Filling the Vacancy left by Scalia: The Democratic Virtues of Delay

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With the death of Antonin Scalia, a vacancy of considerable political import for the future direction of the court has opened up. The quick-minded and rhetorically gifted conservative judge not only often provided a critical 5:4 conservative majority on the Supreme Court, he is also widely regarded as the intellectual leader of the conservative side of the legal establishment. With Presidential elections coming up later this year and the primaries in full swing, it has already become obvious, that appointing Scalia's successor will not be an ordinary appointment process.

Under Art. 2 USC it is the constitutional responsibility of the President to nominate a replacement candidate, putting President Obama in a legal position to ensure that the balance of power on the Supreme Court shifts in favor of Democrats. The problem for Obama is that it is the constitutional responsibility of the Senate to confirm any nominee the President puts forward. Republicans currently hold a 54/46 majority in the Senate. Historically the Senate has been deferential to the President's choice, but in recent decades that deference has arguably shrunk as a matter of political practice, as Supreme Court appointments have become ever more politicized.

With the Presidential elections scheduled for Dec. 2016 and the new President to be sworn into office in January 2017, Republican Presidential candidates as well as leading Senate Republicans have indicated that they would seek to delay the appointment of a new Justice until after the elections. The Senate Judicial Appointments Committee operates under a filibuster rule, according to which a 60 votes are necessary to bring a nominee to a vote. Even if all Democrats supported a candidate, they would need 16 Republicans to go along with them. To justify their delaying tactics Republicans have already brought the "Thurmond rule" in play: an informal rule proposed by Senator Strom Thurmond on occasion of refusing to vote for President Lyndon Johnson nominee Abe Fortas in the last six months of his presidency in 1968. Even though there is no canonical formulation of the rule and it is not legally binding, the rule is understood as requiring that the Judicial Committee not vote on a Supreme Court candidate within the last six months of a lame duck President´s term. The rule has been cited opportunistically on occasion by both sides, but there appear to be no further instances in which it played a central role. If President Obama moved forward quickly with a nomination in late February or early March, and the Senate´s scrutiny would take no longer than the usual range of 75-90 days, the situation would not quite fall under the literal scope of the rule, but nobody appears to believe that this is how things are likely to go. The question I want to pursue is the following: *If Republicans delayed the procedure or refused to vote on any nominee Obama puts forward, would they violate their constitutional responsibilities, as Democrats insist?*

In the end I don´t think so. On the contrary: I will argue that there are good grounds of constitutional principle that make delaying the appointment an attractive proposition.

To begin with, this is an issue that also turns on constitutional arguments, even if it is not an issue that will be decided by judges. It will not be resolved by judges, because under the "political question doctrine" the procedural practice governing the internal workings of Congress are not generally subjected to constitutional scrutiny by Federal Courts. It is nonetheless an issue of principle, because what is at issue is a constitutionally appropriate understanding of the duties of constitutional actors. Furthermore neither constitutional text, nor, I will assume, modern precedent or established conventions provide determinative guidance on how the Senate should proceed here. But that does not mean that there are no constitutional principles at stake and that the tactical and strategic jockeying for political advantage by the parties is the only game in town.

Constitutional actors are under an obligation to ensure that they exercise their constitutional functions in a way that does not undermine the point and purpose of what they have been established for. If, for example, the vacancy on the Supreme Court were to seriously undermine its constitutional functioning, then the President and

the Senate would be under a duty to exercise their powers in a way that would restore the effective functioning of the Supreme Court as soon as is compatible with the rigors of a carefully conducted appointments process. But of course the Supreme Court can function perfectly well with eight judges for a year. Only six judges are needed in order for the court to decide cases (28 U.S. Code § 1). Nor is it a problem that in some cases the court may divide evenly on a case, when there are only eight judges. The US S. Ct. would function like the German Federal Constitutional Court, where there are eight judges in each Senate as a matter of design: Absent a majority to overturn a decision, the decision of the previous decision-maker would be confirmed. A 5:3 decision would be needed to overturn the decision of lower courts. So concerns relating to ensuring the proper constitutional functioning of the Supreme Court are not a serious issue.

The core case *in favor* of connecting the appointment of a new Supreme Court Judge to the outcome of the Presidential election process is related to the problem of democratic legitimacy. All other things being equal, a judge appointed by a President who has just been elected and who has had the opportunity to make his appointment policies a subject of the campaign enjoys greater democratic legitimacy than an appointment made by a lame duck President towards the end of his term. Such a President, prevented from seeking a third term by constitutional term limits, has no incentive to ensure that his nominee reflects widespread representative sensibilities and outlooks, and is subject only to whatever constraints the Senatorial confirmation process may provide.

To see the issue in the wider context of the legitimacy of constitutional adjudication, note how the democratic legitimacy of judges is rightly an issue that is of greater concern in the US than in just about any other constitutional democracy. This is because of the specific content of the rules governing the interaction between democratic politics and adjudication. First, there is the problem of judge's tenure: In most jurisdictions the tenure of constitutional court judges is limited, generally not more than 12 years and occasionally less. In the US judges have life tenure. Often – like Justice Scalia and all Popes except Benedict XV – judges hold office until they die. Justice Scalia sat on the Supreme Court for nearly 30 years. The average term length for the judges that the currently sitting crop of Supreme Court judges have replaced is slightly more than 26 years. There are good reasons why judges are not elected in the same rhythm and with the same frequency as legislators. But even if Jeffersons claim that constitutions should be replaced every 20 years by a revolution may have been over the top, surely the proposition that those who claim to be final interpreters of the constitution should be replaced within that time frame makes good democratic sense.

Second, the perverse effects of the life tenure rule are amplified by the rule on constitutional amendments, which make it a rare historical event for the political branches to come back and challenge the Supreme Court. Art. V USC famously requires not only 2/3 majorities in both houses of Congress, but also the ratification by a qualified majority of states. Compare this not only with rules such as those in Canada or New Zealand, where the legislature has the authority to effectively maintain the legal validity of a statute with simple majorities, but also other constitutional systems where often a qualified majority in the main central legislative bodies suffice to amend the constitution. In some of those jurisdictions amendments to the constitution are not rare events, but routine legislative operations. Taken together these rules provide a structure which places a considerable burden on the plausibility of the constitutionally attractive metaphor of a "dialogue" between judges and the political branches.

I'm not suggesting that connecting the appointment of Supreme Court Justices more closely to Presidential elections is a silver bullet or even a major step in addressing judicial legitimacy issues in the US. For those to be addressed some mix of other reforms would be more effective: life tenure should be abolished, constitutional amendments facilitated, and perhaps even voting majorities changed (why not require that federal courts can strike down state legislation only by a qualified, say 6:3, as is the rule in South Korea?). But applying something like the "Thurmond rule" would appear to be a step in the right direction.

That assessment does not change merely because we might have reasonable grounds to believe that Republicans use that argument only because they believe it suits their policy agenda. (More accurately, when, say, Senator Cruz or Senator Rubio insist that we should wait for the outcome of the election it is not implausible to believe that they say this because they believe saying this will increase their chances of winning the Republican primary). To begin with, whether an obstructionist policy of delay actually does further Republican

policy outcomes is, I think, a complex issue and not at all obvious. If you are a Republican and you are certain that you will win the next elections, then of course you'll want to wait until a new Republican President can appoint a judge more in tune with your sensibilities and outlook. But what if you won't win the elections? Might you not get a better compromise nominee from a sitting duck President operating in a difficult political environment seeking to build a legacy of accomplishment and of overcoming partisanship than a nominee put forward by a newly elected Democratic President in the flush of victory? And might an obstructionist delay policy by Republicans not invigorate a part of the Democratic electorate, that might otherwise not have bothered to show up to vote for a candidate it might find non-inspiring, thereby undermining the chances of electoral victory? These issues are not simple. But whatever the case might be and more importantly: the strategic use and abuse of a good argument by a political adversary should not blind us to the substantive merits of that argument. If Republicans will obstruct an Obama nominee on the grounds that the appointment should be made after the Presidential elections, they may have a fair point.

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