch for smaller Supreme Court

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Campaigning in Colorado this week, Texas U.S. Sen. Ted Cruz road-tested the idea of a shrunken Supreme Court - effectively blocking any justice picked by Democrat Hillary Clinton should she win the presidential election.

The idea has picked up steam in conservative circles as Donald Trump's campaign has fallen behind in the polls, alarming Republicans who fear the first liberal Supreme Court majority since the 1970s.

It also signals that the GOP blockade on nominee Merrick Garland, President Barack Obama's pick to replace the late Antonin Scalia, will continue past the Nov. 8 election.

The White House blasted the GOP over the standoff Thursday, with Obama press secretary Josh Earnest telling reporters that the calls for continued inaction threaten "the same kind of dysfunction that has infected Washington for the last six years."

Cruz, campaigning Wednesday for a Republican Senate candidate in Colorado, stirred the political pot by suggesting that Republicans could block a Democratic president from filling a Supreme Court vacancy indefinitely.

Citing Supreme Court Justice Stephen Breyer's recent comment that the current eight-member court works "about the same" as the regular nine-member complement, Cruz appeared to lay the groundwork for a smaller court.

"There will be plenty of time for debate on that issue," Cruz said. "There is long historical precedent for a Supreme Court with fewer justices. ... Just recently, Justice Breyer observed that the vacancy is not impacting the ability of the court to do its job. That's a debate that we are going to have."

Cruz spokeswoman Catherine Frazier played down the comment on Thursday, saying "many seem to think that he's out advocating for that, which isn't the case. He simply noted that there's a precedent for it."

Cruz made the nomination of strong conservatives to the Supreme Court a major focus of his primary campaign, particularly as Trump began to close in on the GOP nomination in late April.

The stakes for the high court also have helped keep many conservative evangelicals in the Republican fold, even as Trump battles an image of crass behavior toward women, compounded by multiple allegations of sexual misconduct.

"I just want the people to remember: United States Supreme Court," Trump told Pat Robertson's Christian Broadcasting Network in a transcript released Thursday. "Whether they love me or like me or don't like me, we're going to put great justices, pro-life justices, we're going to put Second Amendment justices and I think for the evangelicals it's so important that they get out and vote."

But with Clinton leading in most major polls, and time running out for a Trump comeback, Republicans have begun to talk about ways to stop her from appointing a ninth justice who could tip the ideological balance of the court.

Abbott lends support

Texas Gov. Greg Abbott joined the fray Thursday, praising Cruz on Twitter: "@SenTedCruz: GOP may block Supreme Court nominees indefinitely," he tweeted. "This may be only way to save the Constitution."

Cruz's rhetorical shot across the bow follows that of Arizona U.S. Sen. John McCain, who said earlier this month that Republicans would be "united" in blocking any Clinton nomination. He later backed off those remarks, but the issue has taken on a life of its own.

Cruz's position takes on added significance because he is a member of the Senate Judiciary Committee, which gets first crack at Supreme Court nominations. The committee's chairman, Iowa Republican Chuck Grassley, has taken a softer tone, telling reporters last week that "we can't simply stonewall" Clinton judicial appointments.

Texas U.S. Sen. John Cornyn, the No. 2 Republican in the Senate, also sits on the judiciary panel. He has said nothing about any prospective Clinton nominees. He has made it clear only that there is no chance the Senate will consider Garland's nomination in the upcoming lame-duck session of Congress.

Democrats, meanwhile, have raised the alarm. "Ted Cruz and John McCain may have given away the Republican game plan on the Supreme Court," Senate Minority Leader Harry Reid, D-Nev., wrote in an email Wednesday to the liberal Progressive Change Campaign Committee. "And we need to treat it like the constitutional crisis it will be if Democrats don't take back the Senate majority."

"The Supreme Court could dwindle to seven, then maybe six, justices," Reid added. "It would turn our justice system and our democracy on its head. The founding fathers would roll over in their graves."

The impasse over Garland and the possibility of future gridlock if Clinton gains the White House also is likely to spark a new partisan battle over the super-majority requirement for approving judges or overriding a filibuster, which currently stands at 60 votes.

Diminished activism

As questions about the Supreme Court have intensified in the presidential election, a number of conservative analysts have laid out the theoretical underpinnings for a GOP blockade. Michael Paulsen, a professor at the University of St. Thomas Law School in Minneapolis, argued in a National Review article last week that Congress could pass a law reducing the Supreme Court from nine to six seats. "A smaller court means diminished judicial activism," he wrote.

Ilya Shapiro, a legal scholar at the libertarian Cato Institute in Washington, wrote an essay in the Federalist this week arguing that Republicans would be in their rights to ignore or vote down any Clinton appointee with whom they disagree. "As a matter of constitutional law," he wrote, "the Senate is fully within its powers to let the Supreme Court die out, literally."

In an interview, Shapiro said that voters are the ultimate backstop. "If the voters think they're acting in bad faith, or if they don't agree with the reason why they're doing it, then they can vote them out."

The Constitution is silent on the size of the Supreme Court, and the number of justices is set by Congress. The first high court was composed of six members. It has fluctuated throughout history - usually depending on the number of federal circuits - but it has stood at nine since 1869.

Case for larger court

Constitutional scholar Jonathan Turley of George Washington University said the high court's current size - one of the smallest in the world - is more a matter of "happenstance" than reasoned debate. He long has argued to increase its size, perhaps to as high as 19, to reduce judicial power and de-emphasize the importance of any one judicial pick.

"Ever since we went to nine justices, we've been plagued by the problem of a 'swing' justice," Turley said. "The court effectively becomes a court of one, and, obviously, that problem is going to increase if you reduce your count even further.

"Justices have become too important," Turley continued, "and so the political system shuts down."

President Franklin D. Roosevelt, clashing with the Supreme Court over the New Deal, sought unsuccessfully in 1937 to appoint six additional justices.

Turley and other legal scholars say that while there may be legitimate reasons to reconfigure the size of the court, immediate political expediency should not be one of them.

"With all due respect to all these people, it just looks partisan," said Carl Tobias, a law professor at the University of Richmond. "That's the problem."