AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Powers and Constitutional Authority/Judicial Structure and Selection

**The Nomination of Merrick Garland to the U.S. Supreme Court** (2016)[[1]](#footnote-1)

*In February 2016, Supreme Court justice Antonin Scalia unexpectedly died while on a hunting trip in Texas. During his nearly three decades on the bench, Scalia became one of the most visible figures on the Court and an iconic figure on the political right. The implications of his death were huge. The Court had long been divided between evenly balanced conservative and liberal wings, with Anthony Kennedy holding the pivotal vote. Scalia anchored the conservative wing. With Democrat Barack Obama in the White House, Scalia’s replacement could be expected to dramatically shift the balance of power on the Court and create a solid liberal majority on the Court for the first time since the 1970s. Especially with the stakes so large, confirming a new justice would not be easy since the Republicans held a majority of the seats in the Senate. It would be the first Supreme Court nomination when different parties controlled the White House and Senate since the first Bush administration and Clarence Thomas took the bench after a bruising confirmation battle during Bush’s third year in office.*

*Obama acted fairly quickly to nominate Merrick Garland to fill Scalia’s seat. Garland was a well-respected judge on the prestigious federal Court of Appeals for the District of Columbia, who had developed a reputation as a fairly moderate liberal since Bill Clinton had placed him on the bench in 1997. The fact that Garland was somewhat older than many recent Supreme Court nominees and was not a vocal liberal might have been calculated to swing some Republican senators to favor the nomination. If Garland’s nomination failed, it was unlikely that the lame-duck Obama would have a second chance to fill the seat in a presidential election year.*

*After the Garland announcement, Senate Majority Leader Mitch McConnell adopted a surprising strategy. He took to the Senate floor in March 2016 to declare that the Republican majority would take no action on the Garland nomination. Appealing to the “Biden rule,” McConnell contended that the Senate should not vote to confirm a Supreme Court justice in a presidential election year but should instead hold the seat open until the election results were known. The so-called Biden rule referenced a speech that Vice President Joe Biden had delivered to the Senate in June 1992, when Biden was the chair of the Senate Judiciary Committee and George H.W. Bush was in the White House. With the president’s public approval numbers sitting at or below 40 percent all year, Democrats anticipated winning the White House in 1992 and were unhappy with the results of the Thomas nomination. Harry Blackmun was the oldest justice on the Court and retirement rumors were swirling. The author of the majority opinion in* Roe v. Wade*, Blackmun had become a reliable liberal vote on the Court and his replacement by a conservative justice in 1992 could have been expected to create a stable conservative majority. In the summer of 1992, Biden declared that if a vacancy arose on the Court then President Bush should follow the example of previous presidents and decline to make a nomination to fill the seat and the Senate should refuse to hold hearings on any nominee until after the election. Attempting to fill a vacancy “once the political season is under way” would only result in a “conflagration,” and it would be better for the Court to operate with eight justices until the election resolved how the seat should be filled.[[2]](#footnote-2) McConnell was able to hold together the Republican caucus behind his strategy despite vocal Democratic complaints that Garland should receive a hearing and floor vote before the election and conservative worries that a victorious President Hillary Clinton would likely nominate someone to the left of Garland if the seat remained vacant through election day. McConnell’s gamble was rewarded when the Republican nominee Donald Trump won a surprising victory in the fall of 2016. Among President Trump’s first acts was to nominate the conservative Neil Gorsuch to fill Scalia’s seat, and Gorsuch was quickly confirmed by the Republican majority in the Senate.*

SENATOR MCCONNELL (Republican, Kentucky) Mr. President, the next Justice could fundamentally alter the direction of the Supreme Court and have a profound impact on our country, so of course--of course the American people should have a say in the Court's direction.

It is a President's constitutional right to nominate a Supreme Court Justice, and it is the Senate's constitutional right to act as a check on a President and withhold its consent.

As Chairman Grassley and I declared weeks ago and reiterated personally to President Obama, the Senate will continue to observe the Biden rule so that the American people have a voice in this momentous decision. The American people may well elect a President who decides to nominate Judge Garland for Senate consideration. The next President may also nominate somebody very different. Either way, our view is this: Give the people a voice in filling this vacancy.

Let me remind colleagues of what Vice President Biden said when he was chairman of the Judiciary Committee here in the Senate. Here is what he said:

It would be our pragmatic conclusion that once the political season is underway, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over. That is what is fair to the nominee and is central to the process. Otherwise, it seems to me . . . we will be in deep trouble as an institution.

Chairman Biden went on.

Others may fret that this approach would leave the Court with only eight members for some time, but as I see it . . . the cost of such a result--the need to reargue three or four cases that will divide the Justices four to four--are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what would assuredly be a bitter fight, no matter how good a person is nominated by the President.

That was Chairman Joe Biden.

Consider that last part. Then-Senator Biden said that the cost to the

Nation would be too great no matter who the President nominates. President Obama and his allies may now try to pretend this disagreement is about a person, but as I just noted, his own Vice President made clear it is not. The Biden rule reminds us that the decision the Senate announced weeks ago remains about a principle and not a person--about a principle and not a person.

It seems clear that President Obama made this nomination not with the intent of seeing the nominee confirmed but in order to politicize it for purposes of the election--which is the type of thing then-Senate Judiciary Committee Chairman Biden was concerned about. It is the exact same thing Chairman Biden was concerned about. The Biden rule underlines that what the President has done with this nomination would be unfair to any nominee, and, more importantly, the rule warns of the great costs the President's action could carry for our Nation.

Americans are certain to hear a lot of rhetoric from the other side in the coming days, but here are the facts they should keep in mind. The current Democratic leader said the Senate is not a rubberstamp, and he noted that the Constitution does not require the Senate to give Presidential nominees a vote. That is the current Democratic leader. The incoming Democratic leader did not even wait until the final year of George W. Bush's term to essentially tell the Senate not to consider any Supreme Court nominee the President sent. The Biden rule supports what the Senate is doing today, underlining that what we are talking about is a principle and not a person.

So here is our view. Instead of spending more time debating an issue where we can't agree, let's keep working to address the issues where we can. We just passed critical bipartisan legislation to help address the heroin and prescription opioid crisis in our country. Let's build on that success. Let's keep working together to get our economy moving again and to make our country safer, rather than endlessly debating an issue where we don't agree. As we continue working on issues like these, the American people are perfectly capable of having their say on this issue. So let's give them a voice. Let's let the American people decide. The Senate will appropriately revisit the matter when it considers the qualifications of the nominee the next President nominates, whoever that might be.

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SENATOR LEAHY (Democrat, Vermont). . . .

In the last 100 years since public confirmation hearings began in the Judiciary Committee for Supreme Court nominees, the Senate has never denied a nominee a hearing and a vote. No nominee has been treated the way Senate Republicans are treating Chief Judge Garland. Even when a majority of the Judiciary Committee did not support a nominee, the committee still reported out the nomination for a vote on the Senate floor. This allowed all Senators to exercise their duty to consider the nominee.

In fact, when I became chairman of the Judiciary Committee in 2001 during the Bush administration, I and Senator Hatch--who was then the ranking member--memorialized how the committee would continue in this tradition to consider President George W. Bush's Supreme Court nominees. In a letter to all Senators, Senator Hatch and I wrote, ``The Judiciary Committee's traditional practice has been to report Supreme Court nominees to the Senate once the Committee has completed its considerations. This has been true even in cases where Supreme Court nominees were opposed by a majority of the Judiciary Committee.'' Senator Hatch and I agreed to that. And then-Majority Leader Trent Lott agreed, too, saying this back in 2001: ``the Senate has a long record allowing the Supreme Court nominees of the President to be given a vote on the floor of the Senate.'' We all agreed to this because that is what we in the Senate have done for a century, in an open and transparent manner, allowing the American people to see us doing our work.

This is exactly what the Judiciary Committee should be doing this very day. It has now been 42 days since Chief Judge Merrick Garland was nominated to the Supreme Court. If we follow the average confirmation schedule for Supreme Court nominees over the last 40 years, the Judiciary Committee should be convening a hearing today on Chief Judge Garland's nomination. The late Justice Scalia, whom Chief Judge Garland would replace on the Court, received a hearing 42 days after his nomination. And Democrats were in charge when the Senate last voted on a Supreme Court nominee in an election year when Justice Anthony Kennedy was confirmed in 1988. Justice Kennedy received a hearing in the Judiciary Committee just 14 days after President Reagan nominated him. Had he been nominated at the same time as Chief Judge Garland, his hearings would already have been completed.

Last month, the Kennedy Institute released a national poll that showed just 36 percent of Americans know that the Senate confirms Supreme Court nominees. Our response as Senators to this unfortunate fact should not be to deny Chief Judge Merrick Garland a public hearing and a vote, breaking 100 years of Senate tradition and failing to do our jobs as Senators. Instead, our response should be to engage with the American people and to show them through our actions that the Senate can hold up its part of the constitutional framework.

And although many Americans may not be able to tell you that the Senate confirms Supreme Court nominees, a solid majority of the American public does know--by a 2-to-1 margin--that Chief Judge Garland deserves to have a hearing. That strong majority of the public is telling us that the Senate should show up for work and carry out its constitutional duty by holding a hearing for Chief Judge Garland.

. . . .

Some Republican Senators have claimed that their unprecedented obstruction against Chief Judge Garland is based on ``principle, not the person.'' There is no principle in refusing to confirm Supreme Court nominees in election years, as the Senate has done over a dozen times, most recently for President Reagan's last nominee to the Court. Furthermore, we have seen Republican Senators and outside interest groups attack Chief Judge Garland's judicial record, but then refuse to allow him the chance to respond at a public hearing. This is not principled, it is not fair, and it is not right.

To deny Chief Judge Garland a public hearing and a vote would be truly historic--but that is not the kind of history the Senate should be proud of. Over the more than 40 years I have served in the Senate, I recall times when the consideration of Supreme Court nominees was controversial.

But in every one of those instances, the nominee received a public hearing and a vote. We did not avoid doing our jobs simply because it was hard.

We must remember why we are here in the United States Senate. We are all here to serve the American people by carrying out our sworn oaths to uphold the Constitution. Protection of our enduring constitutional system requires that we hold our constitutional duties as Senators above the partisan politics of the now. I hope that Republicans will soon reverse course and put aside their obstruction to move forward on Chief Judge Garland's nomination.

1. Excerpt taken from *Congressional Record*, 114th Cong. (March 16, April 27, 2016). [↑](#footnote-ref-1)
2. Ronald K.L. Collins, “Fallout from Supreme Court Rulings, Taking Another Look at the Court Confirmation Process,” *Baltimore Sun* (5 July 1992): 5M. [↑](#footnote-ref-2)