

National Journal

What the Fight Over Merrick Garland Means For Future Nominees



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By refusing to even consider Merrick Garland, President Obama’s Supreme Court nominee, Senate Republicans have raised the level of partisanship in judicial nominations to the highest level in 30 years.

While both parties accuse the other of firing the first or worst shot, neither seems to be interested in changing course with the ideological balance of the Court at stake—at least for the moment. If the GOP loses the presidential election, there is a chance that the Republicans will back down and confirm Garland in a lame-duck session.

If they don’t, the process could get even more toxic in the future, legal and political insiders say.

“The Republicans prejudging the president’s nominee with respect to even a meeting prior to any announcement was sort of a new nadir for the confirmation process,” said Hannibal Kemerer, a former counsel for the late Sen. Arlen Specter, who served on the Judiciary Committee for decades. “My guess is that it’s going to be more and more difficult to get a nominee—regardless of qualification—confirmed.”

The end of the filibuster for Supreme Court nominees seems a foregone conclusion to many Republicans. They believe it may die as early as next year if a Republican minority in the Senate successfully filibusters a Democratic president’s nominee.

“If they got in the majority, I think they would do that,” said Sen. Chuck Grassley, the Judiciary Committee chairman, referring to the possibility that the Democrats would end the filibuster.

“Even if Republicans were to roll over and confirm Merrick Garland, Democrats would still repeal the filibuster if and when it serves their interests,” added Ed Whelan, the president of the Ethics and Public Policy Center and a former law clerk to the late Supreme Court Justice Antonin Scalia.

Where it goes from there gets more hypothetical: Will the Senate ultimately refuse to consider Supreme Court nominees in midterm election years? In the last two years of a president’s term? But hardly anyone has entertained the possibility that the Senate might try to de-escalate the political wars over Supreme Court nominees.

“I don’t know how you would do that now. Any action that one party takes can be just unilateral disarmament at this point, and I think that’s something no one wants to risk,” said Carrie Severino, chief counsel and policy director at the Judicial Crisis Network, which ramped up to attack the nominee well before Obama settled on Garland, a judge on the U.S. Court of Appeals for the D.C. Circuit.

[Sen. Lindsey Graham](#) acknowledged at a recent Judiciary Committee hearing that Republicans were “setting a precedent” by refusing to consider the nominee even before Obama had put his name forward.

Many Republicans say they’re simply fighting back in a battle started by Democrats—including and especially Vice President [Joe Biden](#), a former Senate Judiciary Committee chairman. Grassley charged that the Republican strategy does not create a precedent, since Biden in a 1992 speech, and Democrats since then, have argued that a nominee should not be considered in a presidential year. Yet Grassley acknowledged that there is a difference between talk and action.

“The only difference is there’s an actual vacancy now as opposed to [when] they thought there was going to be a vacancy,” Grassley said in a recent interview. “No, it’s not a precedent. I ought to just stop there because we got 30 years of senators talking about it.”

“There has been a kind of tit for tat on the nomination process,” said Mark Disler, managing partner at Prime Policy Group, who was previously Sen. Orrin Hatch’s chief counsel on the Judiciary Committee.

In 2013, the Democrats ended the filibuster for lower-court nominees after Republicans refused to confirm those nominees. Before that, Biden and Obama gave speeches suggesting Supreme Court filibusters that never actually happened.

“I do think both parties are to blame for this; when the Democrats exercised the nuclear or constitutional option, that was a leveraging up in a bitter fight,” said Kemerer, who’s now an attorney at [Squire Patton Boggs](#). “But it didn’t impact the Supreme Court confirmation process.”

Republicans and even some Democrats see the party's approach to Garland as payback, 30 years later, for the defeated nomination of Robert Bork, who served where Garland does now, on the D.C. appellate court.

"Having seen the tactics used against both Bork and (Clarence) Thomas, while this is obviously a different circumstance, I don't see it as really a step up in partisanship. Frankly, it's more, you reap what you sow," Disler said.

And Kemerer called the Bork nomination the "beginning of the end of senatorial comity and accommodation, in particular the Supreme Court space."

Yet the fallout from Garland's nomination might produce future judges who have a lot more in common with Bork than with the moderate, relatively nonideological Garland.

"We're going to pick the most hard-ass people we can find," Graham said at this month's Judiciary hearing. "You're going to have the most liberal members of your caucus pushing you to pick the most liberal judges ... and we'll do the same."

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