



The Revenge Of Mitch McConnell: GOP Senate Will Halt Obama Nominations

By [Sahil Kapur](#)
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If Republicans win control of the Senate next week, as many expect, they will gain a powerful weapon to reshape President Barack Obama's legacy in his final two years: the authority to block his nominations.

Under a Democratic-led Senate, Obama has enjoyed remarkable success in confirming his executive appointees and remaking the federal courts in his image.

A recent [New Yorker](#) essay by legal analyst Jeffrey Toobin fleshed out Obama's contribution to the United States judiciary, which spans two Supreme Court justices, 53 appeals court judges and 223 trial court judges, all with lifetime tenure. Today 9 of 13 appeals courts, which have the last word on a vast majority of legal issues, have a Democratic majority; before he took office Republicans controlled 10 of 13.

"It's been absolutely huge," conservative legal scholar and Georgetown law professor Randy Barnett said of Obama's impact on the courts. "We've noticed patterns of voting with respect to certain kinds of legislation that gets upheld. There are certain executive branch practices that get upheld that would not have been upheld before."

Even Obama's executive branch picks have mostly been confirmed, though many have faced delays due to Republican filibusters and stalling tactics.

That streak could screech to a halt if Republicans win the net six seats needed to take the Senate come January. In that scenario, [probable](#) Judiciary Committee Chairman Chuck Grassley (R-IA) could prevent any nomination from coming up in committee, and probable Majority Leader Mitch McConnell (R-KY) could block anyone from receiving a full Senate vote.

"My guess is Obama would have to present nominees that are much much more acceptable to Republicans, or they won't even schedule hearings," Barnett said.

McConnell, a ruthless and clever strategist, has been hungry for revenge ever since Democrats [abolished the filibuster](#) for most nominations last November.

"I say to my friends on the other side of the aisle: you'll regret this," McConnell said at the time. "And you may regret it a lot sooner than you think."

A Republican majority would force Obama to fundamentally change his approach to nominations, said Roger Pilon, the director of the Cato Institute's Center for Constitutional Studies. He said some liberal nominees — like Nina Pillard, who was [confirmed](#) as a D.C. Circuit Court of Appeals judge last December, and has been compared to Ruth Bader Ginsburg — would be nonstarters in a GOP Senate. Others would be subject to negotiations.

"He's going to have a harder time getting his nominations through," Pilon said. "Elections have consequences. And he's going to have to come up with people who are less radical than some of the people he's nominated."

Ed Whelan, a conservative lawyer and legal writer for National Review, said a Republican-led Senate could dramatically slow down Obama's efforts to fill federal court vacancies.

"If the Senate remains under Democratic leadership after November's elections, look for the floodgates to open even wider, with Obama swamping Bush's eight-year total of 61 confirmed appellate judges," he [wrote](#). But under GOP control, "[t]he White House would have no choice but to consult extensively in advance with Republicans about whom to nominate."

Pilon, a member of the Federalist Society, a group of conservative legal minds whose mission it is to remake the judiciary in the mold of jurists like Antonin Scalia and Clarence Thomas, said there's an "evolution going on with Republicans right now" in that direction, due to the election of young constitutionalists like Sens. Mike Lee (UT), Rand Paul (KY) and Ted Cruz (TX).

"They're going to have a major influence" when it comes to nominations, Pilon said, "because that's where the energy is."

Obama, a former constitutional law professor himself, is conscious of the GOP's rightward drift on legal issues. "So the fact that now Democratic appointees and Republican appointees tend to vote differently on issues really has more to do with the shift in the Republican Party and in the nature of Republican-appointed jurists," he told Toobin.

Similarly for the executive branch, Obama would have a tougher time confirming his picks if he had to clear them with McConnell. His top priority is to appoint a successor to Attorney General Eric Holder. One of the candidates for the powerful job is Tom Perez, the current labor secretary, who faced fierce Republican opposition but was confirmed last year by a [narrow 54-46 vote](#) in a Democratic Senate. "If he were to nominate Perez for AG," Pilon said, "I cannot imagine that would go anywhere in a Republican-led Senate."

Then there are sub-cabinet positions that Obama wants to fill, an administration official said. They include "senior positions at the Department of Defense, the State Department, the Department of Veterans Affairs and the Department of Homeland Security to name just a few, and dozens of ambassador posts around the globe waiting to be filled." The official told TPM

that a GOP Senate would complicate that task, claiming that even under the status quo, "Senate Republicans are more concerned with blocking public servants from getting to work."

Democrats, aware that their majority will be shrunk or lost in January, are [gearing up for a major nominations push](#) in the lame duck session, which could span late nights and potentially weekends. But with 156 nominations currently pending on the calendar, only a small fraction can get through before the next Congress convenes on Jan. 3.

"A Republican Senate would shut the door on confirmations, and they're going to do so on executive as well as judicial ones," said Norm Ornstein, a congressional scholar with the American Enterprise Institute.

If a Supreme Court position were to open up under Obama and a Republican-led Senate, all hell would break loose. The [stakes are so high](#), the Court so evenly divided on monumental issues, that the GOP would face enormous pressure from the right to stop any nominee run out the clock on Obama's presidency. Whether they could get away with it politically depends on the timing of the vacancy the type of nominee Obama chooses to put forth.

For Federalist Society conservatives, a Republican-led Senate is only the first step in their [overarching goal](#) of returning American jurisprudence to a pre-New Deal era when the federal government was forbidden from exercising any power not explicitly enumerated by the Constitution. That means no federal minimum wage and [perhaps no Social Security](#).

"It's very important that Republicans win the Senate," Pilon of Cato said. "But since we live today essentially in an executive state, the 2016 elections are even more important."