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## Ted Cruz Knows Better Than to Suggest Shrinking the Supreme Court

Dianaa Wray

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Sen. Ted Cruz is never one to miss an opportunity to grab some headlines, and now he's done it again by stating publicly that he thinks it would be just fine if the U.S. Supreme Court — which has had a vacancy since Justice Antonin Scalia died in February — continued to function with just eight justices.

In other words, Cruz was saying the Republican-controlled Senate could simply choose to leave Scalia's seat empty for the duration if Hillary Clinton is elected president.

Cruz isn't the first Republican to tout this option, but it comes across as particularly exasperating that he should be the one to suggest this.

After all, Cruz is supposed to be a brilliant constitutional scholar. He clerked for famed conservative Chief Justice William Rehnquist and argued before the court during his time as solicitor general of Texas. In other words, he knows exactly how the court functions and what difficulties can arise when the court isn't fully staffed. He also should know what it would mean if the Senate were to decide to, as the Cato Institute's Ilya Shapiro suggested last week, allow the Supreme Court to "die out, literally."

But still, he told a clutch of reporters after a speech in Colorado last week that leaving the seat vacant could be a real option, according to the *Washington Post*. "There is certainly long historical precedent for a Supreme Court with fewer justices. I would note, just recently, that 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."

The thing is, that "long historical precedent" that Cruz is claiming would totally allow the Senate to never get around to advising and consenting on Merrick Garland and any other future Supreme Court nominees? It doesn't really exist.

Sure, back when the Supreme Court got started in 1789 there were only six justices, but there have been nine justices on the court since 1869. In fact, it seems like the Supreme Court has been very good with exactly nine justices for a while now. Back in 1937 when President Franklin D. Roosevelt attempted to pack the high court by creating six extra seats, not only did that plan not

happen, it sparked a Constitutional crisis. The Senate has never simply left a seat on the court empty.

Of course, slow pedaling judicial nominations is par for the course with Cruz. He and fellow Texas Sen. John Cornyn have made a habit of delaying and blocking federal judicial appointments to everything from the federal trial courts to the Fifth Circuit Court of Appeals.

This is how the Republican-dominated Senate rolls as a whole. The Senate confirmed only 11 judges in all of 2015, the lowest single-year total since 1960, according to the Alliance for Justice. With only 11 more judges confirmed so far in 2016, this Congress is on pace for the lowest number of judicial confirmations since the 82nd Congress, back in 1951 and 1952.

While this tactic probably plays beautifully to Republican constituencies — they're opposing President Barack Obama so much that he can barely even get judges confirmed — it has led to increased workloads and delays in trials for federal courts that handle thousands of cases per year. Right now, 10 percent of the U.S. district federal judgeships are vacant and many of the other judges are handling massive caseloads.

In 2010, Chief Justice John Roberts scolded both Democrats and Republicans for the obstructionism and political machinations that had led to so much foot-dragging on federal judicial confirmations. Since then, the lag time has only gotten worse, according to the Washington Post.

So, we've already got a palpable example of what happens when any portion of the judicial system is allowed to "die out". When the Supreme Court is evenly split between its liberal and conservative wings, as it is now, a lot of the cases are still decided unanimously, but major issues tend to divide the court. If the court is deadlocked this leaves the lower court decision intact. If this happens when the Supreme Court is looking at a hot-button legal issue, one where the lower courts have come in divided on which way to go, this can mean a whole bunch of different interpretations of federal law across the country. As Cruz himself is surely aware, federal law is not like interpretive dance — you can't just make up what the law is supposed to mean as you go along.

The Supremes themselves have also been showing signs of wear and tear from the long delay to fill Scalia's seat. The court's docket is more empty than usual this term, as the justices back-packet the big cases they'd previously agreed to hear until they have a full court again. The justices themselves are arguing over whether the current vacancy is a problem for the court or not. (Breyer says they're doing just peachy while justices Sonia Sotomayor, Elena Kagan, Ruth Bader Ginsberg and Clarence Thomas all said that this just isn't so.)

Meanwhile, Cruz and his ilk are talking straight-faced about doing away with the court entirely. From some people, this wouldn't seem like such a big deal. But Cruz isn't just any old politician. He knows the significance of decisions from *Marbury v. Madison*, *Plessy v. Ferguson*, *Brown v. Board of Education*, *Roe v. Wade*, *Miranda v. Arizona*, *Bush v. Gore* and *Obergefell v. Hodges*. He understands why FDR's court packing scheme was met with outrage, why Rehnquist went to great lengths to ensure that the justices on his court got along, and he was well aware that

Roberts would be a chief justice who presided over the court with an apolitical approach to cases.

Sure, every justice appointed to the Supreme Court has his or her own viewpoints on things, but the justices are there to be the highest court in the land and the last stop on questions about Constitutional issues — like, let's say, whether the Affordable Care Act is legal or whether gay people should have the right to get married — without worrying too much about what the Republican or Democratic factions are going to say about it. Or at least that's how it's supposed to work. It doesn't really function that way when the court is deadlocked and avoiding controversial cases while some lawmakers are questioning whether or not the highest court in the land should exist at all.

And Cruz can't help but know this. Cruz knows what the Supreme Court is and what it does and the crucial part it plays in our democracy. He knows better.