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This Could Be The Beginning Of The End Of The Supreme Court As We Know It

Conservatives lay the groundwork for blocking all of Hillary Clinton's nominees.

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Maybe Sen. John McCain (R-Ariz.) had the right idea after all. Maybe Republicans are willing to trigger a constitutional crisis over the Supreme Court.

Some conservatives certainly seem to be warming up to McCain's controversial suggestion last week that Senate Republicans should dig in their heels and block any and all Supreme Court nominees put forth by a future President Hillary Clinton.

Who needs a fully functioning Supreme Court after all?

“As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally,” wrote the Cato Institute’s Ilya Shapiro in a column Wednesday on The Federalist.

Shapiro is well-versed in constitutional issues, and his argument has a legal, if contorted, basis. Nothing in the Constitution explicitly stands in the way of senators who would be willing to destroy the nation’s highest court — if not an entire branch of the federal government — to stop Clinton from selecting judges who share her views.

But McCain’s comments suggesting a total blockade initially faced opposition, even from some members of his own party. “We can’t just simply stonewall” those hypothetical Clinton nominees, said Sen. Chuck Grassley (R-Iowa).

Of course, as chairman of the Senate Judiciary Committee, Grassley is doing exactly that to Merrick Garland, President Barack Obama’s choice to fill the vacancy created by the death of Justice Antonin Scalia.

To Shapiro, there’s nothing wrong with even more Senate obstructionism because “the Constitution is completely silent” on how the upper chamber provides its “advice and consent” on the president’s nominees.

Legal scholars across the ideological spectrum have agreed that’s true. But they’ve also concluded that the Republicans’ no-hearings-no-votes posture on Garland is unprecedented in American history. And many deplore the partisanship that has overwhelmed the judicial confirmation process over the last few decades.

Not Shapiro. “I simply can’t blame politicians who follow their convictions,” he wrote. “If you truly believe that a particular nominee would wreak havoc on America, why not do everything you can to stop him?”

Shapiro noted that senators may pay a political price for refusing to work with a president from the other party. More importantly, the justice system pays a price.

Even those now on the Supreme Court have lamented that a shorthanded court can’t operate as it should.

“It’s much more difficult for us to do our job if we are not what we’re intended to be — a court of nine,” said Justice Sonia Sotomayor during a recent appearance in Minnesota. She added that 4-to-4 rulings can leave the law unsettled and justice across the country “administered in an unequal way.”

In other words, when lower courts disagree on how to interpret a particular law or how to apply the Constitution to new problems — and they do regularly — the justices are supposed to step in and resolve that disagreement. When an equally divided Supreme Court can’t do that, the meaning of congressional statutes and the Constitution may vary from state to state — which isn’t just or fair.

This didn’t seem to be a concern to Shapiro.

“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,” he concluded.

If Clinton wins and the Republicans retain control of the Senate, this argument could serve as the groundwork for their next play in Congress — even though they’ve spent most of 2016 insisting that the people’s choice for the next president should get to pick Scalia’s replacement.

Sen. Ted Cruz (R-Texas) signaled on Wednesday that he may be a convert to this vision of a new normal — a Supreme Court not at full steam for a very long time:

Of course, none of this likely matters if Democrats regain the Senate, which HuffPost Pollster projections say is not beyond the realm of the possible.

The Constitution may give the president the power to nominate justices and the Senate the power to vote them up or down. But in the end it’s the voters who choose.