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Bipartisan approval lends a sense of balance to the judiciary

By J. Harvie Wilkinson III, Published: November 24

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Last week, with the Senate eliminating most filibusters on presidential nominees, was a sad one for the federal judiciary. It would be wholly inappropriate for a judge to apportion blame at the prospect that the voices of present and future Senate minorities have been effectively silenced in judicial confirmations. Now, even those with the most rigid and absolute beliefs can spend a lifetime on the federal bench without a scintilla of bipartisan support. That both parties have contributed to this state of affairs does nothing to lessen its damage to the federal courts.

Judicial nominations for lower federal courts have always been a third-tier issue with the public. Perhaps this is because those nominees are a bit faceless; perhaps because the issues before those courts are more than a bit arcane. The impact of a judicial nominee lies far in the future, so it is understandable that the salience of such nominations ranks below the economy, foreign policy and many pressing domestic issues.

Given that the ballot box is an imperfect guarantor of the bent or character of judicial appointments, any incentive to place jurists of moderate persuasion on the courts must come from the need to attract Senate support across the aisle. Last week, that need was much diminished. What is a third-tier issue with the public is a first-tier issue with the more strident and single-issue interest groups that burrow into the nominating process. It has always been the case that judges might prove one form of political payback to any president's most ardent supporters, but now the incentive to use the judiciary in this manner will be greatly magnified.

At its best, judging requires a sense of balance. Judges must weigh liberty, order, the public interest and individual rights. They must put aside their own beliefs when interpreting a statute and ruling on its constitutionality. The separation of legal duty from political conviction is perhaps the most difficult judicial task and one that ideologues are more loath to undertake.

I remember riding home one evening with Justice Lewis Powell, whom I was serving as a law clerk. I was pumped over a vote he had cast that day, and I expected him to share my excitement. He responded that he considered himself fortunate if only 48 percent of the legitimate points to be made were on the other side.

I shall always be proud that President Ronald Reagan appointed me to the federal bench. But I never believed that he sent me forth to storm the barricades. The Clinton and Obama appointees to the U.S. Court of Appeals for the 4th Circuit with whom I have had the pleasure to work are without exception men and women of the highest legal talent and of a thoughtful and reflective approach to the law. Do we invariably agree? Of course not. But our court has made the effort to listen in a genuine sense, not with a "spare me your reasons, just tell me your vote" attitude.

I like to think that the bipartisan support these judges attracted has had a great deal to do with the quality of our discussions. I remember one case on which I sat with two of President Obama's recent appointees. Our conference discussion on how to resolve the case lasted almost an hour. After that, phone calls ensued. The final opinion was not completely to my liking, but the process was altogether satisfying. Sometimes with a compromise, each side wins by not losing everything. At the end of the day, my two colleagues not only produced a just resolution of the case but also helped me become a better judge.

Ideologues pose a unique risk for courts. Judicial institutions run on custom and practice as well as rules, and the public depends on a certain judicial dispassion, which recognizes the difference between disagreement on substance and fraying the very understandings by which we operate. Taking disagreements personally, believing oneself in sole and permanent possession of the truth can, in countless ways, delay dispositions and corrode the quality of justice. This is one thing a bipartisan confirmation process has, for decades, helped to prevent.

It is far beyond my purview to comment on the impact last week's events will have on the Senate as an institution, but the impact on the institution of the federal courts will, over time, be severe.

A return to bipartisan understandings in the judicial nominations process would help to keep the courts above political rancor and would serve this country well. The question for a great nation should often be: Will the center hold? It is a quiet question, not often posed in the partisan battles that can be a necessary and important feature of political life. But it must be posed now lest last week prove not an aberration but the coming rule.

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