



Justice at Stake

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With the House of Representatives safely in Republican control for the foreseeable future, attention is correctly focused on the probability of a Republican takeover of the Senate in the 2014 election. Much of the President's legislative agenda is already stalled because of Republican control of the House. But the Senate alone votes to confirm presidential nominations to the federal courts. And it is here that perhaps the greatest impact of Republican control of the Senate is likely to be felt.

Before Senate Democrats changed the rules in November 2013 to allow lower federal court nominees to be voted on by a simple majority vote to break a filibuster, Senate Republicans, although in the minority, obstructed or delayed dozens of nominations to the federal district and appeals courts, including many non-controversial nominees. This had the effect of diminishing the imprint of President Obama on the courts; but since the change in the Senate rules, confirmations have accelerated. By now, the appointees of Democratic presidents including those forwarded by President Obama dominate most federal appeals courts and district courts. The steady pace of additional confirmations to the lower courts would, however, slow to a crawl should Republicans gain control of the Senate in 2015.

Obama nominees in a Republican controlled Senate would face obstruction or delay first at the Senate Judiciary Committee stage. There, Iowa Senator Charles Grassley, as the new chair of the committee, would be able to slow down the process and use his position to obstruct some, perhaps all, Obama nominees to the appeals courts and some of the nominees to the district courts. Republicans who anticipate winning the presidency in 2016 as well as both houses of Congress would, to the extent possible, seek to keep vacancies open with the expectation that a Republican president should be able to fill them.

A Republican Senate will likely not overturn the rules change that calls for only a majority vote to break a filibuster of lower court nominations. Indeed, in the hope of a 2016 complete sweep of the national elections, Republicans might even extend the change in filibuster rules to Supreme Court nominees. If they did so, Senate Republicans would set the stage for a Republican President along with a GOP-controlled Senate to be able to nominate and confirm by simple majority vote additional activist-oriented conservative Supreme Court justices like Antonin Scalia, Clarence Thomas, and Samuel Alito.

Should such a dream scenario for conservative Republicans come to pass after 2016, at both the Supreme Court and lower court levels this would mean naming jurists who do not believe there is a constitutionally based right to privacy – and consequently no constitutional right for a woman to abort a non-viable fetus or for same-sex couples to marry (or, indeed, for same sex couples to be free from legislation criminalizing their sexual practices).

In addition, the most conservative Supreme Court justices generally take a dim view of the due process rights of people accused or convicted of crimes; instead, they use their ability to interpret the Constitution to back law enforcement. These justices have been skeptical of equal protection claims of racial minorities and women, on the grounds that such claims unfairly disadvantage non-minorities and white males. The most conservative justices are generally unsupportive of campaign finance reform which they see as encroaching upon First Amendment freedoms. And they have displayed hostility to environmental regulation, government regulation of the economy, health care reform, and the rights of organized labor – all of which they believe have little support in the Constitution to justify what they see as overreach by the federal government.

In the short run, then, if the election of 2014 brings about Republican control of the Senate, we can expect obstruction and delay of Obama nominees to the lower federal courts. If a vacancy occurs on the Supreme Court, particularly towards the end of the second term, we can anticipate an effort to deprive Obama of the opportunity to fill it, seeking to keep the position vacant until after the presidential election of 2016.

It is perhaps no exaggeration to claim that nothing less than justice, at least from the perspective of liberals and civil libertarians, is at stake in the 2014 election.