

# **TF** THE FISCAL TIMES

## **Conservative Support Grows to Block Clinton SCOTUS Nominees**

Rob Garver

October 28, 2016

As it becomes all but crystal clear that Hillary Clinton will be the next president and have the opportunity to fill multiple seats on the Supreme Court, which would cement a liberal majority on the panel for the first time in a generation, a Republican strategy of total war on her nominees is taking shape.

The court, currently down one of its nine members due to the death of Justice Antonin Scalia last year, has muddled through for months while the GOP refused President Obama's nominee Merrick Garland a hearing, much less a vote.

Now, members of the GOP are seriously discussing the possibility of continuing to obstruct Democratic appointees indefinitely.

"I promise you that we will be united against any Supreme Court nominee that Hillary Clinton if she were president, would put up," McCain said in an interview last week. "This is why we need the majority."

After McCain, who is running for reelection, was criticized for his apparent promise to oppose Clinton Supreme Court nominees sight unseen, a spokesperson offered this walk back: "Senator McCain will, of course, thoroughly examine the record of any Supreme Court nominee put before the Senate and vote for or against that individual based on their qualifications as he has done throughout his career."

However, this week Texas Sen. Ted Cruz was there to pick up the banner and carry it forward. In a discussion with reporters Wednesday, he said that there is a "long historical precedent for a Supreme Court with fewer justices" and suggested that Justice Stephen Breyer had said the loss of a single Justice is "not impacting the ability of the court to do its job."

Breyer's point had been much narrower, in fact, pointing out that the basics of how the court reaches a decision were unchanged by the loss of one justice. However, the lack of a ninth Justice has led to stalemates in a number of cases so far, and that number will only grow in the future if the court remains deadlocked.

To be clear, four years of deadlock are vastly preferable to Cruz and others rather than four years of binding opinions from a court with a more liberal majority.

“For those of us who care passionately about the Constitution and Bill of Rights, who care about free speech and religious liberty and the 2nd Amendment, the best way to protect those rights is to win on Election Day so that we see strong conservatives nominated to the court, and maintain a Republican majority in the Senate to confirm those strong conservatives,” Cruz added.

Sen. Harry Reid, the retiring minority leader from Nevada, used his Republican colleagues’ words to rally Democratic support at the polls on November 8. In an email circulated by the Progressive Change Campaign Committee, he wrote, “Ted Cruz and John McCain may have given away the Republican game plan on the Supreme Court. And we need to treat it like the constitutional crisis it will be if Democrats don’t take back the Senate majority.”

Of course, earning the opprobrium of Harry Reid isn’t exactly a new experience for either McCain or Cruz, and on Wednesday, there was a sign that some figures in right-wing think tanks might be ready to stand behind them, providing intellectual support to a total blockade on Democratic Supreme Court nominees.

“As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally,” wrote Cato Institute fellow and attorney Ilya Shapiro. “I’m not sure such a position is politically tenable—barring some extraordinary circumstance like overwhelming public opinion against the legitimacy of the sitting president—but it’s definitely constitutional.”

Shapiro argues that blocking non-conservative appointees would be not just legal, but the proper thing for a conservative senator to do.

“If you truly believe that a particular nominee would wreak havoc on America, why not do everything you can to stop him?” he wrote. “I imagine this is what senators Obama and Clinton were doing when they voted to filibuster Judge Samuel Alito. While I think they were hopelessly misguided in their assessment of Justice Alito and his legal views, I don’t fault them for pursuing an agenda they believed in.”

In the end, he concluded, “If Hillary Clinton is president it would be completely decent, honorable, and in keeping with the Senate’s constitutional duty to vote against essentially every judicial nominee she names.”

The endgame here is ugly but predictable. In 2013, faced with a backlog of 59 executive branch appointees and 17 federal judicial nominees who were repeatedly filibustered by the GOP, Reid exercised what became known as the “nuclear option.” Invoking a point of order on the Senate floor, he forced a change in the Senate rules to bar filibusters of all executive branch nominees except for Supreme Court judges.

The distinction between Supreme Court nominees and all the rest was arbitrary, though, a sop to senators deeply uncomfortable with the move to overturn years of tradition. There would be nothing stopping the next Democratic Majority Leader -- likely New York Sen. Chuck Schumer, if the Democrats win the majority in November -- from changing the rules again, this time to block filibusters on Supreme Court nominees.

In fact, in a recent interview with Talking Points Memo, Reid indicated that is exactly what he expects will happen.

“I really do believe that I have set the Senate so when I leave, we’re going to be able to get judges done with a majority. And, it’s clear to me that if the Republicans try to filibuster another circuit court judge, but especially a Supreme Court justice, I’ve told ‘em how and I’ve done it, not just talking about it. I did it in changing the rules of the Senate. It’ll have to be done again,” Reid said.

“They mess with the Supreme Court,” he added. “It’ll be changed just like that in my opinion.”