



Cruz says there's precedent for keeping ninth Supreme Court seat empty

David Weigel

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Speaking to reporters after a campaign rally for a Republican U.S. Senate candidate here, Sen. Ted Cruz (R-Tex.) said that there was “precedent” for a Supreme Court with fewer than nine justices — appearing to suggest that the blockade on nominee Merrick Garland could last past the election.

“You know, I think there will be plenty of time for debate on that issue,” said Cruz, when he was asked whether a Republican-controlled Senate should hold votes on a President Hillary Clinton’s nominees. “There is certainly long historical precedent for a Supreme Court with fewer justices. I would note, just recently, that Justice Breyer observed that the vacancy is not impacting the ability of the court to do its job. That’s a debate that we are going to have.”

Cruz’s remarks put him at odds with several colleagues on the Senate Judiciary Committee, including its chairman, Sen. Charles E. Grassley (R-Iowa). “If that new president happens to be Hillary, we can’t just simply stonewall,” Grassley told reporters last week.

But Grassley made those remarks after Sen. John McCain (R-Ariz.) told a Pennsylvania radio station that Republicans would be “united against any nominee” put forward by a President Clinton. McCain walked back the remarks, but the threat of a liberal justice replacing the late Antonin Scalia — a move that would create a liberal Supreme Court majority for the first time since the 1970s — has kept many Republicans in Trump’s camp.

In the days since McCain’s gaffe, several conservative legal writers have argued that the threat of a Clinton presidency should get Republicans thinking about a long-term blockade on nominees. Last week, in National Review, Minneapolis law professor Michael Stokes Paulsen argued that a new Congress should pass a law shrinking the Supreme Court from nine to six seats. “A smaller court means diminished judicial activism,” Paulsen wrote. “As the Court’s size shrinks, activist majorities become mathematically harder to put together. Four votes out of seven is harder to achieve than five of nine.”

On Wednesday, in an essay in the Federalist, Cato Institute legal scholar Ilya Shapiro went further, suggesting that Republicans refuse to appoint any high court nominees put forward by Clinton.

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

In Colorado, making a series of stops for underdog Senate candidate Darryl Glenn (R), Cruz said that voters needed a “check and balance” on the president, no matter whether Clinton or Trump won.

“I think for those of us who care passionately about the Constitution and Bill of Rights, who care about free speech and religious liberty and the Second 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 said. “And that’s what I’m fighting to do.”