OBAMA PACKS THE COURT

If you have ever been before a judge for any reason, did you think about whether the judge was appointed by a Democrat or a Republican?

Probably not. People expect judges, regardless of political leanings, to be fair and competent -- and for the most part, this expectation has been fulfilled in America, unlike many other places in the world.

The action by the Senate Democrats last week, though, to kill the long-standing agreement that required a 60 percent supermajority vote for the confirmation of a federal court judge (with the exception of the Supreme Court) and change to a simple majority vote causes many to fear the increased politicization of the federal judiciary.

The judicial rulings in traffic cases, family disputes, property theft or damage, personal injury and most business disputes are rarely affected by the political leanings of the judge. Where a judge's political or philosophical views do affect rulings are most often in cases involving basic civil liberties and economic freedoms.

Yet most studies show that judges, whether they lean to the right or to the left, side with the government in the vast majority of cases. The cases that most often make news are those where the courts strike down the government position. Then there is the occasional, truly awful decision where the courts sow the seeds of future conflict.

At the Supreme Court level, two cases come to mind. The first was the *Dred Scott* decision upholding the rights of slaveowners, which may have been the key that sparked the Civil War by delaying the ongoing natural death of slavery as an institution.

The second was *Roe v. Wade*, which took away the state power to decide the extent of legality or nonlegality of abortions (which was being handled state by state at the time) -- and created a federal right beyond the scope of the Constitution, resulting in decades of unnecessary additional conflict between advocates and opponents of abortion.

The immediate cause of the Senate action in changing its rules appears to be the desire of the Obama administration to appoint three new federal judges to the U.S. Court of Appeals for the District of Columbia Circuit. This court is often viewed as the most important appellate court, in part because many of the cases involving alleged federal government overreach go to that court.

Critics of the administration accuse President Obama of trying to "pack" the court with liberal judges. They also claim that the court is now underworked, based on caseload, and is not in need of additional judges.

Caseload is an imprecise measure of the judges' workload because it ignores the complexity of cases, and many of the cases before the D.C. appellate court are very complex. That being said, the fact is that up until 2000, the typical judge on this court heard approximately 112 cases per year and wrote about 30 opinions. (Usually three judges hear each case, but only one is assigned to write the opinion for the court.)

However, in recent years, the number of cases being heard by the full-time judges has dropped to approximately 70, with a corresponding drop in the number of opinions they write. Based on workload, critics have it right in that there seems to be no current justification for the appointment of additional judges to that court.

Because that court is often the venue for cases dealing with excessive regulations by government agencies, it could reasonably be expected that more liberal judges might be less prone to rein in the regulators. If this court becomes more liberal, though, plaintiffs against federal agencies will be more likely to bring their cases in another court they think might be more sympathetic to their ws.

In an average year, there is turnover of roughly 6 to 7 percent of appellate court judges, so over the remaining three years of his term, Mr. Obama might appoint an additional 20 percent of the judges. Reducing the threshold by which judges gain Senate approval is likely to result in the appointment of less-qualified judges, and in the long run, judges with views further from the mainstream on both the right and left.

As can be seen in this chart, there has been a sharp reduction in the ranking of the U.S. legal- and property-rights protection in recent years. The United States was still in the top 10 as late as 2000, but now has sunk to 38.