Eight Is Enough

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Eric J. Segall, Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court (2017).

In February 2016, shortly after the death of Justice Antonin Scalia, progressives, including progressive law professors, salivated at the prospects for the Supreme Court. President Barack Obama would fill a vacancy (the third of his presidency and the same number Reagan had appointed), shifting a 5-4 conservative Court to a 5-4 liberal Court. And with the expected election of Hillary Clinton to potentially replace three Justices who were 78-years-old or older, a 6-3 liberal Court—unseen since the 1962-68 heyday of the Warren Court—seemed possible. Visions of vigorous liberal constitutionalism, especially on "Culture War" issues, danced in the heads of constitutional scholars and advocates.

It was not to be, of course. Those dreams died in stages, with first the success of Senate Republicans' 300-day inaction on President Obama's nomination of Merrick Garland, then Donald Trump's unexpected election in November 2016, then his January 2017 nomination of Tenth Circuit Judge Neil Gorsuch to fill the vacancy.

Although a self-described progressive, Eric Segall spent this interregnum attempting to steer the conversation and the political process in a different direction. In *Eight Justices Are Enough* (a paper I read and commented on in draft), the culmination of a series of op-eds, blog posts, and talks, Segall argues that Congress should permanently establish the status quo since Scalia's death that may continue for the duration of the current Term: An eight-Justice Court, evenly divided between Democratic and Republican appointees. Each seat would be designated (or at least understood) as "belonging" to that party and to be filled by a nominee of that same party, regardless of the appointing President. In essence, Segall argues, the Supreme Court should be staffed the same way as the Federal Election Commission or the Court of Appeals for the Armed Forces (a non-Article III court).

Segall's proposal seizes on an unprecedented political moment: An even number of Justices with an even ideological divide adhering to the party affiliations of their appointing Presidents and, presumably, of the Justices. That last part is important, because previous sharply divided Courts have not followed partisan lines. The four-Justice "liberal" wing from 1994-2009 consisted of two Republican appointees. So did the liberal majorities on the Warren Court. One of the "Four Horsemen" voting to declare New Deal legislation invalid was a Democratic appointee, while three of the regular dissenters were appointed by Republicans Presidents.

This proposal also reflects Segall's scholarly approach to the Supreme Court, which he has long labeled a political rather than judicial institution in his own writing and his work with Judge Richard Posner. If a Justice's politics dominates how she decides cases, Segall suggests, it is better to bring party affiliations into the open and make them an explicit part of the Court's structure.

The change could be implemented deceptively easily and immediately. Congress determines the size of the Court and can reduce the number of seats from nine to eight by ordinary legislation; Article III does not command a minimum or maximum size for the Court, nor that there be an odd number of Justices. The trickier piece is ensuring same-party nominees. One way is through legislation, like that establishing the FEC, providing that "no more than four members of the Court may be affiliated with any particular

party." Although Segall does not mention it, this would not be without constitutional uncertainty, going to whether Congress can legislate limits on eligibility for a seat on the Court. Article III famously does not establish eligibility qualifications or limitations for a federal judge, not even that she be a lawyer. Alternatively, the Senate could enact an internal rule that it may confirm only a nominee from the same party as the prior holder of the seat and must refuse to confirm a nominee not of the same party, ensuring that there are never more than four Justices from one party. Segall does allow for possible confirmation of an independent, or someone who refuses to disclose party affiliation, by a supermajority.

Segall does not require the President to nominate a member of a particular party, which would trigger sticky constitutional questions about the scope of the President's Article II appointment powers and congressional power to limit presidential prerogatives. But the President would know that if he nominates a Republican to replace Justice Ginsburg (or if President Clinton would have nominated a Democrat to replace Justice Kennedy), the Senate would not confirm.

Segall identifies three broad benefits in his proposal. First, it ensures at least a minimum of bipartisan support for any significant constitutional decision, since at least one Justice from the other party is necessary to create a majority. While an excess of constitutional decisions from a closely divided Court can be troubling, the problems of perception are exacerbated when the divide tracks partisan lines. Instead, Justices will work harder to avoid ties and to achieve some bipartisan agreement, perhaps by rendering narrower ("minimalist," in the parlance) decisions. Second, the proposal removes incentives for partisan gamesmanship in timing retirements. A Democratic Justice has no incentive to time her retirement for when a Democrat is in the White House (or to hold on until a Democrat returns to the White House) if her successor on the Court will be a Democrat, regardless of the appointing President. Third, Segall rebuts arguments that the proposal would be detrimental to the uniformity of federal law. Because only a small portion of the Court's decisions are 5-4, it is likely the eight-Justice Court would be evenly divided and unable to decide only on a similarly small number of cases. More importantly, having an evenly divided Court devolves decisionmaking power to the lower courts, which include a larger number of judges, who are politically, educationally, socially, geographically, and experientially more diverse.

Segall's proposal creates some downstream effects that may prevent it from achieving its purposes. It theoretically could produce more moderate nominees, as a Republican President will appoint the most moderate (i.e., least liberal) Democrat he can find for a Democratic seat (and vice versa, for a Democratic President with a Republican seat). Segall regards this as a long-term benefit, a way to reduce the role of partisanship in the Court's decsionmaking by getting less-partisan Justices. But that also means Justices will not entirely lose the incentive for gamesmanship in timing their retirements. Justice Ginsburg still may try to hold on to allow a Democratic President to replace her with a similarly liberal Democrat, rather than allowing a Republican President to replace her with a moderate Democrat. The difference is merely one of degree. Segall addresses this concern by requiring that any nominee be approved by a majority of that party's members on the Senate Judiciary Committee. In theory, this forces a Democratic President to appoint, and Senate Democrats to vote to confirm, someone who is "Republican enough" to satisfy the Senate GOP caucus. That, of course, may undermine the goal of appointing moderate Justices.

The proposal also creates some perverse incentives for actors to avoid or delay acting to fill a vacancy for a lengthy period. If the new status quo is an evenly divided eight-person Court, a vacancy necessarily produces a seven-person Court with a 4-3 partisan advantage for one side. And partisan actors on that side might prefer to keep that edge for some period of time. Thus, President Trump might leave Justice Ginsburg's seat unfilled to maintain a 4-3 Republican Court, rather than appoint a new (even moderate) Democrat. Or he can strip the force from the Democratic veto on the Senate Judiciary

Committee—if they do not go along with his conservative-Democrat nominee, he is happy to leave the seat vacant. Or a Democratic Senate majority might refuse to confirm a Republican nominee to fill Justice Kennedy's seat, leaving a 4-3 Democratic Court. Or a Democratic Senate minority might filibuster Kennedy's replacement, producing the same result (or forcing Republicans to eliminate the filibuster). The Justices themselves might prevent this manipulation by conditioning their resignations on confirmation of a replacement. But that option disappears with an unexpected vacancy created by death, illness, or incapacity.

Finally, the proposal places downward political pressure on lower-court appointments. These have become nearly as politicized as Supreme Court appointments, as demonstrated by Republicans' deliberate strategy to leave more than 100 unfilled vacancies for President Trump. Segall's plan could exacerbate the problem. If SCOTUS's inability to get a majority empowers lower courts to resolve more national issues within their geographic regions, each political party wants to increase the likelihood of favorable decisions being affirmed by that evenly divided Court. Both parties thus must maintain and strengthen majorities on lower courts, as appointment obstruction and gamesmanship trickle down to the lower courts. The new system also may prompt those lower-court judges to flex their powers, as by issuing and affirming universal (or nationwide) injunctions, binding the federal government to the decision of a single local court and essentially creating nationwide law, never to be reviewed or resolved by SCOTUS. Whether these are features or bugs, and whether as bugs they outweigh the merits of Segall's proposal, is a matter for political debate.

Segall's is only the newest among numerous proposals to alter the makeup and selection of the Supreme Court, both to fix the broken confirmation process and to depoliticize the Court as an institution (as perceived, if not in reality). The Paul Carrington Proposal would establish de facto eighteen-year term limits by statutorily providing for regular biennial appointments to the Court, with cases heard by the nine junior-most Justices. Others have proposed constitutional amendments to eliminate life tenure in favor of term limits. Others propose eliminating permanent Justices, staffing the Supreme Court with randomly selected rotating judges assigned from lower courts. Segall's proposal has the benefit of simplicity in enactment—it involves small sub-constitutional changes, codifies the Court's familiar status quo from the past year, and does not alter the terms or conditions of any sitting Justice's appointment. It also is the most honest—reappropriating the partisanship that Segall argues exists in the Court and incorporating it into formal institutional structures.

The political reality, of course, is that none of these proposals is likely to be enacted. It would require unilateral disarmament by one party at the height of power (in this case, Republicans, who control the Senate and the White House and, but for the filibuster, can put anyone they want on the Court). That power might shift in two or four years will not affect that calculus. And the window for Segall's plan is especially narrow, tied as it is to the Court's current partisan moment. If Gorsuch is confirmed and the next vacancy comes via a retiring Justice Breyer, the resulting eight-person Court would not contain an even partisan divide for Congress to codify.

On the other hand, legal scholars must not run from bold ideas simply because other legal institutions are not on board. And Segall's proposal is unique enough to look attractive should the current appointment stalemate continue. Senate Democrats have murmured about filibustering any Trump nominee, payback for Republicans' having "stolen" the appointment from President Obama. If Senate Democrats are serious and committed enough to maintain that stance for several years, Senate Republicans may face a choice—either eliminate the filibuster (as Democrats previously did for lower-court appointments) or look for a solution that accepts the stalemate and finds benefits in retaining it.

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