



## Judge not, lest ye be judged

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Back in the summer of 2005, I urged Democrats not to oppose President Bush's nomination of John Roberts to the Supreme Court of the United States. Despite my strong disdain for his politics, I argued that Roberts was a first-rate legal mind. Just as important, the future Chief Justice passed my three-part test for any Supreme Court nominee selected by a Republican president. For starters, his anti-abortion views were not disqualifying, as they would be shared by any GOP pick. Second, Roberts' statements and writings did not reflect the extremism on social issues, criminal justice, and economic regulation exhibited by some of the other favorites on the right-wing short list. And despite his opposition to the Voting Rights Act and AIDS advocacy during his tenure in the Reagan administration, John Roberts had not made a career as a partisan hatchet man. In a nutshell, I believed Senate Democrats should give President Bush some latitude because Roberts simply was neither a Robert Bork nor a Harriet Miers.

But in 2017, my position has long since changed. Democrats must do whatever it takes to block 10th Circuit Court of Appeals Judge Neil Gorsuch, President Trump's nominee to fill the seat left vacant almost a year ago by the death of Antonin Scalia. This isn't because of a severe outbreak of "Roberts Remorse," though I along with many others, like Professor Jeffrey Rosen and Senate Minority Leader Chuck Schumer, suffer from it. In fact, the Democratic stonewall has little to do with Judge Gorsuch himself or any of the jurists the Federalist Society and the Heritage Foundation lovingly assembled for Donald Trump.

Simply put, in refusing to give President Obama's pick Merrick Garland so much as a hearing for 310 days, Republicans conspired to steal a Supreme Court seat. Led by Senate Majority Leader Mitch McConnell, the GOP didn't just take an unprecedented step in obstructing Obama's choice to replace Scalia, but shattered institutional Senate norms throughout his eight years in office. That's why the Democratic Supreme Court slogan through at least Jan. 20, 2021 must be #EightisEnough.

Now, the best and brightest in the Republican Party and its amen corner should have no problem with this conclusion. After all, they argued for precisely the same thing in the last weeks of the 2016 campaign, when a victory by Democrat Hillary Clinton seemed likely.

Consider, for example, that “maverick” Arizona Sen. John McCain. In late October, McCain declared Senate Republicans would be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up. Tea Party flame-thrower Ted Cruz agreed, saying, “There is certainly long historical precedent for a Supreme Court with fewer justices.” Utah Sen. Mike Lee, often mentioned as a possible SCOTUS candidate himself, was not only a strong backer of McConnell’s #NoHearingNoVote roadblock for Garland. In the month before Election Day, Lee said the Senate’s “advise and consent” power would be used to say “no” to anyone and everyone a President Hillary Clinton might select:

“Make no mistake: As a former law clerk...I don’t believe there would be a real substantive distinction, a real noticeable difference between the voting pattern of a justice who would be appointed by a President Hillary Clinton... and Merrick Garland. I just don’t think there is much, if any, difference.”

If key members of the Republican Senate were committed to preventing Barack Obama and/or Hillary Clinton from filling the “Scalia seat,” the panoply of right-wing think tanks hoping to choose a Republican replacement were outspoken about their scorched-earth strategy.

Within days of Justice Scalia’s death, the usual suspects on the right were laying out the case for what would become the Republicans’ judicial coup. Scalia’s body wasn’t even cold on Feb. 14, 2016 when the Cato Institute’s Michael Cannon insisted Congress could and should “deny Barack Obama the power to replace Justice Scalia.” On March 17, 2016, David Applegate of the Federalist Society wrote that Merrick Garland was “Obama’s sacrificial lamb” and a man whose “supporters should be honest and smart enough to recognize ... will not be confirmed by this Senate.” By July, vote fraud “expert” Hans Von Spakovsky expressed the Heritage Foundation’s view that “Republicans should not fold on Garland’s nomination.” And on Oct. 26, 2016, Ilya Shapiro summed up the coming GOP judicial coup at The Federalist in a post also featured by Cato:

The Senate should refuse to confirm all of Hillary Clinton’s judicial nominees.

As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court literally die out.

To put it another way, in trying to seat Merrick Garland President Obama was only trying to do what presidents have always done. But Mitch McConnell and his Republicans did—and promised to do—what was once unimaginable. The Republican leader didn’t just refuse to hold hearings for any Supreme Court nominee, but prevented President Obama from filling the vacancies on the nation’s 13 circuit courts of appeal as well. McConnell explained his scheme to right-wing radio host Hugh Hewitt in June 2015:

“So far, the only judges we’ve confirmed have been federal district judges that have been signed off on by Republican senators,” McConnell said on “The Hugh Hewitt Show.”

“And do you expect that that will continue to be the case for the balance of this session?” Hewitt asked.

“I think that’s highly likely, yeah,” McConnell responded.

McConnell largely kept his promise. While President George W. Bush had 23 federal district court and four appeals court judges confirmed by the Democratic majority in 2008, the Republican-controlled Senate has limited Obama to just one circuit court nomination confirmed in 2015 and 2016, and a total of four district courts judges approved through the first quarter of 2016. And as the Daily Beast documented, Republicans began applying the brakes in 2015:

According to a detailed study by the Brookings Institute, the Senate has already slowed the pace of judicial confirmations to record levels. In the case of Reagan, Clinton, and Bush, confirmations didn't slow until the second half of the presidents' eighth year in office. In their seventh years, the Senate confirmed 23, 17, and 29 judges, respectively. In Obama's seventh year? 10.

In other words, the two-term Republican presidents fared almost twice as well as the two-term Democrat presidents, with Obama faring the worst by far.

And that's precisely how Barack Obama's presidency ended. As the Washington Post reported on Dec. 30, 2016, Republican obstruction of President Obama was simply different in kind and degree than anything that had come before:

Donald Trump is set to inherit an uncommon number of vacancies in the federal courts in addition to the open Supreme Court seat, giving the president-elect a monumental opportunity to reshape the judiciary after taking office.

The estimated 103 judicial vacancies that President Obama is expected to hand over to Trump in the Jan. 20 transition of power is nearly double the 54 openings Obama found eight years ago following George W. Bush's presidency.

Confirmation of Obama's judicial nominees slowed to a crawl after Republicans took control of the Senate in 2015. Obama White House officials blame Senate Republicans for what they characterize as an unprecedented level of obstruction in blocking the Democratic president's court picks.

As the record shows, the GOP strategy of blocking the courthouse doors to new Democratic judges began the moment Barack Obama first walked into the Oval Office. (Republican calls for "up or down" votes and an end to the judicial filibuster went silent before Obama was even sworn in.) Citing research by the Alliance for Justice, in June 2011 ThinkProgress reported:

[T]he Senate confirmed fewer of [Obama's] district and circuit nominees than every president back to Jimmy Carter, and the lowest percentage of nominees - 58% - than any president in American history at this point in a President's first term. By comparison, Presidents George W. Bush, Clinton, George H.W. Bush, Reagan and Carter had 77%, 90%, 96%, 98%, and 97% of their nominees confirmed after two years, respectively.

Senate Republicans' mass obstruction of Obama's judges stands in stark contrast to the treatment afforded to past presidents. Indeed, the Senate confirmed fewer judges during Obama's first two years in office than it did during the same period in the Carter Administration, even though the judiciary was 40 percent smaller while Carter was in office.

As dismal as that record was, it was actually an improvement from a year earlier, when only 43 percent of President Obama's judicial appointments had been confirmed during his first year-plus in office:

Judicial confirmations slowed to a trickle on the day President Barack Obama took office. Filibusters, anonymous holds, and other obstructionary tactics have become the rule. Uncontroversial nominees wait months for a floor vote, and even district court nominees--low-ranking judges whose confirmations have never been controversial in the past--are routinely filibustered into oblivion. Nominations grind to a halt in many cases even after the Senate Judiciary Committee has unanimously endorsed a nominee.

Such tactics are completely unprecedented, and so are their results. Fewer than 43 percent of President Obama's judicial nominees have so far been confirmed, while past presidents have enjoyed confirmation rates as high as 93 percent. And President Obama's nominees have been confirmed at a much slower rate than those of his predecessor--nearly 87 percent of President George W. Bush's judicial nominees were confirmed.

It's no wonder Chief Justice John Roberts—certainly no friend of Barack Obama and the Democratic Party—urged action in January 2011 to address "the persistent problem of judicial vacancies." Eventually, then-Senate Majority Leader Harry Reid went "nuclear," banning the filibuster on non-Supreme Court nominations. But by 2014, the confirmation rate for Obama's selections still trailed George W. Bush's by 88 to 79 percent. And Obama's choices for both the federal bench and executive agencies had to wait far longer to be confirmed:

All of which is why Democrats must attempt to block any nominee Donald Trump tries to put on the Supreme Court. The successful judicial coup perpetrated by the Senate Republicans simply cannot stand. As eager filibuster leader Sen. Jeff Merkley of Oregon put it this week, "This is a stolen seat being filled by an illegitimate and extreme nominee, and I will do everything in my power to stand up against this assault on the Court."

But the judicial branch isn't the only pillar of America's constitutional democracy at risk should the Republican hijacking go unchallenged. The Senate, too, is teetering as a result of the GOP's transformation of the world's greatest deliberative body into a right-wing wrecking ball. Forced by Republican obstructionism to eliminate the filibuster for executive branch appointees and non-Supreme Court judicial nomination in 2013, Democrats must now turn to the judicial filibuster to keep this and any nominee off the highest court for the duration of Donald Trump's presidency.

Mitch McConnell, as President Trump requested, may decide to "go nuclear" and kill the judicial filibuster for the Supreme Court, as Republicans under Bill Frist threatened to do for George W. Bush back in 2005. But if he does, he will have finally snuffed out a Senate he already left in a persistent vegetative state. And in the eyes of the U.S. media and the American people, the smoking gun will be McConnell's hand.