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# Supreme Court Continuity Crisis

SEVEN JUSTICES instead of nine now sit on the high bench of the United States Supreme Court. The resignations of the late Hugo L. Black and John Marshall Harlan reduce the court close to the required quorum of six.

This in itself creates a crisis of continuity and confidence. If two members of the present seven should be absent for illness—and Justice Thurgood Marshall has been in and out of the hospital during the past year—or for some other reason, no decisions could be reached. That happened some years ago when an important anti-trust suit against Alcoa reached the high court on appeal. Justices previously connected with the case disqualified themselves to reduce the bench to five. It was necessary to name a panel of circuit court judges to prevent an indefinite stalemate.

That was a single suit against one company. Alongside the issues now awaiting decision it was comparatively insignificant. Because two places are unfilled, the court has deferred arguments on four cases involving capital punishment, with more than 600 individuals under sentence of death in prisons across the country. Arguments in three cases related to the powers of government to crack down on polluters also have been postponed.

But it is not merely a matter of numbers and a full court. The suspicion within the court is that the Nixon administration means to make it subservient to Nixon policies and Nixon ideology. Attorney General John N. Mitchell is accused of lobbying for decisions favorable to the administration after cases have been argued and referred to the judical conference. A serious charge, it is made by one deeply concerned over the independence of the highest tribunal. Through a spokesman, Mitchell says this is absolutely untrue, that he has never talked to a justice about a pending decision.

Rep. Richard H. Poff's abrupt withdrawal from consideration when it had been thought he was certain to be nominated to the Black vacany illustrates the deadlock between the White House and opposition forces. Civil rights leaders, blacks and labor were prepared to fight a Poff nomination, if necessary with a fillibuster.

POFF'S UNCOMPROMISING opposition to civil rights measures was the touchstone. He also introduced a bill providing that only native-born Americans should be eligible to serve on the high court. This would have barred the late Justice Felix Frankfurter, a Harvard Law School professor nominated by Franklin D. Roosevelt. Frankfurter was born in Vienna.

Mr. Nixon has said repeatedly that he means to name strict constructionists. But this has been only loosely defined. Is it an ideological definition? Will the court after a first Nixon term, or perhaps a second Nixon term, end up with six Nixons on the bench and two or three lonely dissenters?

For that matter, Justice Black might have been called a strict constructionist. In the long succession of his dissents and his opinions, illuminated with the courage and compassion of a noble mind, he hewed to the line of the Constitution and, above all, the Bill of Rights and the First Amendment. That was strict construction.

As for the opposition in the Senate, they seem to want to dictate the ideological bent of the nominee. And, given the potential of the filibuster in a Congress controlled by the Democrats, they might prevail not only in dubious appointments but whenever the nominee held contrary ideological beliefs.

The crisis of continuity and confidence is undeniable. The extraordinary suggestion is heard that the vacancies on the court be left unfilled until after the 1972 election. That would be a warranty of stalemate and uncertainty.

The President has a golden opportunity to end all this. He can fill the two vacancies with men without narrow ideological restraints or geographical boundaries. If a Southerner is important, the name of Prof. Charles Alan Wright of the University of Texas Law School is immediately to the fore.

The best precedent in the past has brought men like Justices Black and Harlan to the court, and this can happen again.