



The Senate Should Refuse To Confirm All Of Hillary Clinton's Judicial Nominees

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October 26, 2016

When Sen. John McCain said last week that he would work to block *any* Supreme Court nominee a president Hillary Clinton would name, it raised some eyebrows. Republican senators pledged not to take up any nominee to fill the late Justice Antonin Scalia's seat until after the election, but that stance expires January 20 (regardless of any lame-duck machinations).

When Senate Majority Leader Mitch McConnell announced the #NoHearingNoVote position, he argued that, given the nation's polarization and that the next justice could swing the balance of the Supreme Court, this election-year vacancy should be filled by the people's choice.

It was a principled position, but a controversial and risky one. Yet McConnell's calculus has been borne out. Not only has his caucus stuck with it, but it seems the voters concerned about Republican "obstruction" wouldn't vote GOP anyway. Senate Judiciary Committee Chairman Charles Grassley of Iowa has faced the brunt of the "do your job" attack and is pulling away in the polls—regardless of the negative Donald Trump effect.

But the McCain volley, launched while campaigning for embattled Pennsylvania Sen. Pat Toomey, is something new: are Republicans really planning to keep that seat empty for four (even eight) years if Clinton wins? (Presumably this would be in a scenario where they keep the Senate; Democrats would surely get rid of the filibuster if it came to that.) Doesn't that expose their motivations as purely partisan regardless of their high-minded rhetoric?

The Constitution Allows It

Well, let's get one thing out of the way first: the Constitution is completely silent on all this. It's the president's job to nominate and the Senate's to provide "advice and consent," but there's no further textual explication.

During the battle over the current vacancy, some senators have said they've fulfilled their duty by giving President Obama the advice that they simply won't confirm anyone. (Also, why hold farcical hearings that would be even more Kabuki theatre than what we've come to expect?) The voters seem to have evaluated this position and found it acceptable, although of course the GOP may lose its Senate majority for other reasons.

Similarly, if a majority of senators refused to confirm anyone to *any* offices, or pass *any* legislation whatsoever, that's their prerogative. As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally. 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.

But that's not what McCain meant. He's not a lawyer and indeed walked back his comments, saying through a spokeswoman that while “Hillary Clinton has a clear record of supporting liberal judicial nominees,” he would “thoroughly examine the record of any Supreme Court nominee . . . and vote for or against that individual based on their qualifications as he has done throughout his career.” Reading between the lines, he expects to reject Clinton's nominees because they're too progressive, but he'll certainly make sure of that fact before voting that way.

Utah Sen. Mike Lee said much the same thing at a debate earlier this month. He explained there's no difference between a so-called “moderate” like current Scalia replacement nominee Merrick Garland and whomever else a President Clinton would pick. “Not a single Democratic nominee to the U.S. Supreme Court since [Byron White, nominated by President Kennedy in 1962] has voted independently,” he detailed, which is why he's been skeptical of President Obama's nominees.

People Elect Senators to Represent Them, Too

Indeed, Hillary Clinton herself said at the last presidential debate that the Supreme Court is meant to answer questions like “What kind of country are we going to be? What kind of opportunities will we provide for our citizens?” Well, gee, if those are the questions you ask, of course you'll end up with super-legislators, presumably in ideological agreement with the president appointing them. If you want the judiciary determining public policy, of course you'd think that Supreme Court justices should “represent all of us.”

But that goes against the rule of law and the idea of a judge as neutral arbiter, doing his or her best to apply the law to the facts at issue. As Supreme Court Chief Justice John Roberts explained at his confirmation hearings, the little guy should win when the law favors him, and the big corporation should win when the law goes that way.

Clinton's admission that her nominees would “be in the grand tradition of standing up to the powerful”—like some black-robed community organizers—is far more damning than her nonsensical positions on *Heller* (Second Amendment) or *Citizens United* (declining to punish producers of a movie criticizing Hillary Clinton).

Should senators rubber-stamp judicial nominees of that ilk, who care not about the law but rather hew to particular policies, out of a sense of tradition or deference to the executive? I simply can't blame politicians who follow their convictions. If you truly believe that a particular nominee would wreak havoc on America, why not do everything you can to stop him?

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.

So when you get past the gotcha headlines, breathless reportage, and Inauguration Day, 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.

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