Slate

Eight Is Not Enough

Senate Republicans believe the Supreme Court will be just fine permanently operating one justice down. Here's how John Roberts can talk sense into them.

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When is a gaffe not a gaffe? When it is perfectly and calculatedly intentional. Last week, Arizona Sen. John McCain suggested that Senate Republicans "will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up." His campaign immediately tried to moderate this overt threat to continue a Republican high court blockade after the election with the promise that McCain would "thoroughly examine the record of any Supreme Court nominee" the next president puts forward. That sounded like a veiled promise to continue the present course of unparalleled obstruction but to at least go through the motions of holding hearings.

But even that breathtakingly antagonistic position might have been a bit too confusing for GOP voters, who have been told throughout this election that making sure another Democratic appointee isn't seated on the Supreme Court is of apocalyptic importance. So the plan has now been clarified. Writing this week in the *Federalist*, the Cato Institute's Ilya Shapiro argued that "as a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally." Shapiro then added, "If Hillary Clinton is president it would be completely decent, honorable, and in keeping with the Senate's constitutional duty to vote against essentially every judicial nominee she names."

Enhancing that clarity was Texas Sen. Ted Cruz—a man who's never met a government shutdown he didn't like. Asked this week about Supreme Court vacancies, the man who once proclaimed that the people should decide who takes over Antonin's Scalia seat in this next election showed unequivocally that he was full of it: "There will be plenty of time for debate on that issue, there is long historical precedent for a Supreme Court with fewer justices." Then he added that "just recently Justice [Stephen] 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."

And why is Cruz quoting Breyer, the Bill Clinton court appointee, about a potential Hillary Clinton court appointment? Well because Breyer—in what is becoming a burgeoning rift with Sonia Sotomayor, Elena Kagan, Ruth Bader Ginsburg, and even Clarence Thomas—has been making the case that everything is ice cream and ponies at the shorthanded high court. He took to MSNBC this week to argue that the vacancy is barely felt. Pointing out that the mechanics of the court work "about the same" with eight or nine justices, Breyer said this:

The court, when it began at the time of the Constitution's writing, had six members for several years… They had 10 members for several years after the Civil War. They functioned with an even number of members.

Sotomayor sharply disagrees. "It's much more difficult for us to do our job," she said at an event in Minnesota earlier this month, "if we are not what we're intended to be—a court of nine." Justice Thomas also weighed in, albeit gently, this week, explaining that in a city full of broken government, the court is also subject to its own charges of brokenness. "At some point, we are going to have to recognize that we are destroying our institutions," he said. When asked about whether there's any hope of improving the confirmation process, Thomas added "there's always hope." (This might be more hope than I am able to muster.)

With threats now emanating from the Senate to continue this blockade indefinitely, it's time for the chief justice to weigh in.

I have been writing for much of the year about the logic behind the court's decision to remain above the partisan election fray. It makes perfect institutional sense—even as the candidates have tried to make the future composition of the court the focus of the election—for the court itself to remain calm and carry on.

But in this second to last week before the election, we are starting to see the strain. The court is having trouble filling its docket. The justices are declining to schedule hot-button cases they had previously agreed to hear. The justices are taking it upon themselves to explain the situation to the country, and they do not all appear to be on the same page. And now that some Republicans are gleefully arguing that they may be legally able to shrink the court down and drown it in a bathtub, the moment has come for some institutional pushback. It needs to come from the chief justice.

What can John Roberts say? It's almost painfully simple. He can say, in the most sober, measured, and nonpartisan fashion that the court needs nine justices. He can note that although the court began with six justices—and from 1863 to 1866 had 10—the Judiciary Act of 1869 stipulated that the court be made of nine justices. He can note what happened to FDR when he attempted to pack the court in 1937 and observe parenthetically that this revolt came from the American public. He can also point out that fluctuations in the authorized strength of the court came with changes in the circuit courts, not recreational obstruction in the Senate.

The chief justice might also point Cruz, McCain, Breyer, and anyone else who might argue that eight is enough to the Supreme Court's official recusal policy, which provides that:

[E]ven one unnecessary recusal impairs the functioning of the Court. … In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect on the certiorari process.

Roberts might add that Justice Scalia himself made that point when he declined to take himself out of a case in which he was accused of having a conflict of interest. As Scalia noted at the time he might recuse himself *only* if he were sitting on the Court of Appeals:

There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The court proceeds with eight justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.

Then Roberts may point to his predecessor, Chief Justice William H. Rehnquist. Declining to recuse himself in a 1972 case, Rehnquist wrote, "affirmance of [conflicting lower court decisions] … by an equally divided court would lay down 'one rule in Athens, and another in Rome, with a vengeance.' " That is precisely what happened at the end of the latest term with 4–4 gridlock in four key cases, including vital disputes over the future of public-sector unions, jurisdiction on tribal lands, and of course President Obama's executive action on immigration.

There is a time for sober reticence, and then there's a time when it's too late to repair the damage. Turning this already terrible election into a referendum on whether voters should collude with Senate Republicans to eviscerate the Supreme Court for the foreseeable future is intolerable to both institutions.As Ian Millhiser wrote, allowing the court to dwindle to eight or even seven members as a result of bare-knuckled obstruction would so undermine the legitimacy of future rulings and someday justices that the court might not ever recover. And as Georgia State University law professor Eric Segall argued in the*Los Angeles Times* this week: "Concern by the justices that speaking out may look too political is silly. The court finds itself in this stalemate because it is primarily a political institution to begin with. And, as the third branch of the national government, the court has a right to protect itself."

We all agree the Supreme Court is best served by lofty nonchalance about the casual nihilism that has characterized the last eight months of debate over the future of the court. And nobody doubts that if Senate Republicans are willing to shutter the court rather than lose it, there is little the law can do. But the one thing the court has left is the public authority to make the case that just because something is legal, doesn't make it right. If the Republicans take the Senate, it won't matter that there was once a difference.