



Why It's Impossible To Keep Judge Nominations Non-Political

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The year just past was a big one for judges. I don't mean the decisions they reached or the big cases argued at the Supreme Court, but how our black-robed arbiters were picked and who they are. Few would've predicted the record number of circuit court confirmations (12) or total nominees (68), or their quality (a few overly publicized weak spots notwithstanding). This presidential administration has surpassed even George W. Bush's well-oiled machine for selecting committed and youthful originalists and textualists, and getting them through the Senate.

A year ago, we were still getting over the surprise that the next resident of the White House would be Donald J. Trump. It was just sinking in that one of the new president's first orders of business would be to fill the late Justice Antonin Scalia's seat. Republican senators' refusal to take up any nominee until after the election, of course, preserved the vacancy.

People lost their minds over this maneuver, labeling it a constitutional crisis, or a dereliction of duty, or the GOP's denial of President Obama's legitimacy. It wasn't any of those things, but just good ol'-fashioned hardball politics. Senate Majority Leader Mitch McConnell took a risky gamble that paid off, in significant part because voters decided that Trump's list of Supreme Court potentials was better than what they could expect from Hillary Clinton.

So all the harping about Neil Gorsuch being an "illegitimate" justice is sour grapes, tied into general complaints about the election—such as that the Russians prevented Clinton from campaigning in Wisconsin and wrote her "basket of deplorables" speech—as much as anything else. Trump recognized that this was a winning issue and exploited it.

But What about the Lower Courts?

Lower-court judges, meanwhile, were real wildcards. If a constitutional lawyer who had been editor-in-chief of the *Harvard Law Review* deprioritized judicial nominations—Obama made relatively few his first term, and especially his first year—how much would a celebrity real-estate developer care? Would Trump see these as patronage posts for his casino lawyers and

other JDs he encountered in the entertainment world? Would he just focus on immigration and trade and let the judiciary erode away?

As it turns out, the president took door number three: defer entirely to his counsel, Don McGahn, a libertarian-minded political lawyer who has been taking advice from the Federalist Society (of which he and most of his team are members) and other conservative legal elites.

The result has been the biggest success of Trump's first year, and judges of the same kind and caliber as those conservative-constitutionalist presidential candidate Ted Cruz would have come up with—and probably better than Jeb Bush or Mitt Romney picks. This was made possible by former Senate Majority Leader Harry Reid, who eliminated filibusters for lower-court (and executive) nominees in 2013, a decade after he initiated partisan judicial filibusters for the first time ever.

Now, when I point all this out, or detail the tit-for-tat escalations that have brought us to the current level of political toxicity, I get reminded that, back when it was almost certain that Clinton would win the election, I counseled Republican senators to vote against virtually all of her nominees. “Life comes at you fast,” goes the Twitter meme. But I see nothing inconsistent with arguing both that (1) Judiciary Committee Chairman Chuck Grassley should discount blue-slip courtesies even more than he has, and (2) he and his colleagues should vote against nominees they think will do violence to constitutional structure.

Different Parties Support Different Legal Theories

It's simply senators' prerogative to vote against nominees they think will be bad (though Democrats seem more concerned about bacon jokes and anti-Catholic bigotry than jurisprudence and the only damaging line of questioning thus far was by Republican Sen. John Kennedy (LA)). But then it's up to voters to evaluate those judgments. It's a shame that quality nominees are confirmed only on party-line votes, but we've gotten here not because either party acted unconstitutionally but rather because we're at the culmination of a long trend whereby divergent interpretive theories map onto ideologically sorted parties.

Judicial nominations are properly an election issue, so it's heartening that voters are paying attention. Federal judges are a big deal: deciding many more cases than the Supreme Court and nominated for life, thus carrying certain legal-policy views long beyond the term of the president who appointed them. It's understandable that, given these stakes, senators try to advance or block as many judges as possible.

Perhaps Schumer should've offered to confirm 40 district judges (and no circuit judges) in exchange for not forcing cloture votes and 30 hours of debate on every nominee. McConnell may have still rejected that deal, because a dozen circuit judges may have greater impact long-term, or because the Senate wasn't using its floor time for anything useful anyway. Then Schumer may have offered something legislative—though he's in a hard spot, with his base demanding no compromise.

But that's the way the game has to be played: a Senate minority can still delay nominations—for now—without stopping them altogether, but a Senate majority is the ultimate whip hand. It's not

hard to understand, so maybe people are finally coming around to the idea that, even and especially for judges, elections have consequences.

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