

NewsRoom

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Section: Opinion

Commentary: Their silence was supremely conspicuous

Erwin Chemerinsky

In two weeks of political conventions, eight nights of countless political speeches, was Chief Judge Merrick Garland's name mentioned even once? Was there any discussion of the 100 vacancies in the federal courts and the refusal of the Republican Senate to vote on nominees?

This is a degree of obstructionism that is unprecedented in American history. No nomination for the Supreme Court has languished longer than Garland's. Throughout American history, presidents in the last year of a term in an election year have nominated individuals to the Supreme Court 24 times, and the Senate has confirmed in 21 instances. Never before has a Senate declared that it won't even hold hearings and votes on a nominee until after an election.

Did a single speaker at the Republican convention question Judge Garland's qualifications? Of course not, because his qualifications are impeccable: a graduate of Harvard Law School, he clerked on the Supreme Court, was a federal prosecutor, a partner at a major law firm, and for 19 years a federal Court of Appeals judge. By all accounts, he is moderate, tending towards the right on criminal justice issues and towards the left as to other constitutional rights.

Did a single speaker at the Democratic Convention discuss how the Republican Senate is violating its constitutional duty to "advise and consent" to nominations for the judiciary? Did a single speaker talk about how the Republican obstructionism is keeping the judiciary from fulfilling its constitutional duties?

The question is why not. My sense is that both political parties figure voters don't care much about the Supreme Court and the lower federal courts. Perhaps that is because people don't realize how much this election means for the Supreme Court and for all of our rights.

Right now, there are four justices appointed by Democrats and four appointed by Republicans. The fight over Justice Antonin Scalia's replacement reflects the potentially pivotal role of the next justice.

Moreover, the next president - especially if he or she serves two terms - is likely to shape the Supreme Court and the lower federal courts for decades to come. Since 1960, the average age at which a Supreme Court justice has left the bench is

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78. Scalia was 79 when he died on Feb. 13. In 2017, the year the next president is inaugurated, there will be three justices 79 or older: Ruth Bader Ginsburg, Anthony Kennedy and Stephen Breyer.

Literally every issue concerning constitutional rights will turn on who replaces these justices.

A Hillary Clinton victory likely will mean, as she spoke of in her acceptance speech at the Democratic convention, the overruling of *Citizens United v. Federal Election Commission*. A court with a majority appointed by a Democrat is unlikely to extend protection of gun rights and perhaps would overrule decisions that recognized a constitutional right for individuals to have guns in their homes for the sake of security. A Democratic majority on the court likely will declare the death penalty unconstitutional as cruel and unusual punishment, bringing the United States in line with almost every other western nation.

If Donald Trump wins and fills these vacancies, especially from the list of potential nominees that he released, *Roe v. Wade* is sure to be overruled and no longer will women have a constitutional right to abortion. Civil rights programs, such as affirmative action, will come to an end. The court will allow far more government support for religion and religious involvement with government; there will be no notion of a wall separating church and state.

The next election will affect all of us, often in the most intimate and important aspects of our lives. Who fills the vacancies on the court should be the most important issue in the November presidential election.

It is a shame both political conventions largely ignored it.

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