TAKE BACK THE COURT

5-5-5 AND APPELLATE ROTATION PLANS ARE UNCONSTITUTIONAL AND UNWORKABLE

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INTRODUCTION:

Over the last month, Presidential Candidate Pete Buttigieg has signaled openness to packing the Supreme Court with additional Justices.[1] In addition, Buttigieg has proposed other reform measures as alternatives to court-packing.[2] Specifically, Buttigieg has discussed expanding the Supreme Court to fifteen seats and allotting five seats for Democratic appointees and five seats for Republican appointees; the remaining five seats would be chosen by consensus of the first ten appointees (i.e., the "5-5-5" plan).[3] He has also spoken about the possibility of having appellate judges fill Supreme Court seats on a temporary and rotating basis (i.e., the "appellate rotation" plan).[4] Despite the merits of these alternatives, they are unworkable because they violate the Appointments Clause of the Constitution, and because the Supreme Court would have ample time to enjoin and then strike down statutes advancing either proposal. Without an unlikely constitutional amendment that strips the President of appointment powers, the 5-5-5 and appellate rotation plans will not reform the Court.

THE 5-5-5 PLAN IS UNCONSTITUTIONAL AND UNWORKABLE:

A proposal whereby the Supreme Court would be expanded to fifteen seats—five of which are filled by Republican appointments, five by Democratic appointments, and the last five by consensus of the other ten—immediately prompts questions of conflict with Article II, Section 2, of the Constitution (the "Appointments Clause"). This Clause states that the President, "by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court." Any attempt to transfer this decision-making power from the President to Congress (for the first ten seats) and a panel of ten Supreme Court Justices (for the last five seats) poses clear conflicts with the Appointments Clause.[5] The Constitution clearly reserves judicial appointment powers for the President, and any attempt to abrogate them would erode fundamental separation of powers principles.

The 5-5-5 plan's partisan restriction on judicial appointments probably violates the constitution as well. By reserving ten Supreme Court seats for the two major American political parties, the 5-5-5 plan would formally exclude third parties and independents from high-stakes political participation. Two current U.S. Senators (Bernie Sanders of Vermont and Angus King of Maine) were elected as Independents; under a bipartisan 5-5-5 plan, Vermont and Maine would presumably have unequal representation in deliberations over the makeup of the Supreme Court. The Supreme Court and lower courts have repeatedly signaled that party restrictions on judicial and civil service appointments are unconstitutional.[6]

The Court would have ample time between the enactment of a statute advancing the 5-5-5 plan and the swearing in of new Justices to strike down the plan. Advancing 5-5-5 plan by statute realistically requires maintaining the current makeup of the Supreme Court and limiting reform to future vacancies. A realistic 5-5-5 plan could possibly add six seats to the Supreme Court (in order to reach fifteen seats), immediately fill those six seats in the intended bipartisan manner (in effect, a "2-2-2") and then fashion some "fair" way to fill vacancies as they come. However, there would be enough time to obtain at least injunctive relief before those initial six appointments were confirmed by the Senate. Simply put, a statute advancing such a proposal would be quickly struck down by the Supreme Court, so without an unlikely constitutional amendment that strips the President of appointment powers, the 5-5-5 plan is unworkable.

1 See, e.g., Josh Voorhees, Pete Buttigieg May Have Just Found a Way to Get Noticed in the Crowded Democratic Primary, Slate (Feb. 22, 2019), https://slate.com/news-and-politics/2019/02/pete-buttigieg-court-packing-electoral-college.html

2 See, e.g., 2020: Pete Buttigieg on Freedom and Farting Cows, Pod Save America (Mar. 1, 2019), https://crooked.com/podcast/2020-pete-buttigieg-on-freedom-and-farting-cows; see also

3 Id.

4 Id.

5 There is a conceivable proposal whereby the President would choose the five Democrats and five Republicans in order to avoid an Appointments Clause challenge; however, the constitutional problem with the final five seats chosen by the judicial panel certainly still remains.

6 See, e.g., Branti v. Finkel, 445 U.S. 507 (1980) (holding that party restrictions on public defenders violated the First and Fourteenth Amendments); see also Adams v. Governor of Delaware, 914 F.3d 827 (3d Cir. 2019) (holding that party restrictions on state judicial appointments violated unaffiliated appointees' First Amendment rights).

THE APPELLATE ROTATION PLAN IS UNCONSTITUTIONAL AND UNWORKABLE:

Recall that the Appointments Clause states that the President, "by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court." Here (and in other sections of the Constitution) the Framers arguably contemplate a distinct office of a Supreme Court judge—an office separate from judges in lower courts created by Congress. Rotating lower court judges into that constitutionally-distinct office would conceivably undermine the President's specific power to appoint Supreme Court Justices pursuant to the Appointments Clause.[7] Conservative legal commentators have argued that a system of appellate rotation likely amounts to an unconstitutional encroachment on the Appointments Clause for this very reason.[8] The Supreme Court's modern obsession with originalism could lead it to latch onto this intent-based reading of the Appointments Clause and invalidate an appellate rotation statute.

Proponents of appellate rotation point to an important historical antecedent to support their proposal: the practice of "circuit-riding," whereby early Supreme Court Justices would sit on lower courts on a temporary and rotating basis. They argue that the practice of rotating Supreme Court Justices down to appellate courts strongly suggests the feasibility of similarly rotating appellate judges up to the Supreme Court.[9] However, this comparison is, at best, imperfect because of concerns that a lower court appointee would fill the constitutionally-distinct offices of "Judges of the supreme Court" without Presidential prerogative.

Proponents also point to the Supreme Court's 1803 decision in Stuart v. Laird–which upheld the practice of circuit-riding–as evidence that the Supreme Court would similarly find a statutory appellate rotation plan to be constitutional.[10] But, Stuart v. Laird upheld circuit-riding because of the Court's "practice and acquiescence under it for a period of several years"—that is, the Court oddly deferred to judicial custom.[11] Assuming this line of reasoning would even pass muster today, the results are not favorable: our status quo for the past century-and-a-half has been the absence of circuit-riding.[12] In sum, today's conservative Supreme Court is poised to use the Appointments Clause of the Constitution to block any statutory attempt to rotate appellate judges up to the Supreme Court.

A statute advancing an appellate rotation plan would fill future vacancies by rotation instead of direct appointment, leaving a considerable amount of time for the Court to consider and strike down the statute before it takes effect. For this reason, appellate rotation is no more workable than 5-5-5.

CONCLUSION:

Statutes advancing either the 5-5-5 or appellate rotation plan are unconstitutional and unworkable. Either proposal's likely statutory structure would give the Supreme Court ample time to strike it down before it fully goes into effect. Although standing may be difficult to establish in a potential legal challenge, Republicans arguably have weaponized standing doctrine to their advantage in recent years, and it is not inconceivable that, motivated by the desire to preserve the Court's conservative majority, they would identify a creative way to establish standing.[13] Without an unlikely constitutional amendment enshrining either of these proposals, the 5-5-5 and appellate rotation plans cannot reform the Supreme Court.

7 This also poses the same constitutional problems for another popular judicial reform proposal: statutory term limits. See, e.g., Akhil Reed Amar & Steven G. Calabresi, Term Limits for the High Court, The Washington Post (Aug. 9, 2002), https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c.

8 Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol'y 769, 861 (2006).

9 See, e.g., John O. McGinnis, Justice Without Justices, 16 Const. Comment. 541 (1999).

10 Stuart v. Laird, 5 U.S. 299, 1 Cranch 299, 2 L. Ed. 115 (1803).

11 Id. at 309.

12 See Judiciary Act of 1891, ch. 517, 26 Stat. 826 (eliminating the practice of circuit-riding).

13 See, e.g., Texas v. U.S., 809 F.3d 134 (2015) (Texas's DAPA challenge) and U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (2015) (the House's challenge to certain ACA subsidies).

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