



THURGOOD MARSHALL LAW REVIEW

VOLUME 42

ONLINE

ISSUE 2

MERRICK GARLAND AND THE STALEMATE SENATE: DOES THE SENATE OWE NOMINEES A VOTE?

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A Publication of
Thurgood Marshall School of Law

THURGOOD MARSHALL LAW REVIEW

VOLUME 42

SPRING 2018

ISSUE 2

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INTRODUCTION

On March 16, 2016, President Barack Obama nominated Merrick Garland¹ to fill the vacancy left by the passing of Supreme Court Justice Antonin Scalia. Immediately after the passing of the iconic justice, there were frenzied media stories regarding who President Obama might pick to replace him, what the Republican controlled Congress would do, and what the vacancy and subsequent nomination would mean for the cases left on the SCOTUS docket.

It didn't take long for the Senate's plan to come together; the plan could be described by one word: Obstruction. On the day of the nomination, Senate majority leader Mitch McConnell stated that Garland would not get a vote and refused to meet with the jurist,² igniting a debate regarding the Senate's responsibility to hold confirmation hearings for presidential nominees. The president, with several important cases on the docket regarding affirmative action, abortion, and religious freedom and the Affordable Care Act,³ and eager to get the seat filled, charged that voting on the nominee was part of the Senate's work that doesn't stop near the end of a presidential term.⁴

One of the Senate's most important powers is established by relatively simple language in our nation's Constitution. The provision that establishes the roles in the appointment process is known as the Appointments Clause and reads as follows: "[The President] ... shall nominate, and

¹ Stephen Collinson, Kevin Liptak, Ariane de Vogue & Manu Raju, *Obama Nominates Merrick Garland to Supreme Court*, CNN, <http://www.cnn.com/2016/03/16/politics/obama-supreme-court-announcement/> (Mar. 16, 2016).

² David Herszenhorn, *Some Senate Republicans Will Meet with Supreme Court Nominee*, THE NEW YORK TIMES, https://www.nytimes.com/2016/03/17/us/politics/supreme-court-merrick-garland-senate.html?_r=0 (Mar. 16, 2016).

³ Ron Elving, *On the Docket, in Limbo: Scalia's Death Casts Uncertainty on Key Cases*, NPR, <http://www.npr.org/2016/02/14/466752491/on-the-docket-in-limbo-scalias-death-casts-uncertainty-on-key-cases> (Feb. 14, 2016).

⁴ Michael Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, THE NEW YORK TIMES, <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> (Mar. 16, 2016).

by and with the Advice and Consent of the Senate, shall appoint... Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for....”⁵

While the President is empowered to decide who he or she would like to fill critical roles in our judiciary, he or she must do so with the advice and consent of the Senate.⁶ “Advice and Consent,” for these purposes, has been interpreted to mean the post-nomination confirmation of the nominee by the Senate.⁷ But one must ask, if the advice and consent of the Senate is required for the confirmation of a presidential appointee, does it follow that the Senate has an obligation to advise and consent? The short answer appears to be “no,” as there is nothing in the Appointments Clause that mandates the Senate to hold a vote.⁸ Furthermore, while the Constitution enumerates the duties and responsibilities of the Senate,⁹ the Senate is permitted to make its own rules regarding internal procedures,¹⁰ including the procedure regarding presidential nominations.¹¹ The long answer to this question can be a bit more complicated.

Even if it were to be determined that there is no legal obligation for the Senate to hold a confirmation vote, it can be argued that there are different obligations and considerations to be made regarding Congress’ refusal to act in this situation. Considerations that include the checks and balances on power and the efficacy and efficiency of our government, including our judiciary.

⁵ U.S. CONST. art. II, § 2, cl. 2.

⁶ *Id.*

⁷ John McGinnis, *Advice and Consent: What the Constitution Says* (Jul. 19, 2005), <http://www.heritage.org/research/reports/2005/07/advice-and-consent-what-the-constitution-says>.

⁸ *See* U.S. CONST. art. II, § 2, cl. 2.

⁹ *See* U.S. Const. art. I, § 8.

¹⁰ *Nixon v. United States*, 506 U.S. 224, 231-232 (1993).

¹¹ Rules of the Senate, XXXI, para. 6 (2013).

HOW JUDICIAL CONFIRMATIONS USUALLY WORK

When a vacancy comes to be available, the President will present a nominee for an open seat on the bench.¹² There are no requirements or qualifications to become a Supreme Court Justice, in fact the nominee does not even need to go to law school.¹³ Though he or she may choose whomever he or she wishes to fill the seat, presidents are more likely to nominate judges whose votes and opinions align more closely with their political views,¹⁴ and circuit judges are nearly always considered when there are vacancies on the Court.¹⁵ After a nominee is chosen by the President, the Senate Judiciary Committee will hold a hearing, where the nominee gives testimony and answers questions from the committee designed to evaluate the nominee for the position.¹⁶ Questions asked during the hearings vary, but nominees are often asked questions regarding their jurisprudence, how they interpret constitutional provisions, and their views on the current controversial political topics.¹⁷ If the committee approves of the nominee by unanimous vote, the nominee will be presented to the Senate for a confirmation vote.¹⁸ A simple majority vote is required to confirm a nominee.¹⁹ If the Senate votes by a simple majority to confirm, a “resolution of confirmation” is sworn to by the secretary of the Senate, and transmitted to the White House.²⁰

¹² American Bar Ass’n, *Supreme Court Nomination Process Q&A*, http://www.americanbar.org/publications/preview_home/supremecourt nomination.html (last visited Jan. 14, 2016).

¹³ Scotus.org, *General Information FAQ*, <https://www.supremecourt.gov/faq.aspx#faqgi2> (last updated Dec. 13, 2016).

¹⁴ Ryan C. Black & Ryan J. Owens, *Courting the President: How Circuit Court Judges*

Alter Their Behavior for Promotion to the Supreme Court, 60 AM. J. POL. SCI. 30, 32-33 (2016).

¹⁵ *Id.* at 32.

¹⁶ Am. Bar Ass’n, *supra* note 12.

¹⁷ Lori Ringhand & Paul Collins, *Legal scholarship highlight: The evolution of Supreme Court confirmation hearings*, SCOTUSBlog.com (Mar. 25, 2016 9:26 AM), <http://www.scotusblog.com/2016/03/legal-scholarship-highlight-the-evolution-of-supreme-court-confirmation-hearings/>.

¹⁸ Am. Bar Ass’n, *supra* note 16.

¹⁹ Am. Bar Ass’n, *supra* note 18.

²⁰ DENIS STEVEN RUTKUS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE, 54 (2010).

The President, after receiving the resolution, signs a document called a “commission,” and the nominee is officially appointed to the Court.²¹ If the nominee fails to garner a majority vote in favor of confirmation, the President must return to the drawing board and present another nominee.²²

The confirmation process as we know it is a product of the modern era.²³ Nominee George Williams was the first to have a hearing in front of the Judiciary Committee in 1873. During his hearing, Williams took limited questions regarding the allegation that he misappropriated funds.²⁴ Prior to this, the meetings held by the committee in regard to nominees were not open to the public.²⁵ For over seventy-years after the Williams hearing, public hearings were not common and there were no rules that required or encouraged it.²⁶ The first nominee to take questions unlimited in scope, under oath, in a public hearing was Justice Felix Frankfurter.²⁷ His nomination was controversial, like Williams and Garland’s nomination. Justice Frankfurter decided to take the approach he took in his confirmation process, to establish his loyalty to the United States and quell any worry about his approach to the law and constitutional interpretation.²⁸ After Frankfurter was confirmed, the Senate committed to holding public hearings for nominees.²⁹ This was in part because of mistakes that happened during other confirmations, such as Justice Hugo Black’s confirmation. In Justice Black’s confirmation there was an uproar upon the public’s realization

²¹ *Id.*

²² Am. Bar Ass’n, *supra* note 19.

²³ Lori Ringhand, *Legal scholarship highlight: The evolution of Supreme Court confirmation hearings*, SCOTUSblog (Mar. 25, 2016, 9:26 AM), <http://www.scotusblog.com/2016/03/legal-scholarship-highlight-the-evolution-of-supreme-court-confirmation-hearings/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

that Justice Black had ties to the Ku Klux Klan. Another reason for the public hearing was the changing landscape of politics and civil rights that necessitated making the process of choosing leaders more transparent.³⁰

Public hearings are not the only way that confirmation hearings for judicial nominees are conducted.³¹ The types of questions asked has changed as well.³² As discussed above, the questions asked in George Williams' hearing were strictly related to whether he had misused government funds. Over time, the nature of the questions have evolved to evaluate the jurist's positions on constitutional interpretation.³³ While Williams was only asked questions about his alleged indiscretions; Justice Sonia Sotomayor was asked about her personal biases,³⁴ as well as how she viewed the *stare decisis* applications of precedent cases³⁵ such as *Griswold*³⁶ and *Kelo*.³⁷ Questioning often will examine how the nominee plans to approach issues that are currently controversial,³⁸ such as the issue of same-sex marriage in 2009 during Justice Sotomayor's confirmation hearing.³⁹

Finally, the length of time it takes to get from the nomination of a judicial candidate to confirmation by the senate has changed.⁴⁰ The change in length of time is often credited to the

³⁰ Lori Ringhand, *Legal scholarship highlight: The evolution of Supreme Court confirmation hearings*, SCOTUSblog (Mar. 25, 2016, 9:26 AM), <http://www.scotusblog.com/2016/03/legal-scholarship-highlight-the-evolution-of-supreme-court-confirmation-hearings/>.

³¹ *See Id.*

³² *Id.*

³³ *Id.*

³⁴ *Hearing on Confirmation of Sonia Sotomayor to Supreme Court of the United States before the S. Comm. On Judiciary*, 111th Congress 12-19 (2009)

³⁵ *Id.* at 25-27.

³⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

³⁸ Ringhand, *supra* note 30.

³⁹ Hearing, *supra* note 34.

⁴⁰ *See How Long Does It Take to Confirm a Supreme Court Nominee?*, THE NEW YORK TIMES <http://www.nytimes.com/interactive/2016/02/13/us/how-long-does-it-take-to-confirm-a-supreme-court-nominee.html> (Feb. 13, 2016).

politicization of the nomination and confirmation process, and the use of the process to control the direction of the court and maintain or gain political power.⁴¹ Prior to the nomination of Merrick Garland, the Senate had never taken more than 125 days to move from the nomination of a candidate to the result of the confirmation hearing. Since the beginning of the United States, the average amount of days that this process took was 25 days. Since 1975, it has taken the Senate 67 days to confirm or deny a nominee, on average.⁴²

The chart below shows how many days passed between the sitting President nominating the candidate and the senate holding the final vote.⁴³ This chart includes the time of the Senate hearing and any intermediate proceedings. Not shown on the chart is the time elapsed for Merrick Garland, who was nominated 294 days before his nomination was expired by the swearing in of the new Congressional session.

⁴¹ Ringhand, *supra* note 30.

⁴² Barry J. McMillion, Supreme Court Appointment Process: Senate Debate and Confirmation Vote 13 (2015), <https://www.fas.org/sgp/crs/misc/R44234.pdf>.

⁴³ *Id.* at 12.

Nominating President	Senate Majority	Nominee	Number of Days Elapsed from Nomination to Final Vote
Obama	D	Kagan	87
Obama	D	Sotomayor	66
Bush, G.W.	R	Alito	82
Bush, G.W.	R	Roberts*	23
Clinton	D	Breyer	73
Clinton	D	Ginsburg	42
Bush, G.H.W.	D	Thomas	99
Bush, G.H.W.	D	Souter	69
Reagan	D	Kennedy	65
Reagan	D	Bork	108
Reagan	R	Rehnquist**	89
Reagan	R	Scalia	85
Reagan	R	O'Connor	33
Ford	D	Stevens	19

THE CURIOUS CASE OF MERRICK GARLAND

Merrick Garland's nomination officially expired on January 3, 2017 with the start of the new Congress.⁴⁴ Two hundred ninety-four days passed between Garland's nomination on March 16, 2016 and the expiration of his nomination,⁴⁵ far exceeding the average and the greatest amount of time it usually takes for the Senate to act on a nominee.⁴⁶ While Congress has failed to act on a nominee in the past, it is still a rare occurrence.⁴⁷ The last time a nomination expired without any consideration or action from the senate was in 1853. President Millard Fillmore nominated

⁴⁴ Doug G. Ware, *Nomination expires for Obama Supreme Court Appointee Merrick Garland*, United Press International (Jan. 23, 2017 4:25 PM), http://www.upi.com/Top_News/US/2017/01/03/Nomination-expires-for-Obama-Supreme-Court-appointee-Merrick-Garland/4841483472115/.

⁴⁵ Collinson, *supra* note 1.

⁴⁶ McMillion, *supra* note 42.

⁴⁷ Ware, *supra* note 43.

William C. Micou in the last two weeks of his presidency, and Congress thought it would be best to leave the seat on the bench vacant.⁴⁸

Merrick Garland, by many measures, should have been a candidate Republicans would have eagerly considered to fill the vacancy left by Justice Scalia.⁴⁹ Though not full conservative, Garland was regarded as a moderate and tended to rule in favor of the government, often breaking ranks with his more liberal colleagues on the court.⁵⁰ Several Republican political leaders had great things to say about Garland during his confirmation to the Court of Appeals for the DC Circuit in 1995.⁵¹

Merrick Garland is well educated and highly qualified for the job of Supreme Court Justice. Judge Garland attended Harvard University for both his undergraduate and law degrees.⁵² While at Harvard Law, he served as an editor on the Harvard Law Review.⁵³ After graduating from Harvard, Garland clerked for Judge Henry Friendly, a conservative, then for Justice William Brennan, a liberal.⁵⁴ Garland has worked for judges on both sides of the proverbial aisle and is considered moderate liberal.⁵⁵ In addition to gaining federal clerk experience, Merrick Garland has served as an assistant to the district attorney,⁵⁶ and in private practice at the law firm of Arnold &

⁴⁸ THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 203 (Paul Finkelman ed. 2014).

⁴⁹ Nina Totenberg & Carrie Johnson, *Merrick Garland Has A Reputation Of Collegiality, Record Of Republican Support*, NPR (Mar. 16, 2016 11:04 AM), <http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Porter.⁵⁷ While at Arnold & Porter, Garland taught classes on antitrust at Harvard Law School.⁵⁸ Garland left private practice to return to public service and served as a federal prosecutor as his final position before nomination by President Bill Clinton for the Court of Appeals for the D.C. circuit.⁵⁹ In this role, Garland came to be known as a moderate liberal, yet held more conservative views in some areas than Justice Scalia, the Justice who Garland was chosen to replace.⁶⁰

At the time of his nomination to the federal circuit court, Judge Garland received praise from several Republican senators.⁶¹ Orrin Hatch, a Republican senator from Utah, stated at the time of Merrick Garland's nomination to the D.C. Circuit:

Merrick B. Garland is highly qualified to sit on the D.C. circuit. His intelligence and his scholarship cannot be questioned... His legal experience is equally impressive... Accordingly, I believe Mr. Garland is a fine nominee. I know him personally, I know of his integrity, I know of his legal ability, I know of his honesty, I know of his acumen, and he belongs on the court. I believe he is not only a fine nominee, but is as good as Republicans can expect from this administration. In fact, I would place him at the top of the list.⁶²

⁵⁷ Nina Totenberg & Carrie Johnson, *Merrick Garland Has A Reputation Of Collegiality, Record Of Republican Support*, NPR (Mar. 16, 2016 11:04 AM), <http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sarah Wheaton, Josh Gerstein & Seung Min Kim, *Obama Picks Merrick Garland for Supreme Court*, POLITICO (Mar. 16, 2016 12:30 PM) <http://www.politico.com/story/2016/03/obama-to-announce-supreme-court-pick-at-11-am-220851>.

⁶² Josh Israel, *6 Quotes From Senate Republicans About Merrick Garland That Are Really Awkward Now*, ThinkProgress.org (Mar. 16, 2016) <https://thinkprogress.org/6-quotes-from-senate-republicans-about-merrick-garland-that-are-really-awkward-now-2d75f357a25e#.shcaa4q0x>.

Despite Garland's qualifications and Hatch's personal knowledge of Garland's skill and talents as a jurist, Senator Hatch decided a confirmation hearing was not warranted during Garland's nomination to the Supreme Court.⁶³

The sudden change of heart seems to lend itself to the idea the only reason the Judiciary committee refused to even hold a hearing for Garland was a forceful attempt to gain power of the court. By holding the vacancy open for the next president to fill, the Republicans were willing to take the risk their candidate would win and fill a seat more favorable to their party. The would-be majority leader of the House of Representatives, John Boehner, promised to stop President Obama at all costs.⁶⁴ Seemingly, the Republicans of this administration have held fast to that promise.

Senator Hatch argued since there has never been a confirmation of a Supreme Court Justice this late in a president's term, there is precedent for not holding a hearing for Merrick Garland now.⁶⁵ This argument, however, is misleading.⁶⁶

As it turns out, the reason that a confirmation has never come this late in a presidential term is simple, there has never been a vacancy to fill at this point.⁶⁷ Since the inception of term limits, the opportunity has never arisen for a sitting president, in the end of their last term, to appoint a Supreme Court Justice.⁶⁸ Thus, Senator Hatch's assertion of precedent, or lack thereof, is not convincing with respect to the nomination and confirmation of Merrick Garland this late in

⁶³ Eugene Scott, *Hatch Will Meet with Garland, Still Does Not Support His Confirmation*, CNN (May 26, 2016 3:04 PM) <http://www.cnn.com/2016/05/26/politics/orrin-hatch-merrick-garland-confirmation/>.

⁶⁴ Andy Barr, *The GOP's No-Compromise Pledge*, POLITICO (Oct. 28, 2010 8:09 AM) <http://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311>.

⁶⁵ Robert Schlesinger, *The GOP's Supreme Court Riddle*, US News (Mar. 29, 2016 12:00 PM) <http://www.usnews.com/opinion/blogs/robert-schlesinger/articles/2016-03-29/this-proves-the-anti-merrick-garland-supreme-court-nomination-is-nonsense>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

President Obama's term. Other than playing partisan politics, there is no valid reason to deny even as much as a hearing for Garland.

WHAT HAPPENS TO MERRICK GARLAND NOW?

Now that the nomination has expired,⁶⁹ it is likely that Merrick Garland will return to his post as Chief Judge of the Court of Appeals for the DC Circuit.⁷⁰ The last time Garland served in this was nearly a year ago before he recused his position following his nomination to the highest court in the land.⁷¹ This was a precautionary measure, designed to ensure that he would not face any conflicts of interest should one or more of the cases in front of the DC Circuit court were to be argued in front of the Supreme court.⁷²

There are some who are holding out hope that the President-Elect will resubmit Garland to the Senate for confirmation, but that is unlikely.⁷³ President-Elect Trump has prepared a shortlist of possible nominees to the court, without listing Merrick Garland as a possibility.⁷⁴ Donald Trump has claimed that he will announce his pick for the court within two weeks of being sworn in, ensuring that the confirmation process gets started sooner rather than later.⁷⁵

⁶⁹ Ware, *supra* note 43.

⁷⁰ Ariane de Vogue, *Merrick Garland: What Happens Now?*, CNN (Nov. 15, 2016 6:11 AM) <http://www.cnn.com/2016/11/15/politics/merrick-garland-what-now/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Ariane de Vogue, *CNN's Donald Trump Supreme Court Nominee Shortlist*, CNN (Jan. 12, 2017 6:31 PM) <http://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/>.

⁷⁵ Alexander Bolton, *Conservatives Press Trump on Supreme Court Pick*, The Hill (Jan. 12, 2017 6:00 AM) <http://thehill.com/homenews/senate/313904-conservatives-press-trump-on-supreme-court-pick>.

IS THE SENATE REQUIRED TO HOLD A VOTE?

Looking to the Constitution, the power of Congress to confirm appointees is granted by relatively simple language.⁷⁶ The Constitution states that the President may nominate, and with the advice and consent of the Senate, the nominee may be appointed.⁷⁷ As stated earlier in this article, there are no enumerated powers that mandate the Senate to hold a vote for a presidential Supreme Court nominee.⁷⁸

Abiding by the rules of statutory construction, it is relatively simple to deduce that the Constitution states that a nominee cannot be appointed without the advice and consent of the Senate, but the Constitution does not define what Advice and Consent is, nor does it mandate the Senate to offer it.⁷⁹

As we have discussed previously, the Senate is permitted to enact its own rules and procedures for the duties assigned to it via the Constitution.⁸⁰ In the case of appointments, it has.⁸¹ In section six of Senate rule XXXI, we can turn back to statutory construction to evaluate the rule's meaning and implications.⁸² The rule states:

Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment

⁷⁶ U.S. CONST. art. II, § 2, cl. 2.

⁷⁷ *Id.*

⁷⁸ *See* U.S. Const. art. I, § 8.

⁷⁹ *Id.*; *see* U.S. CONST. art. II, § 2, cl. 2.

⁸⁰ Nixon, *supra* note 10.

⁸¹ Rules, *supra* note 11.

⁸² Rules, *supra* note 11.

or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.⁸³

The form of this rule is telling. The first words refer to nominations that are *neither* confirmed nor rejected during the session shall not be acted upon. It is a commonly held legal principal that the term “shall” is generally to be interpreted to mean “must.”⁸⁴ “Shall” is mandatory, whereas “may” is permissive.⁸⁵ Relying on this principal, it can be determined that the Senate is not required to hold a vote, or otherwise offer its advice or consent to any nomination offered by the President at any time. If a nominee is offered, the session expires, and the Senate has done nothing, the nomination expires and nothing more is required of the Senate regarding that nominee. The President must offer the nominee again in order to get confirmation from the Senate.⁸⁶

Some may contend that the refusal to hold a vote does not establish whether or not the Senate actually gives its consent; to say that without a “yes” or a “no,” it is impossible to be certain that the Senate either approves or disapproves of a nominee. This argument will not stand. Even if it were true, that consent could not be established by silence, it would not matter. The fundamental issue is that the Senate is *not required* to establish the matter in either direction. And allowing a nomination to go stale by inaction is an implicit disapproval of the nominee.

Thus, interpretation of the Constitution and the rules of the Senate establishes that there is no legal duty for the Senate to hold any votes, nor is the Senate required to advise upon or give consent regarding presidential appointees.

⁸³ Rules, *supra* note 11.

⁸⁴ “May” Law.com, <http://dictionary.law.com/Default.aspx?selected=1229>.

⁸⁵ *Id.*

⁸⁶ Rules, *supra* note 11.

SEPARATION OF POWERS

One of the most critical mandates of our Constitution is the separation of powers. The founders of our Nation sought to ensure that no one branch of the government was able to wield too much power over any other branches of the government.⁸⁷ There is an argument to be made that the Senate's ability to choose whether or not it votes on a presidential nominee is an appropriate check and balance on the power of the executive. It certainly can be. There is also an argument to be made that allowing nominations to languish at the feet of the Legislature opens the door to an abuse of power. In the case of Merrick Garland, in a time where the Senate has promised not to hold hearings on ANY nominee,⁸⁸ regardless of beliefs, jurisprudence, necessity or best interests of the judiciary, the Senate has been able to hold a tremendous amount of unchecked power over the other two branches of our government.

The implications of this can be far-reaching. There is no limit to how many nominees the Senate can choose to ignore for the sake of petty partisan politics. Imagine an election year where the President-Elect is of one party, and the opposing party holds the power in the legislature. If there is a vacancy on the high court, what is stopping the Judiciary Committee in the Senate from refusing to hold hearings on nominees from that president for the entire term in office?

The issue this would cause are numerous. The Supreme Court hears very few cases per term,⁸⁹ arguably the most important and controversial cases of the time. If there is a decision that is voted on and comes down to a 4-4 split, the decision of the lower court stands and the case is of

⁸⁷ *Separation of Powers*, CORNELL UNIVERSITY, https://www.law.cornell.edu/wex/separation_of_powers (last visited Jan. 12, 2017 11:09 PM).

⁸⁸ Barr, *supra* note 64.

⁸⁹ Scotus.org, *General Information FAQ*, <https://www.supremecourt.gov/faq.aspx#faqgi9> (last updated Dec. 13, 2016).

no precedential value.⁹⁰ After these cases are disposed of by the Supreme Court, the law challenged therein has not been settled and is still open to interpretation. This leaves us in a situation where there are many cases perpetually challenging the same laws and regulations without any resolution. This would undoubtedly cause gridlock in the judicial system, as well as cause confusion over the correct interpretation of the law. The efficient filling of judicial vacancies can help prevent this gridlock and confusion.

RECESS APPOINTMENTS

The president is allowed by the Constitution to appoint persons to senior federal official positions in times of congressional recess.⁹¹ These appointments must be confirmed by the Senate by the end of the next term, however.⁹² The constitutionality of the recess appointment has caused many a debate, the Supreme Court held that both inter-session and intra-session appointments are done, but the legality of intra-session appointments are still hotly debated.⁹³

A recess is defined as “a temporary interruption of the Senate's proceedings, sometimes within the same day. The Senate may also recess overnight rather than adjourn at the end of the day. Recess also refers to longer breaks, such as the breaks taken during holiday periods, pursuant to concurrent resolution.”⁹⁴

This is another example of the checks and balances afforded to the branches. The ability to make recess appointments is a check on the Senate’s power in cases like Merrick Garland’s,

⁹⁰ Brendan I. Koerner, *What Happens in a SCOTUS Tie?*, Slate (Feb. 13, 2016 6:50 PM) http://www.slate.com/articles/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html.

⁹¹ U.S. CONST. art. II, § 2, cl. 3.

⁹² *Id.*

⁹³ Amy Howe, *Court Strikes Down Recess Appointments: In Plain English*, SCOTUSBLOG.COM (Jun. 26, 2013 3:13 PM) <http://www.scotusblog.com/2014/06/court-strikes-down-recess-appointments-in-plain-english/>.

⁹⁴ Recess, Senate Glossary, http://www.senate.gov/reference/glossary_term/recess.htm (last visited Jan. 12 11:30 PM).

where the Senate refuses to hold a vote. An argument can be made here that this is another reason why the Senate should not be mandated to hold a hearing or a vote for a presidential nominee. If the president cannot convince the Senate to hold a hearing, he can simply appoint the nominee while Congress is in recess.

However, it is not that simple. Due to the use of pro forma sessions, making recess appointments can be difficult.⁹⁵ Pro forma sessions occur when members of congress stay and work for the sole purpose of qualifying the body as “in session.”⁹⁶ In order to qualify as a “recess,” either the House or the Senate must be in adjournment for three consecutive days.⁹⁷ In 2012, Department of Justice Office of Legal Counsel decided that the president could determine whether or not Congress is in session, and therefore use his discretion to make recess appointments.⁹⁸ This was hotly debated, and the courts decided that allowing the President to decide when Congress is in session is a direct violation of the separation of powers and would be impermissible.⁹⁹ In this case, President Obama tried to use a notoriously short intersession recess¹⁰⁰ to make appointments,

⁹⁵ Michelle Cottle, *How the Senate Foils Obama Even When It's In Recess*, THE ATLANTIC (Mar. 23, 2016) <http://www.theatlantic.com/politics/archive/2016/03/pro-forma-senate/474930/>.

⁹⁶ *Id.*

⁹⁷ U.S. CONST. art. I, § 5, cl. 4.

⁹⁸ DEPT. OF JUSTICE,

LAWFULLNESS OF RECESS APPOINTMENTS DURING A RECESS OF THE SENATE NOTWITHSTANDING PERIODIC PRO FORMA SESSIONS (2012),

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjVo5rerMPRAhUoslQKHQxXC6gQFggdMAA&url=https%3A%2F%2Fwww.justice.gov%2Folc%2Fopiniondocs%2Fpro-forma-sessions-opinion.pdf&usq=AFQjCNEqJnfZrGgNvcFWtoV0Q4zZmm3_9Q&sig2=xa5f8b0hNXMTMQUGgHtjjQ.

⁹⁹ Brief for Respondent at 26, *NLRB v. Noel Canning* 134 S. Ct. 2550 (2014) (No. 12-1115)

<http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/01207461695uide694c75117931832.pdf>.

¹⁰⁰ Opinion by Jonathan H. Adler, *The Real Reason President Obama Won't Recess Appoint Merrick Garland to the Supreme Court*, THE WASHINGTON POST (Dec. 29, 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/29/the-real-reason-president-obama-wont-recess-appoint-merrick-garland-to-the-supreme-court/?utm_term=.bb0c8716a146.

and it was held that if the recess was not long enough to require the consent of the House, it was not long enough to allow recess appointments.¹⁰¹

President Obama has not been able to utilize a recess appointment for Merrick Garland. In fact, this is the exact situation that Justice Breyer tells us the recess appointments clause is NOT intended to do, and that is to squash political debates and disagreements.¹⁰² Justice Breyer is of the opinion that instead of being used to resolve political questions, the purpose is merely to give the president a method by which to appoint officials if the need should arise while Congress is not in session.¹⁰³

Aside from the use of a recess appointment, others have tried other methods to get the Senate to hold a vote. One New Mexico attorney has even brought a lawsuit in regards to the matter. In his complaint, he alleges that the value of his vote was less valuable since the Senators he voted for were prevented from voting on the nomination, and charges that such refusal to hold a vote created a constitutional crisis.¹⁰⁴ The court dismissed the complaint, stating that the senator has not suffered an injury at all, let alone an injury that is particular enough to establish standing to sue.¹⁰⁵

Since the use of a recess appointment to get Merrick Garland on the bench, the options have all but run out for President Obama and Merrick Garland.¹⁰⁶ With the nomination expired, and the new administration preparing to start work on January 20, Merrick Garland will

¹⁰¹ *Id.*

¹⁰² *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014).

¹⁰³ *Id.*

¹⁰⁴ Mike Debonis, *Judge dashes Merrick Garland's final, Faint Hope for Supreme Court Seat*, THE WASHINGTON POST (Nov. 18, 2006), https://www.washingtonpost.com/news/powerpost/wp/2016/11/18/judge-dashes-merrick-garlands-final-faint-hope-for-a-supreme-court-seat/?utm_term=.eed181b73a02.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

be returning to his “day job” on the Court of Appeals.¹⁰⁷ And although Judge Garland has not made any public statements regarding his nomination, one has to wonder how such a distinguished jurist feels about the actions of those in the Senate regarding his confirmation.

A PRACTICAL DUTY

Justice Scalia’s passing has already made an impact on the Court, as shown by the recent decision in *United States v. Texas*.¹⁰⁸ The 4-4 tie in this case is said to “doom” President Obama’s immigration policy protecting certain classes of undocumented people from deportation.¹⁰⁹ This demonstrates that having only 8 justices on the bench can have widespread and long-lasting implications. This time, the obstruction was carried out by the GOP, but with a new republican president preparing to take office, who is to say the Democrats will not find a way to obstruct nominations in the same or a similar manner? This is not or should not be, a matter of politics, but rather an issue of practicality and efficiency. Too much time has been wasted by our government acting in a way that seems to serve no other purpose but to exact revenge on the opponent, or to oppose for the sake of opposition and making life for the opponent difficult. It should give all Americans pause that this level of obstruction has been allowed to occur.

So, while it has been established that there is no legal duty imposed on the Senate by the Constitution or the Senate’s internal procedural rules,¹¹⁰ there is an argument to be made that there is a responsibility beyond a legal one to ensure that our judiciary is capable of performing its duties.

¹⁰⁷ de Vogue, *supra* note 70.

¹⁰⁸ Niraj Chokshi, Katie Rogers, & Mike McPhate, *A Brief Guide to Today’s Court Decisions*, THE NEW YORK TIMES (Jun. 23, 2016) <https://www.nytimes.com/2016/06/24/us/what-we-know-about-the-supreme-court-decisions.html>.

¹⁰⁹ Pete Williams, *Supreme Court Tie Dooms Obama Immigration Policy*, NBC News (Jun. 23, 2016 3:02 PM) <http://www.nbcnews.com/news/us-news/supreme-court-tie-dooms-obama-immigration-policy-n582961>.

¹¹⁰ Rules, *supra* note 11; *See* U.S. CONST. art. 1, § 8.

It should not be the case that American lives hang in the balance because leaders of one political party or another have decided that they are contentious enough, and disagree with the president so vehemently on matters of unrelated policy that any attempt by that president to do his or her job is stopped before it ever begins. Checks and Balances should encourage the branches of our government to work together to solve problems and to ensure the efficient operation of our government.

CONCLUSION

It is quite the shame that our elected officials have allowed such petty instances of partisan politics to get in the way of performing in a manner that makes the lives of Americans better. It seems that occasionally, government officials lose sight of the goals of the Constitution and the language therein that states we are a government “... of the people, by the people, and for the people.” Performing such duties is an integral part of ensuring that every citizen is represented and has his or her interests regarded as important and valid. This is an attitude that we are missing in our government halls now. There needs to be a shift at the top, where those that are elected step away from the squabbles presented by differing views in policy, and learn to step back and view the big picture when it comes to governing. Ensuring that our courts are fully staffed and prepared to find solutions to the legal problems that affect the citizens of this country should be the top priority.

With that said, I suggest a practical approach to the issue of the confirmation of presidential nominees. While I understand there is no legal obligation for the Senate to offer their advice and consent to the President regarding who he has selected to fill vacancies on the court, I assert that there is a practical obligation. Our Senators, our government, are charged with the job of serving

the people. It is my belief that a component of serving the people of this country is ensuring that all branches of government are working at the highest efficiency possible, and prioritizing country over party when making policy decisions. Keeping vacancies open for the sake of partisan politics harms this country, and is an insult to the Americans who voted for them.

The Senate should introduce a rule that requires, at least, a vote of the Senate on presidential nominees within a reasonable time from the nomination. The hearing with the Judiciary Committee need not be required, though it is advisable. However, before the session in which the candidate is nominated, the Senate must hold a confirmation vote. If the Senate has decided, for any reason, that the candidate is not viable or qualified for the position, it may vote not to confirm. The point of the vote would be to “advise and consent” to the nomination. This does not have to be in the affirmative, but the Senate should be made to tell the President and the people of this country “yes” or “no” in clear and definitive terms rather than languish on the floor with no decision. This will make the process more efficient, and ensure that work could be done, if nominees were not hanging in the balance and all parties were free to keep doing their jobs and considering what kinds of nominees would be best for the positions they have been nominated for.

