

A Crucial Part Of Obama's Legacy Is On The Line Tonight

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The election scenario we now find ourselves in is the one Senate Minority Leader Mitch McConnell had in mind when he delivered an ominous warning to Senate Majority Leader Harry Reid last November.

"You'll regret this," McConnell said. "And you may regret it a lot sooner than you think."

McConnell's pronouncement came after Reid finally [pulled the trigger on the so-called "nuclear option,"](#) which was one of the most drastic rule changes in recent Senate history. Under the new rules, most presidential nominees could be appointed by a simple majority vote. It removed the minority party's power to filibuster and prevent executive and judicial nominees from getting confirmed.

Reid and senior Democrats argued at the time the rules changes were necessary due to a mass blockade of judges by Republicans. But after Tuesday, they could find themselves on the other side of the coin and in the minority party if, as is looking increasingly likely, [Republicans take back control of the Senate.](#)

A major benefactor of the rules change was President Barack Obama, who has largely reshaped the federal courts with a friendly ally in a Democratic-controlled Senate. However, now Republicans have the power to effectively grind Obama's nominees to a halt — or force him to make compromises for his judicial picks to get a vote.

"Sounds like Harry Reid might be getting his comeuppance," Roger Pilon, the chair of the Cato Institute's Center for Constitutional Studies, told Business Insider.

A significant part of Obama's legacy rests on the judicial nominees he can appoint to courts, which will determine the constitutionality of his administration's policies, regulations, and executive actions long after he leaves office. With Reid's help, judicial appointments have been one of the few ways Obama has been able to work around a polarized, gridlocked Congress that is on track to [become the least productive in history](#) when it comes to passing bills into law.

Consider the way Obama has already reshaped the federal judiciary: When he came into office, only one of the 13 powerful US Courts of Appeals were filled with a Democratic-appointed

majority of judges. Now, nine of the 13 courts have Democratic-appointed majorities. According to [The New Yorker's Jeffrey Toobin](#), he has nominated far more women and minorities than any of his predecessors.

If Republicans control the Senate, Obama's advantage will disappear. Sen. Chuck Grassley (R-Iowa), the likely next chair of the Judiciary Committee, could block any nominees from even receiving a hearing. And McConnell, who stands to become the next Majority Leader, could prevent them from getting a full vote on the Senate floor.

Three of Obama's nominees to the US Court of Appeals for the DC Circuit—which is widely considered the second-most powerful bench in the country after the Supreme Court—were confirmed last year after Reid changed the Senate's rules. Many of Obama's appointees are controlling the implementation of his agenda, writing new rules for financial reform, climate change, and even gun control and immigration.

The DC Circuit Court has vast jurisdiction over the federal government and thousands of regulations, rules, and executive actions from more than 400 administrative agencies. It's the court, for example, that last January [ruled Obama's 2011 recess appointments unconstitutional](#).

"The issues before this court are some of the most important with respect to administrative law, which is where so much law gets made today," Pilon said.

The rules change benefitted the Obama administration in a major way this year in a case involving the Affordable Care Act. A three-judge panel—two Republican-appointed, one Democratic-appointed—ruled [a 2012 IRS regulation that implements key subsidies](#) under the law is invalid, in the case of *Halbig v. Burwell*. That decision has the potential to eliminate a feature of Obamacare that provided tax credits for more than five million people that enabled them to purchase health insurance through the federal exchange.

But the Department of Justice appealed the panel's decision, requesting an "en banc" review by the full D.C. Circuit Court. The math for the Obama administration was better in this situation—because of Reid's rule change, the court splits 7-4 in favor of Democratically appointed judges. In September, [the court agreed to rehear the case](#), and thanks to Reid's nuclear option, many experts expect it will reverse the *Halbig* decision and preserve the tax credit feature of the president's signature healthcare law.

"If Republicans take the Senate, judicial appointments are probably going to grind to a halt," Timothy Jost, a professor at the Washington and Lee University School of Law, told *Business Insider*. "And that would probably have an effect in lots and lots of areas, including healthcare."

According to [data](#) from the non-profit group Alliance for Justice, there are 56 total district and circuit court vacancies without nominees. Congressional scholar Norm Ornstein of the American Enterprise Institute [wrote](#) this March that he expects Republicans to confirm virtually none of the possible nominees if they take control of the Senate.

But though they admit lingering hard feelings, Republicans have adopted a conciliatory tone in advance of the election. [Top lawmakers and aides say they want](#) to employ a strategy that will show they can be effective at governing.

In Kansas last month, Sen. Pat Roberts, who is running for re-election, promised a McConnell-led majority would eliminate the nuclear option and restore minority rights upon taking back control of the Senate.

"We want to give back the minority right in the Senate like it used to be for the last 225 years before Harry Reid did that," Roberts told Business Insider. "That might be a little tough job, given the kind feelings that we have and the way we've been treated. But I think that's the right thing to do."

Alliance for Justice also isn't expecting a doomsday situation for confirmation of judicial appointments, though almost everyone acknowledges the pace of confirmations will severely slow during Obama's last two years in office.

Each of the three preceding two term presidents — George W. Bush, Bill Clinton, and Ronald Reagan — faced an opposition-party Senate during their last two years in office. But in those three cases, about 20% of each president's total slate of nominees were confirmed during those final two years. Confirmation rates for all three presidents did plunge significantly, however, to the low- to mid-60s.

"Some people have been saying this will result in a complete shutdown," said Michelle Schwartz, the director of justice at the group. "We don't think that's right."