"Dealing with the Court's Future Health"

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The lingering illness of Chief Justice William Rehnquist after the recent resignation of Sandra Day O'Connor raises questions of what to do about an infirm Supreme Court member who does not voluntarily retire. While Justice O'Connor chose to leave in good health, Chief Justice Rehnquist has indicated that he will continue to serve as long as his health permits. Two recent, if minor, hospitalizations, leave open questions about future health issues. Creating appropriate procedures for dealing with debilitating illnesses on the Court will contribute to continuity in government.

Illness and infirmities of Supreme Court justices are not recent concerns. Justices Robert Grier and Stephen Field served longer in the nineteenth century than their colleagues thought their mental acuity permitted. Legal leading lights like Oliver Wendell Holmes, Louis Brandeis and Benjamin Cardozo stayed on the Court after their abilities had declined significantly.

In the 1970s and 1980s, Justices William O. Douglas and William Brennan suffered strokes. John Marshal Harlan and Hugo Black had significant vision deficiencies. Thurgood Marshall developed heart problems.

Although only two presidents, Dwight Eisenhower and Ronald Reagan, have served beyond 70, the average retirement age for departing Supreme Court justices since 1954 has been 75 years. Since 1990 it has grown to 81 years.

The current Court is no exception. Justices Rehnquist, Sandra Day O'Connor and John Paul Stevens are seventy-five or older. Rehnquist, O'Connor, Stevens, and Ruth Bader Ginsburg have histories of serious illness.

Previously, when justices were impaired, their colleagues have applied awkward informal and unsuccessful pressures to encourage their retirements. Hugo Black ignored the hints of Chief Justice Earl Warren, Douglas and Harlan to resign for ill health in the 1970s. The situation repeated for Douglas after a stroke at mid decade many months required his colleagues, including then Associate Justice Rehnquist, to reduce his duties. Ad hoc and ad hominem solutions are inappropriate for venerable public institutions.

Moreover, the right to medical privacy for government leaders needs to be respected in these cases. While the press speculates on the illness and diagnosis—as in Rehnquist's case--the details need not become public. It sets a good example to protect the privacy of senior government leaders, while addressing the continuing and quality of policymaking. A solution that deals with incapacity in privacy-respecting ways needs to be developed before the next serious Supreme Court health crisis might roil the Court.

The 25th amendment about on presidential removal or resignation provides a model for impaired justices. For constitutional reasons, the 1980 judicial disability law does not apply to the Supreme Court. As the 25th amendment authorizes an executive branch committee to

declare the president infirm, Court procedures could constitute the other members into a medical committee. When a member is seriously ill, the majority could decide if she or he should step aside temporarily or step down. When in the majority, the Chief Justice would notify an ill justice of the determination of his brethren about the need to be relieved of duty. If the Chief Justice were ill, the senior associate justice would act instead.

Alternatively, the Court could authorize an outside body of medical specialists to examine the ailing Justice and recommend action. The panel should include specialists in the justice's illness and devise appropriate procedures for determining disability. Recognition of political pressures to replace elderly justices with more acceptable ideological juniors should inform the development of objective criteria. The panel report and specifics about the illness would be confidential, but resulting action public.

Developing and publicizing this procedure would be the simplest way of addressing the issue and avoid a constitutional amendment. Because Article III of the Constitution sets the term for judges at life with good behavior, Congress cannot remove justices for causes other than impeachable conduct. If the Court does not soon create and publicize a satisfactory internal solution, the Congress should ask it to act under appropriate procedures.

If the Court still does not create such procedures, the Congress and President should develop a 28th amendment paralleling the 25th and begin the ratification process. The amendment should constitute the justices into a committee of the Court, or authorize an external group appointed by the other Justices to recommend temporary removal or retirement.

The length of Chief Justice Rehnquist's illness, like Presidents Eisenhower, Kennedy, and Johnson health problems, and the time needed for ratification, remind leaders of the need to move quickly in developing policy. Such a solution needs to address illness of justices as public officials while respecting their privacy as individual citizens. Hence, it is now time to establish an interim procedure and set in motion a permanent solution.

While the issues of dealing with illnesses on the Supreme Court may not arise during the hearings on Judge John Roberts's nomination for the Court, they need to be raised in hearings on a new chief justice. This can begin the process of formal congressional hearings on a long term solution for illnesses on the high court.

The benefit of settling these issues soon is that the process will assure the ongoing operation of the Court. Creating an approach to debilitating health problems on the Court that protects the privacy of the justices will set a thoughtful precedent. Though not urgent during the Court's summer recess, the procedures need to be developed soon. In short, a course for dealing expeditiously with ill justices will improve the health of the Court and the body politic.

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