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## THE SENATE HAS NO CONSTITUTIONAL OBLIGATION TO CONSIDER NOMINEES

*Jonathan H. Adler\**

### INTRODUCTION

Justice Antonin Scalia's tragic and unexpected death sent shockwaves through the American legal community.<sup>1</sup> Few justices to sit on the Supreme Court have had as great an impact.<sup>2</sup> Justice Scalia's death also reignited the judicial confirmation wars. Conflict over judicial nominations had been smoldering,<sup>3</sup> but burst into flames once it became clear that President Obama would have the opportunity to nominate Justice Scalia's successor and, just prior to a presidential election, dramatically alter the ideological and doctrinal balance on the Court.<sup>4</sup>

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\* Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law. The author thanks Michael Ramsey and Alan Meese for helpful comments and Shannon Meyer for research assistance. Any remaining errors, omissions or inanities are solely the fault of the author.

<sup>1</sup> See Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, WASH. POST (Feb. 13, 2016), [https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html); Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), [http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0); see also Richard Wolf, *At Supreme Court, Justice Antonin Scalia's Impact Still Felt*, USA TODAY (May 9, 2016), <http://www.usatoday.com/story/news/politics/2016/05/09/supreme-court-antonin-scalia-death-cases-decisions/83892680/>.

<sup>2</sup> See *How Antonin Scalia Changed America*, POLITICO (Feb. 14, 2016), <http://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631>; William Kelley, *Scalia's Lasting Impact on the Supreme Court*, CNBC (Feb. 14, 2016), <http://www.cnn.com/2016/02/14/scalias-lasting-impact-on-the-supreme-court-commentary.html>; Jeffrey Rosen, *What Made Antonin Scalia Great*, THE ATLANTIC (Feb. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/>; Ilya Shapiro, *Scalia Will Be Impossible to Replace*, CNN (Feb. 15, 2016), <http://www.cnn.com/2016/02/15/opinions/scalia-impossible-to-replace-shapiro/>.

<sup>3</sup> See, e.g., Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies Up, Nominees Down*, BROOKINGS (Aug. 18, 2015), <http://www.brookings.edu/blogs/fixgov/posts/2015/08/18-obama-federal-judges-confirmation-wheeler>.

<sup>4</sup> See Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), [http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html?\\_r=0](http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html?_r=0) (discussing potential impact of Justice Scalia's replacement); see also, Erwin Chemerinsky, *The Conservative Era of the Supreme Court is Over*, L.A. TIMES, June 29, 2016, <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-end-of-conservative-supreme-court-20160628-snap-story.html>.

While replacing Justice Scalia with a justice appointed by a Democratic President would certainly have an effect on politically charged areas of the law in which the Court has recently split 5-4, it would also likely have an effect where the Court split 5-4 along non-traditional lines, such as criminal procedure,

Within hours of Justice Scalia's death, Senate Majority Leader Mitch McConnell preemptively announced that he would not allow a vote on a nomination to replace Justice Scalia prior to the election of a new President.<sup>5</sup> If the balance of the Supreme Court is to be altered, Senator McConnell and his allies declared, it should only occur after an intervening election in which the American electorate has the opportunity to consider what sort of change they would like to see on the Court.<sup>6</sup>

In response to the Senate Republican leadership's stated intention to refuse to consider any nominee to replace Justice Scalia, some began to argue that the Senate has a constitutional obligation to act on a Supreme Court nomination.<sup>7</sup> The progressive Alliance for Justice, for example, circulated a letter signed by more than 350 law professors arguing the Senate has a "constitutional duty" to provide a hearing and vote on a nominee to the Supreme

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where Justice Scalia often voted for more "liberal" outcomes. *See, e.g.*, Kevin Ring, *Antonin Scalia Was a Great Jurist for Criminal Defendants*, REASON (Feb. 16, 2016), <http://reason.com/archives/2016/02/16/antonin-scalia-was-a-great-jurist-for-cr>; Robert J. Smith, *Antonin Scalia's Other Legacy*, SLATE (Feb. 15, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/antonin\\_scalia\\_was\\_often\\_a\\_friend\\_of\\_criminal\\_defendants.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html).

<sup>5</sup> *See* Press Release, U.S. Senate Majority Leader Mitch McConnell, Justice Antonin Scalia (Feb. 13, 2016) [hereinafter McConnell Press Release], <http://www.mcconnell.senate.gov/public/index.cfm/news?YearDisplay=2016&MonthDisplay=2&page=6>; *see also* Susan Davis, *Scalia's Death Will Cast A Long Shadow Across This Year's Senate Races*, NAT'L PUB. RADIO (Feb. 15, 2016), <http://www.npr.org/2016/02/15/466735802/scalia-s-death-and-the-2016-senate-races> ("Within hours of Justice Antonin Scalia's death, Senate Majority Leader Mitch McConnell aimed to squash any expectation that President Obama will get to name his successor.").

<sup>6</sup> *See* McConnell Press Release, *supra* note 5 ("The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."); *see also* Orrin Hatch, *The Senate Is Justified in Waiting to Confirm a Supreme Court Nominee*, NAT'L REVIEW (Apr. 4, 2016), <http://www.nationalreview.com/article/433570/merrick-garland-nomination-threatens-separation-powers>.

<sup>7</sup> *See, e.g.*, David H. Gans, *Republicans Who Block Obama's Supreme Court Pick Are Violating the Constitution*, NEW REPUBLIC (Mar. 16, 2016), <https://newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution> ("The claims made by these senators that they can fulfill their 'advice and consent' responsibilities under the Constitution by doing nothing cannot be squared with the Constitution's text and history. The Constitution requires the president and Senate to work together to ensure a fully functioning Supreme Court."); Harry Reid, *Considering Merrick Garland's SC Nomination*, ASIAN J. (Apr. 7, 2016), <http://asianjournal.com/editorial/considering-merrick-garlands-sc-nomination/> ("The Constitution does not exempt Senators from doing their jobs because it is an election year or because they don't like the President."); Nanya Springer, *Leading Constitutional Law Scholar Explains the Supreme Court Vacancy*, AM. CONST. SOC'Y (Feb. 19, 2016), <http://www.acslaw.org/acsblog/leading-constitutional-law-scholar-explains-the-supreme-court-vacancy> ("So, the Constitution creates a duty for the president to appoint Supreme Court justices by using the word 'shall.' There is no clause in Article II that says, 'but not in an election year.'" (quoting Erwin Chermersinsky, *Supreme Court Vacancy: What's Next?*, ACSLAW TALK PODCAST (Feb. 17, 2016) at 3:35–3:48, <http://www.acslaw.org/sites/default/files/SCOTUS%20Vacancy%20-%20What's%20Next.mp3>)); Geoffrey R. Stone, *Do the Right Thing: Obstruction of Supreme Court Nominee Sets a Disastrous Precedent for the Future*, AM. CONST. SOC'Y BLOG (Mar. 9, 2016), <https://www.acslaw.org/acsblog/do-the-right-thing-obstruction-of-supreme-court-nominee-sets-a-disastrous-precedent-for-the>.

Court.<sup>8</sup> This “obligation” is “clear,” the letter proclaimed.<sup>9</sup> Harvard Law School Dean Martha Minow and Pepperdine School of Law Dean (and former judge) Deanell Tacha made a similar argument in the *Boston Globe*.<sup>10</sup> Vice President Joseph Biden also took to the op-ed pages to argue the Senate has a “constitutional obligation” to act on a Supreme Court nomination, and that fulfilling this “constitutional responsibility” requires “considering, debating, and voting on that nominee” on the floor of the Senate.<sup>11</sup> President Obama, for his part, proclaimed, “I have fulfilled my constitutional duty. Now it’s time for the Senate to do theirs.”<sup>12</sup>

The argument that the Senate has a constitutional obligation to act on a Supreme Court nomination is anything but “clear.”<sup>13</sup> This claim finds no support in the relevant constitutional text, constitutional structure, or the history

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<sup>8</sup> *Letter from Law Professors to Senate Leaders*, ALLIANCE FOR JUSTICE (Mar. 7, 2016), <http://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf>. The letter reads, in part:

As scholars deeply committed to the fair administration of justice, upholding the rule of law, and educating future generations of the legal profession, the undersigned professors of law urge you to fulfill your constitutional duty to give President Barack Obama’s Supreme Court nominee a prompt and fair hearing and a timely vote.

The Senate’s obligation in this circumstance is clear. Under Article II of the Constitution, the president “shall appoint . . . judges to the Supreme Court,” and the Senate’s role is to provide “advice and consent.” Yet before the president has even made a nomination to fill the current vacancy, a number of senators have announced that they will not perform their constitutional duty. Instead, they plan to withhold advice and consent until the next president is sworn in nearly a year from now. This preemptive abdication of duty is contrary to the process the framers envisioned in Article II, and threatens to diminish the integrity of our democratic institutions and the functioning of our constitutional government.

<sup>9</sup> *Id.*

<sup>10</sup> Martha Minow & Deanell Tacha, *US Needs a Government of Laws, Not People*, BOSTON GLOBE (Mar. 22, 2016), <https://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYE1btXCQyIM/story.html>. The article reads in part:

Article II of the Constitution is not ambiguous. It directs that the president “shall nominate, and by and with the advice and Consent of the Senate, shall appoint . . . judges of the Supreme Court.” The senators swore their oath to the Constitution. An orderly process, adhering to these words of the Constitution, is not only what the law requires; it is essential to preserving the treasure that is our independent judiciary and rule of law.

<sup>11</sup> Joseph R. Biden Jr., *Joe Biden: The Senate’s Duty on a Supreme Court Nominee*, N.Y. TIMES (Mar. 3, 2016), <http://www.nytimes.com/2016/03/04/opinion/joe-biden-the-senates-duty-to-advise-and-consent.html>.

<sup>12</sup> President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme>.

<sup>13</sup> For arguments against the idea that there is a constitutional duty to consider Supreme Court nominations, see, e.g., Vikram David Amar, *The Grave Risks of the Senate Republicans’ Stated Refusal to Process Any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016), <https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them>; Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, BLOOMBERG (Feb. 17, 2016), <https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution>; see also Lana Ulrich, *Tracking the Controversy Over Judge Garland’s Nomination*, CONST. CTR. (May 27, 2016), <http://blog.constitutioncenter.org/2016/05/tracking-the-controversy-over-judge-garlands-nomination/>;

of judicial nominations. While there are strong *policy* and *prudential* arguments that the Senate should promptly consider any and all nominations to legislatively authorized seats on the federal bench, and on the Supreme Court in particular, the argument that the Senate has some sort of constitutional obligation to take specific actions in response to a judicial nomination is erroneous. Interestingly enough, the argument that the Senate has an obligation to consider judicial nominations is not new. In the face of Senate intransigence on some of his judicial nominees, President George W. Bush declared that: “The Senate has a Constitutional obligation to vote up or down on a President’s judicial nominees.”<sup>14</sup> The argument was wrong then, and it is wrong now.

Senator McConnell’s announcement of across-the-board opposition to any Supreme Court nominee undoubtedly escalated partisan conflict over judicial confirmations. There are many powerful arguments that such reflexive opposition is unwise and imprudent, and threatens to further undermine the functioning and independence of the federal judiciary.<sup>15</sup> These arguments do not, however, establish that refusal to consider the nomination of Judge Merrick Garland to replace Justice Scalia is unconstitutional.

## I. TEXT

Article II, Section 2 of the United States Constitution provides for the appointment of federal judges. It reads, in relevant part:

*The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .*<sup>16</sup>

This provision creates a three-part appointment process for federal judges (including justices to the Supreme Court).<sup>17</sup> First, the President nominates.

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Adam White, *The Ginsburg Affair*, CITY J. (Aug. 4, 2016), <http://www.city-journal.org/html/ginsburg-affair-14679.html>.

<sup>14</sup> Press Release, President George W. Bush, Statement on Judicial Nominations (Dec. 23, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041223-1.html>. President Bush was hardly the first President to claim the Senate was obligated to act on presidential nominations. In 1789, President John Adams wrote that “[t]he whole senate must now deliberate on every appointment.” John Adams, *John Adams to Roger Sherman*, in 4 THE FOUNDERS’ CONSTITUTION 432 (Charles Francis Adams ed., 1850-56), [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_2-3s45.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s45.html).

<sup>15</sup> See, e.g., Amar, *supra* note 13 (noting that opposition to considering a nominee could backfire and escalate conflict over nominations).

<sup>16</sup> U.S. CONST. art II, § 2 (emphasis added).

<sup>17</sup> See Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232 (1999).

Second, the Senate provides advice and consent. Third, providing Senate consent has been forthcoming, the President then makes the appointment.

This process applies to Supreme Court justices, but it also applies to all other principal officers, ambassadors, and lower court judges.<sup>18</sup> The text itself makes no distinction among the various appointments covered by the clause. Further, nothing in this text imposes an affirmative obligation on the Senate to take any specific steps with regard to presidential nominees to the Supreme Court, let alone to hold hearings or a vote on the floor.<sup>19</sup>

The only apparent obligation imposed by Article II is in the declaration that the president “shall” make a nomination. This is an instruction to the President, however, and not to the Senate. The appointments clause conditions appointment on Senate consent. It does not impose an affirmative duty to consider a nominee in any particular way.

Understood in its historical context, it is not even clear the appointments clause imposes an affirmative obligation on the President.<sup>20</sup> While it is common to read the word “shall” in statutes to indicate an affirmative duty, it is not clear the Constitution should be read this way.<sup>21</sup> “The widespread view in modern statutory interpretation that ‘shall’ expresses a mandatory command does not easily cohere with 18th century constitutional drafting and 18th century American-English usage,” argues Professor Seth Barrett Tillman.<sup>22</sup> Rather, Professor Tillman maintains, the word “shall” is often used in the Constitution to allocate authority and indicate a temporal sequence, rather than to impose a duty.<sup>23</sup>

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<sup>18</sup> U.S. CONST. art II, § 2. The clause further provides “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.*

<sup>19</sup> The claim that the Senate is obligated to hold hearings is particularly anomalous as judicial confirmation hearings are a relatively modern invention. There was not even a Senate Judiciary Committee until 1816 and the first time a Supreme Court nominee was called to testify before the Senate Judiciary Committee was 1925, and the second was in 1939. *Senate History: Nominations*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Sept. 11, 2016).

<sup>20</sup> See, e.g., Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 762 n.123 (1999) (“[T]he Appointments Clause is best read as a grant of power rather than an affirmative duty.”).

<sup>21</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112–15 (2012) (discussing the distinction between “mandatory” and “permissive” words).

<sup>22</sup> Seth Barrett Tillman, *Does the President Have a Duty to Nominate Supreme Court Candidates? Does the Senate Have a Duty to Consider Nominees?*, THE NEW REFORM CLUB (March 18, 2016), <http://reformclub.blogspot.com/2016/03/does-president-have-duty-to-nominate.html>; see also Nora Roter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AMER. J. LEG. HIST. 453, 455–56 (2010).

<sup>23</sup> See, e.g., U.S. CONST. art. II, § 1, cl. 6 (“[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”) (emphasis added). As Professor Tillman notes, it would be “odd” to maintain

The historical understanding of the Appointments Clause is consistent with this view. In *Marbury v. Madison*,<sup>24</sup> for example, Chief Justice John Marshall characterized the President's decision to nominate as "completely voluntary."<sup>25</sup> *Marbury* further characterized the subsequent appointment as "voluntary" as well, albeit contingent upon Senate "advice and consent."<sup>26</sup> This understanding is also consistent with that embraced by the Executive Branch, as represented by the opinions of the Department of Justice's Office of Legal Counsel ("OLC"). In a 1999 memo discussing whether the President is obligated to appoint and commission an officer after the Senate has consented to the appointment, OLC concluded that *all* steps in the appointments process, including Senate advice and consent, are "discretionary."<sup>27</sup> Given this understanding, it should be no surprise that, throughout the nation's history, Presidents have failed to make nominations to offices, including judgeships, covered by Article II, leaving such positions vacant and without any prospect for being filled.<sup>28</sup> They have even delayed making nominations to the Supreme Court when vacancies have arisen shortly before an election.<sup>29</sup>

Even if one were to conclude that Article II's declaration that the President "shall" make a nomination to fill a vacancy on the Supreme Court is mandatory, this is still insufficient to establish that the Senate has an affirmative obligation to take specific steps to consider the nomination. Under Article II, the Senate's role in the appointment process is to provide "advice and consent" before an appointment may be made. It is indisputable that the Senate may withhold its consent, and there is nothing in the text of the Constitution that suggests the Senate's failure to provide such consent must take any particular form. Much as the Senate may reject a legislative proposal that originated in the House of Representatives by voting it down, killing it in committee, or simply refusing to take up the measure, the Senate may withhold its consent by voting against confirmation of a nominee, rejecting the nomination in committee, or simply refusing to act.

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that the third use of "shall" in this clause imposes a mandatory duty. See Seth Barrett Tillman, *supra* note 22; see also U.S. CONST. art. II, § 2 (indicating that the President "shall be" Commander in Chief and "shall have power" to make treaties with the advice and consent of the Senate).

<sup>24</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>25</sup> See *id.* at 155.

<sup>26</sup> *Id.* (appointment of an officer "is . . . a voluntary act, though it can only be performed by and with the advice and consent of the Senate.").

<sup>27</sup> See Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232 (1999) ("The Constitution thus calls for three steps before a presidential appointment is complete: first, the President's submission of a nomination to the Senate; second, the Senate's advice and consent; third, the President's appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary.").

<sup>28</sup> See e.g., *Current Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Oct. 11, 2016).

<sup>29</sup> See Johnathan H. Adler, *In Election Years, a (Spotty) History of Confirming Court Nominees*, WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/>.

Other provisions of the Constitution reinforce the Senate's prerogative. Article I, Section 5 states, "[e]ach House may determine the Rules of its Proceedings."<sup>30</sup> This means that each house decides how to discharge its obligations, such as when and whether to rely upon committees or to impose specific procedural hurdles to final action. In the case of nominations, such hurdles for the consideration of judicial nominations have included allowing filibusters and sending nominations to the Senate Judiciary Committee, where many judicial nominations have gone to die.<sup>31</sup> As then-Senator Robert Byrd explained in a 2005 speech,

There is no stipulation in the Constitution as to how the Senate is to express its advice or give its consent . . . . The Constitution itself does not say that each nominee is entitled to an up or down vote. The Constitution doesn't say that, it doesn't even say that there has to be a vote with respect to the giving of its consent. The Senate can refuse to confirm a nominee simply by saying nothing and doing nothing.<sup>32</sup>

Nor does the Constitution identify any criteria which the Senate is required to consider (or ignore) when deciding whether to consent to a nomination.

The history of the Appointments Clause confirms that Senate consent is a precondition for appointment, and not an affirmative duty. As documented by Adam J. White, the Constitution's drafters based Article II's appointment process on provisions in the Massachusetts Constitution of 1780.<sup>33</sup> Under the Massachusetts Constitution, however, it was common for the duty of "advice and consent" to be fulfilled by a refusal to consent, without any record of a vote or other formal action.<sup>34</sup> Further, as White details, the framers expressly rejected a proposal put forward by none other than James Madison that would have imposed a duty on the Senate to affirmatively reject a nomination of which the Senate disapproved.<sup>35</sup>

The Constitution contains multiple provisions under which one constitutional actor must obtain the consent of another in exercising constitutional authority, yet none of these provisions has ever been understood to create a

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<sup>30</sup> U.S. CONST., art I, § 5.

<sup>31</sup> Some of those who now claim the Senate has an affirmative duty to actively consider a Supreme Court nomination have previously defended the use of filibusters to prevent votes on judicial nominees, even when deployed for partisan reasons. See, e.g., Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 331–32 (2005).

<sup>32</sup> *Going Nuclear: The Threat to Our System of Checks and Balances* (C-SPAN2 television broadcast Apr. 25, 2005) (remarks of Sen. Robert C. Byrd, transcript available at <https://cdn.americanprogress.org/wp-content/uploads/kf/GoingNuclearTranscript.pdf>). The text of these remarks was subsequently placed in the *Congressional Record* by then-Senator Joseph Biden. Judicial Nominations, 151 CONG. REC. S. 4356, 4364 (Apr. 27, 2005) (statement of Sen. Joseph R. Biden, Jr.).

<sup>33</sup> See Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 132–33 (2005).

<sup>34</sup> *Id.* at 135–40.

<sup>35</sup> *Id.* at 141–46.

constitutional duty to act.<sup>36</sup> So, for instance, if the House passes a bill to raise revenue, the Senate is under no obligation to take up the measure. It may reject it simply by refusing to act. Article II, section 2 provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,”<sup>37</sup> and yet there is no constitutional obligation for the Senate to schedule a vote or hearing on any treaty the President submits. And so on.

The Constitution does, however, consider the potential consequences of inaction in at least one instance: Article I, section 7, which outlines the requirements for a bill to become a law.<sup>38</sup> Under the normal course, once a bill has passed both houses of Congress, it is presented to the President. If the President signs the bill, it becomes a law. If, on the other hand, the President returns the bill with his objections (i.e., “vetoes” the bill) it does not become a law, unless the President’s objections are overridden by a two-thirds vote in each house. In each of these cases, the President takes an affirmative step in response to the passage of a bill in Congress. But no affirmative step is required, and Article I, section 7 expressly addresses that possibility. It provides that if a President fails to act in response to the presentment of a bill, and neither signs nor vetoes it, the bill may nonetheless become law after ten days (provided other conditions are not met).<sup>39</sup> This suggests that if the framers understood the nomination of a justice to trigger an affirmative duty on the Senate to act—either by voting to approve or reject that nominee—Article II would say so (and, indeed, James Madison had proposed just such an obligation<sup>40</sup>). Instead, it establishes Senate “consent” as a precondition for an appointment to the bench, and such consent may be withheld by refusing to act.

A final point on the text. As noted above, the appointments clause in Article II makes no special provision for Supreme Court nominations. Rather, the reference to “Judges of the supreme Court” comes in the midst of other officers covered by the same clause, including “Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for.”<sup>41</sup> Thus, if the text requires the Senate to actively consider nominations to the Supreme Court, that same text would seem to require identical consideration of nominees to other offices governed by this clause, and yet such a claim is nearly impossible to maintain.

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<sup>36</sup> See Amar, *supra* note 13 (“If we look at other constitutional settings in which one entity must consent to the proposal of another actor before the proposal can take legal effect, we have as a general matter not inferred any duty on the part of the second actor to do anything.”).

<sup>37</sup> U.S. CONST., art. II, § 2.

<sup>38</sup> U.S. CONST., art. I, § 7.

<sup>39</sup> *Id.* (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

<sup>40</sup> See White, *supra* note 33, at 141–47.

<sup>41</sup> U.S. CONST. art. II, § 2.

Neither the text nor the original understanding supports the claim that the Senate has an affirmative obligation to take any specific action in response to a Supreme Court nomination. If the proposition that the Senate has an affirmative obligation to consider a President's Supreme Court nomination is to stand, that argument must rest upon other grounds—grounds to which this essay now turns.

## II. STRUCTURE

Some have argued that the Senate's failure to affirmatively consider a Supreme Court nomination is unconstitutional because it threatens the ability of the Court to function.<sup>42</sup> While the text of the Constitution may not impose an affirmative duty, this argument goes, an affirmative duty exists nonetheless because the failure to act threatens to undermine the constitutional structure by threatening the ability of the federal judiciary to fulfill its constitutional role. This argument is no more convincing than appeals to the text.

Article III of the Constitution provides for a Supreme Court.<sup>43</sup> It does not, however, provide for a set number of seats on the Court. There is no constitutional requirement that the Court have nine justices, or even an odd number. As originally constituted, there were six seats on the Court,<sup>44</sup> and federal law today still defines a quorum of the Court as six justices.<sup>45</sup> Refusing to fill a ninth seat may leave the Court deadlocked in a handful of cases—as may occur when a justice is required to recuse from a case—but it is hardly tantamount to eliminating the Supreme Court.<sup>46</sup> Leaving the Court with an even number of justices may be inefficient or unwise, but it is hardly unconstitutional. Were it otherwise, the Senate's obligation would extend to ensuring that each vacancy is filled—not merely that each nomination is considered—and such an obligation would eviscerate the Senate's power to withhold “advice and consent.”

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<sup>42</sup> For instance, at a recent debate on this question Dean Erwin Chemerinsky argued that the Senate has a constitutional obligation to act because “one branch . . . can't interfere with the functioning of another . . .” *Does the Senate Have a Duty to Hold Hearings on Supreme Court Nominees?*, NAT'L CONST. CTR. 4:04–4:09 (Apr. 7, 2016), <http://blog.constitutioncenter.org/2016/04/podcast-does-the-senate-have-a-duty-to-hold-hearings-for-supreme-court-nominees/>; see also Minow & Tacha, *supra* note 10.

<sup>43</sup> See U.S. CONST., art. III.

<sup>44</sup> Federal Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789).

<sup>45</sup> 28 U.S.C. § 1 (2012) (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

<sup>46</sup> Justice Elena Kagan was required to recuse in twenty-eight cases during her first term on the Court. This amounted to over one-third of the Court's docket, and yet the Court still functioned. See Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan's Recusals*, SCOTUSBLOG (Oct. 9, 2012), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/>.

There is no question that Congress has the power to expand or reduce the size of the Court, and that this power could be used to impair the functioning of the Supreme Court and of lower courts.<sup>47</sup> Dramatically reducing the number of lower courts would impair the functioning of the federal judiciary, but it would be constitutional.<sup>48</sup> That the Senate's power to consent—or withhold consent—to the filling of judicial vacancies imposes similar risks is insufficient to create a constitutional obligation to act in a particular way. Just as Congress regularly uses its power over appropriations to advance substantive policy goals, the Senate may use its advice and consent power to affect the size and functioning of the federal judiciary. That this power may be misused does not disprove the existence of the power. The same can be said for Congress's power to enact other regulations governing the functioning of the judiciary. Some such regulations may enhance the judiciary's ability to function, while others may impair it. Regulations of the latter sort are not inherently unconstitutional. As Justice Joseph Story warned:

It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given.<sup>49</sup>

Even those who argue that the Senate has an obligation to consider nominations recognize that the Senate may exercise this power to refuse to confirm a President's nominees, or block their consideration by the full Senate.<sup>50</sup> One way for the Senate to refuse consent is to vote against nominees. This power is just as prone to misuse as the power to refuse to consider a nomination. A seat on the Supreme Court remains open today because the Senate has refused to act. In the past, however, seats have remained open because the Senate refused to confirm a President's nominees. When Associate Justice Abe Fortas stepped down in May 1969 under a cloud of scandal, it would be a full year before his replacement was confirmed, as the Senate rejected President Richard Nixon's first two nominees for the seat (Clement Haynsworth and Harold Carswell) before confirming Harry Blackmun.<sup>51</sup>

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<sup>47</sup> See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (upholding the Repeal Act of Mar. 8, 1802 which abolished numerous federal judgeships).

<sup>48</sup> I leave aside the question whether it would be constitutional for the Senate to permanently refuse to fill any Supreme Court vacancy. There is an argument such an action would violate Article III, which provides that there must be a Supreme Court. In the present instance, however, all that is at issue is whether the Senate is acting unconstitutionally by refusing to consider a single Supreme Court nomination for a limited period of time.

<sup>49</sup> See *Martin v. Hunter's Lessee*, 14 U.S. 304, 344–45 (1816).

<sup>50</sup> See, e.g. Fisk & Chemerinsky, *supra* note 31.

<sup>51</sup> See Henry B. Hogue, *Supreme Court Nominations Not Confirmed, 1789 – August 2010*, CONG. RESEARCH SERV. 9–10 (Aug. 20, 2010), <https://fas.org/sgp/crs/misc/RL31171.pdf>; *Harry A. Blackmun, 1970–1994*, THE SUP. CT. HIST. SOC'Y, [http://supremecourthistory.org/timeline\\_blackmun.html](http://supremecourthistory.org/timeline_blackmun.html) (last visited Sept. 14, 2016).

President John Tyler had it far worse than President Nixon. In the 1840s, the Senate rejected several of Tyler's nominees to the Supreme Court, leaving a seat vacant for over 800 days.<sup>52</sup> Among those rejected was Rueben Walworth, whose nomination was withdrawn (twice!) when the Senate refused to consider it.<sup>53</sup> The Senate's response to President Tyler's nominations may have been imprudent or unstatesmanlike, but it was hardly unconstitutional. The same can be said of the Senate's refusal to consider a nomination. Likewise, many would suggest that the Senate's recurring failure to act on nominations to fill lower court vacancies, particularly where "judicial emergencies" have been declared, impairs the functioning of the judiciary.<sup>54</sup> This does not, however, mean that the Senate is acting unconstitutionally when it reaches a different judgment about the advisability of filling a given judicial vacancy or otherwise withholds its consent.

### III. HISTORY

Recognizing that neither the text nor structure of the Constitution is sufficient to impose a constitutional obligation on the Senate to consider a President's Supreme Court nomination, some have argued that such an obligation may be derived from the history of judicial nominations.<sup>55</sup> It is widely accepted that consistent practice may inform the resolution of constitutional questions.<sup>56</sup> Thus, if the Senate were to have a long, unbroken practice of considering judicial nominations in a particular fashion, there would be a colorable argument that this practice has a constitutional dimension, and that

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<sup>52</sup> See 138 CONG. REC. 16,310 (1992) (noting that "a seat remained vacant for 28 months"); Drew DeSilver, *Long Supreme Court Vacancies Used To Be More Common*, PEW RES. CTR. (Feb. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/>.

<sup>53</sup> See ARTEMUS WARD ET AL., *HISTORICAL DICTIONARY OF THE U.S. SUPREME COURT* 536 (2015).

<sup>54</sup> See Alicia Bannon, *The Impact of Judicial Vacancies on Federal Trial Courts*, BRENNAN CTR. FOR JUST. (July 21, 2014), <https://www.brennancenter.org/sites/default/files/publications/Impact%20of%20Judicial%20Vacancies%20072114.pdf>; Russell Wheeler & Sarah Binder, *Do Judicial Emergencies Matter? Nomination and Confirmation Delay During the 111th Congress*, BROOKINGS INST. (Feb. 16, 2011), <https://www.brookings.edu/research/do-judicial-emergencies-matter-nomination-and-confirmation-delay-during-the-111th-congress/>. For a current listing of judicial emergencies, see *Judicial Emergencies*, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Oct. 11, 2016).

<sup>55</sup> See, e.g., Gans, *supra* note 7; Stone, *supra* note 7.

<sup>56</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 401 (1819) (noting that precise contours of each branch's powers may be defined and clarified by practice). Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("a systemic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

the failure to abide by this practice is tantamount to violation of a constitutional duty.<sup>57</sup> Yet no such historical norm exists.

There is a long history of Senate refusal to fill judicial vacancies, including by a simple refusal to consider Presidential nominees. As summarized by the Congressional Research Service:

From the appointment of the first Justices in 1789 through its consideration of nominee Elena Kagan in 2010, the Senate has confirmed 124 Supreme Court nominations out of 160 received. Of the 36 nominations which were not confirmed, 11 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate.<sup>58</sup>

Most Supreme Court nominees have been confirmed, but there is nothing approaching an unbroken practice of confirmation, or even of active consideration of nominees. This is particularly so when one considers lower courts.<sup>59</sup> Looking more broadly at all nominations covered by Article II, one finds an even more widespread practice of a failure to act on Presidential nominees. As Professor Anne Joseph O'Connell has documented, positions subject to Senate confirmation have been "empty (or filled by acting officials), on average, one quarter of the time" during the administrations of President Jimmy Carter through President George W. Bush.<sup>60</sup>

As judicial confirmation fights have escalated over the past three decades, it has become increasingly common for the Senate to refuse to consider judicial nominations made during an election year.<sup>61</sup> In April 1988, for example, President Ronald Reagan nominated Judith Richards Hope to an open seat on the U.S. Court of Appeals for the D.C. Circuit.<sup>62</sup> She never received

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<sup>57</sup> Consistent practice, by itself, is not necessarily sufficient to create a constitutional limitation or rule. For instance, prior to President Franklin D. Roosevelt, no President had ever sought re-election for a third consecutive term. It was nonetheless perfectly constitutional for FDR to seek a third and fourth term. Turning the two-consecutive-term norm into a constitutional rule required a constitutional amendment. *See* U.S. CONST., amend XXII.

<sup>58</sup> *See* BARRY J. MCMILLION, CONG. RES. SERV., R44234, SUPREME COURT APPOINTMENT PROCESS: SENATE DEBATE AND CONFIRMATION VOTE (2015). The report summary also notes that "Six of the unconfirmed nominations, however, involved individuals who subsequently were re-nominated and confirmed." *Id.*

<sup>59</sup> *See, e.g.*, DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RES. SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS (2008).

<sup>60</sup> *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 921 (2009).

<sup>61</sup> *See* Carl Tobias, *Filling Federal Court Vacancies in a Presidential Election Year*, 50 U. RICH. L. REV. 1233, 1233 (2016) (noting widespread understanding that "confirmations slow and ultimately halt over presidential election years").

<sup>62</sup> *See Hope In-Law for Bork Seat*, N.Y. TIMES (Apr. 15, 1988), <http://www.nytimes.com/1988/04/15/us/hope-in-law-for-bork-seat.html>.

a hearing, let alone a vote. As both the *Washington Post* and *New York Times* reported at the time, the reasons were simple: Senate Democrats did not want to allow a Republican president to alter the balance of an important court in the year before an election.<sup>63</sup>

Many nominations made within a year of the next presidential election suffered a similar fate. John Roberts, for example, was first nominated to the U.S. Court of Appeals for the D.C. Circuit in January 1992, and the Senate took no action on his nomination.<sup>64</sup> The same was true for University of Virginia law professor Lillian BeVier who was nominated to the U.S. Court of Appeals for the Fourth Circuit in October 1991.<sup>65</sup> Professor BeVier was the first full-time female faculty member at the University of Virginia's law school and a prominent constitutional law scholar, but she never received a hearing, let alone a vote. Eastern District Court Judge Terrence Boyle was also nominated in 1991 and did not receive a hearing either.<sup>66</sup> These were not isolated examples. Over the past few decades, dozens of judicial nominations have been defeated by the Senate's simple refusal to take any formal action before the end of a President's term.<sup>67</sup> Further, as the Congressional Research Service has noted, one common reason for Senate refusal to act is the Senate majority's desire to leave seats open so that they may be filled by the next occupant of the White House.<sup>68</sup>

The Senate's recent history of refusing to consider judicial nominations made within a year of a pending Presidential election is largely confined to lower court nominees. Supreme Court nominations are much more rare, and election-year nominations are rarer still. Prior to Justice Scalia's death, the opportunity to make a Supreme Court nomination in a presidential election year had only arisen twice since World War II. In neither case, however, was there a confirmation prior to the election.

Most recently, in 1968, Chief Justice Earl Warren announced his intention to resign upon the confirmation of his successor. President Lyndon Johnson's decision to nominate Associate Justice Abe Fortas to be Chief Justice (and nomination of Homer Thornberry to fill Justice Fortas's seat) was con-

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<sup>63</sup> See Sandra Torry, *D.C. Lawyer's Nomination to Court of Appeals Appears Stalled*, WASH. POST (Sept. 9, 1988), <https://www.washingtonpost.com/archive/local/1988/09/09/dc-lawyers-nomination-to-court-of-appeals-appears-stalled/b8e4df04-2cf4-4eb9-9c8d-fbc2c569f171/>; Susan F. Rasky and Linda Greenhouse, *Washington Talk: Briefing: A Second Chance?*, N.Y. TIMES (Nov. 18, 1988), <http://www.nytimes.com/1988/11/18/us/washington-talk-briefing-a-second-chance.html>.

<sup>64</sup> See *History of the Federal Judiciary: Unsuccessful Nominations and Recess Appointments*, FED. JUD. CTR., [http://www.fjc.gov/history/home.nsf/page/judges\\_nominations.html](http://www.fjc.gov/history/home.nsf/page/judges_nominations.html) (last visited Oct. 8, 2016) (charting the history of unsuccessful nominations by presidency).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Rutkus & Scott, *supra* note 59.

<sup>68</sup> *Id.* at 45–46.

troversial for many reasons, including “the propriety of a lameduck nomination.”<sup>69</sup> Opposition to confirming Fortas was bipartisan. While Southern Democrats opposed his record supporting civil rights, other Senators were concerned about his alleged ethical improprieties, and others did not like the idea of filling a Supreme Court seat on the eve of an election.<sup>70</sup> Senator Robert Griffin, for example, declared there was “ample precedent” for the position that “the opportunity to make such nominations at this particular point in time should be reserved for the new President soon to be elected by the people,” even if “for purely political reasons.”<sup>71</sup> In the end, the Fortas nomination was defeated (and the Thornberry nomination along with it) when a cloture vote failed.

In September 1956, Justice Sherman Minton left the Court due to ill health. President Dwight Eisenhower filled the vacancy with the recess appointment of William Brennan, a Democrat. In January, after his re-election, President Eisenhower nominated Brennan to fill the empty seat, and the Senate confirmed him by a voice vote in March.<sup>72</sup> Although Eisenhower had not sought to fill the position permanently on the eve of the election—and picked someone of the opposite political party—it was still controversial. In 1960, the Senate passed a resolution opposing the use of recess appointments to fill Supreme Court vacancies.<sup>73</sup>

The last time a Supreme Court vacancy arose in the calendar year of a Presidential election and was filled prior to a election was in 1932, when the Senate confirmed Benjamin Cardozo to fill the seat vacated by Justice Oliver Wendell Holmes.<sup>74</sup> Facing a Senate that was split down the middle, and an impending election, President Herbert Hoover, a Republican, decided to nominate a prominent Democrat to fill the seat.

In June 1992, when considering the possibility of an election-year vacancy to the Supreme Court, then-Senator Joseph Biden spoke on the Senate

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<sup>69</sup> See 138 CONG. REC. 16,311 (1992) (statement of Sen. Biden).

<sup>70</sup> *Id.* at 16,316. (“And the 1968 filibuster against Abe Fortas’ nomination—an assault that was launched by 19 Republican Senators, before President Johnson had even named Fortas as his selection—is similarly well known by all who follow this.” (emphasis added)); see also 133 CONG. REC. 27,027 (1987) (statement of Sen. Maj. Ldr. Mitchell).

<sup>71</sup> See *Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 45 (1968) (statement of Sen. Robert Griffin).

<sup>72</sup> See *William J. Brennan, Jr., 1956-1990*, SUP. CT. HIST. SOC’Y, [http://supremecourthistory.org/timeline\\_brennan.html](http://supremecourthistory.org/timeline_brennan.html) (last visited Oct. 8, 2016).

<sup>73</sup> See 106 CONG. REC. 18,145 (1960).

<sup>74</sup> See John Anthony Maltese, *The Long History of Presidents Nominating Supreme Court Justices in Presidential Election Years*, THE COOK POL. REP. (Feb. 15, 2016), <http://cookpolitical.com/story/9260>. Justice Pierce Butler left the Court within twelve months of a presidential election, but not in an election year. He stepped down in November 1939. The Senate confirmed Justice Frank Murphy to replace Butler in 1940. See *Frank W. Murphy, 1940-1949*, SUP. CT. HIST. SOC’Y, [http://supremecourthistory.org/timeline\\_murphy.html](http://supremecourthistory.org/timeline_murphy.html) (last visited Oct. 8, 2016).

floor of “the tradition against acting on Supreme court nominations in a Presidential year.”<sup>75</sup> In extended remarks, the then-Chairman of the Senate Judiciary Committee reviewed the history of Supreme Court nomination fights, explained why he believed Senate Democrats would be justified in delaying action on any prospective Supreme Court nominee should a vacancy occur prior to the election, and discussed how the Senate and President should work together on future Supreme Court nominations in future years. Senator Biden argued that should there be a Supreme Court vacancy that year, the President “should consider following the practice of a majority of his predecessors, and not—and not—name a nominee until after the November election is completed.”<sup>76</sup> He added further that were such a nomination made, and the President were to go “the way of Presidents Fillmore and Johnson” and “press[] an election-year nomination, the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the campaign season is over.”<sup>77</sup> Senator Biden further noted that “no Justice has ever been confirmed in September or October of an election year—the sort of timing which has become standard in the modern confirmation process.”<sup>78</sup>

Then-Senator Biden no doubt overstated the existence of a meaningful tradition against confirming Supreme Court justices in election years. There is no such meaningful tradition, but nor is there a meaningful tradition of filling Supreme Court vacancies that arise in election years either. In some cases, Presidents have refrained from making such appointments until after the election. In other cases, when nominations were made, the Senate refused to act prior to voters casting their ballots. Where the Senate responded quickly to pre-election nominations, it has usually been when the Senate majority and the President were of the same political party and the overall balance of the Court was not at stake.

All told, there have been 15 occasions in which a vacancy arose in an election year, defined as a vacancy that occurred within a year prior to the election.<sup>79</sup> Only seven of these vacancies were filled by a nominee confirmed

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<sup>75</sup> 138 CONG. REC. 16,316 (1992) (statement of Sen. Biden).

<sup>76</sup> *Id.* at 16,317.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 16,316.

<sup>79</sup> The fifteen vacancies were as follows:

- Sept. 30, 1800, filled on Jan. 27, 1801 by John Marshall;
- Jan. 26, 1804, filled on Mar. 24, 1804 by William Johnson;
- Aug. 25, 1828, filled on Mar. 7, 1829 by John McLean;
- Dec. 18, 1843, filled on Feb. 14, 1845 by Samuel Nelson;
- Apr. 21, 1844, filled on Aug. 4, 1846 by Robert Cooper Grier;
- July 19, 1852, filled on Mar. 22, 1853 by John Archibald Campbell;
- May 31, 1860, filled on July 16, 1862 by Samuel Freeman Miller;
- Oct. 12, 1864, filled on Dec. 6, 1864 by Salmon Chase;
- Mar. 23, 1888, filled on July 20, 1888 by Melville Fuller;
- Jan. 22, 1892, filled on July 26, 1892 by George Shiras Jr.;

by the Senate prior to the election.<sup>80</sup> In two others, a president's election year nominees were confirmed after the election, but in both of these cases the nomination was not made until after the election either (and in one, the nominee was the sixth sent up for that seat). The remaining vacancies were not filled until later, usually by subsequent presidents. Justice Anthony Kennedy was confirmed in a presidential election year, 1988, although the vacancy arose and his nomination was first made in 1987, after two prior nominations had failed.<sup>81</sup> In sum, there are too few instances of election-year vacancies upon which to build *any* claim of historical practice, in either direction, let alone the sort of unbroken tradition that could ripen into a constitutional norm obligating the Senate to act.

In an extensive and thoughtful article, Professors Robin Bradley Kar and Jason Mazzone argue that the Senate majority's refusal to consider the Garland nomination is historically unprecedented and violates a longstanding "historical rule" governing nominations:

Whenever a Supreme Court vacancy has existed during an elected President's term and the President has acted prior to the election of a successor, the sitting President has been able to both nominate and appoint someone to fill the relevant vacancy, by and with the advice and consent of the Senate.<sup>82</sup>

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- Jan. 2, 1916, filled on June 1, 1916 by Louis Brandeis;
  - June 10, 1916, filled on July 24, 1916 by John Hessin Clarke;
  - Jan. 12, 1932, filled on Feb. 24, 1932 by Benjamin Cardozo;
  - Nov. 16, 1939, filled on Jan. 16, 1940 by Frank Murphy;
  - Oct. 15, 1956, filled on Mar. 19, 1957 by William Brennan.

See Jonathan H. Adler, *In Election Years, A (Spotty) History of Confirming Court Nominees*, WASH. POST (Feb. 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/>; *Timeline of the Justices*, SUP. CT. HIST. SOC'Y, [http://supremecourthistory.org/history\\_timeline.html](http://supremecourthistory.org/history_timeline.html) (last visited Oct. 8, 2016); *Supreme Court Nominations, Present-1789*, UNITED STATES SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Oct. 8, 2016).

<sup>80</sup> The seven nominees approved prior to the election were: Johnson, Fuller, Shiras, Brandeis, Clarke, Cardozo, and Murphy. See *Supreme Court Nominations, present-1789*, UNITED STATES SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Oct. 8, 2016).

<sup>81</sup> President Ronald Reagan first nominated Judge Robert Bork to replace the Justice Lewis Powell. After the Senate rejected Bork's nomination, Reagan nominated Judge Douglas Ginsburg, but Judge Ginsburg withdrew his nomination after only a few days, and before his nomination was formally submitted to the Senate. Although Powell stepped down in June 1987, the approaching presidential election and the potential for his replacement to alter the balance of the Court, made the confirmation process for his successor more contentious than it might otherwise have been. As then-Senator Joseph Biden would recount in 1992, many "questioned our committee's ability to fairly process the Bork nomination—a year before the 1988 campaign—without becoming entangled in Presidential politics." 138 CONG. REC. 16,316 (1992) (statement of Sen. Biden).

<sup>82</sup> Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 62–63 (2016).

The gerrymandered formulation of this rule—which seems to imply the Senate must confirm, and not merely consider, a nominee—should be sufficient to demonstrate that there is no constitutional norm with regard to Senate conduct, and certainly no norm requiring affirmative consideration of a nominee.<sup>83</sup>

In order to determine whether there is a constitutional norm governing Supreme Court nominations, one cannot consider Senate conduct in isolation. After all, as Kar and Mazzone note, the process necessarily involves engagement between the executive and legislative branch. Thus, one would have to consider the possibility of a norm of Senate conduct in conjunction with the possibility of a norm of presidential conduct, such as a norm against forwarding nominations to fill vacancies that arise in an election year prior to an election when the Senate is controlled by the opposition party.

Kar and Mazzone discount the Senate's rejection of Fortas (because there was no actual vacancy) and place substantial emphasis on the fact that the Senate has most commonly rejected election-year nominations when the President obtained office by succession. Yet they do not consider what effect (if any) the adoption of presidential term limits should have on the analysis (insofar as it creates the possibility of lame-duck nominations by Presidents who are no longer politically accountable to the electorate) and fail to consider what relevance, if any, the practice of many Presidents to defer making a nomination until after the intervening election should have on the analysis. The point here, again, is not that there is a precedent in support of the Senate's current obstruction. There is not. Instead, the point is far more modest—that there is no countervailing constitutional norm that could support a claim of constitutional obligation.

Any attempt to argue that there is a constitutional norm sufficient to create a constitutional obligation for the Senate to act to confirm an election year nomination is plagued by the problem that there are so few cases to examine. As already noted, the death of Justice Scalia created the first election-year vacancy in over fifty years. Skipping over the Fortas nomination, the last time a President made a nomination to fill an election year vacancy was in 1940, when the White House and Congress were aligned and there was no prospect of a confirmation altering the balance of the Court.

While there are relatively few instances in which the Senate considered a President's nominee to fill a Supreme Court vacancy that arose during an election year, there are numerous examples of the Senate refusing to confirm—indeed, even refusing to consider—a President's nominees to lower courts when the nominations were made during an election year. A few of these were discussed above. Kar and Mazzone discount the relevance of these nominations, however, arguing that the Supreme Court is different. They write:

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<sup>83</sup> For a critique of this view, see White, *supra* note 13.

Lower federal judges are not inferior officers and they have Article III protections. Thus, appointments related to lower federal judges might seem to provide an important counterexample to the previous argument. Still, lower courts are themselves created by legislation whereas the Supreme Court is established by the Constitution and cannot be extinguished by Congress. Hence, Congress's greater power to create or abolish lower federal courts through legislation arguably include the lesser power to implicitly consent to long-standing senatorial practices that allow for the transfer of some lower federal judicial appointments submitted late in a president's final term. Once again, however, no analogous legislative power exists with respect to the Supreme Court.<sup>84</sup>

Here Kar and Mazzone seek to manufacture a distinction that simply does not exist in the Constitution. As noted above, individual seats on the Supreme Court are as much a creature of "legislative act" as are lower federal courts. If Congress's power to extinguish seats on lower courts means the Senate may choose "to let certain late appointments to those courts lapse shortly before a presidential transition," there is no reason why this would not apply to the ninth seat on the Supreme Court.<sup>85</sup>

The long and short of this analysis is that there is no well-established tradition of successful nominations to fill judicial vacancies in election years. There are few such instances, and none in the modern era on all fours with the present. If anything, there is a tradition of seeking to avoid this scenario. Again, the claim is not that precedent supports the refusal to consider a replacement for Justice Scalia prior to the election. Rather, the claim is that there is no well-established precedent—and nothing remotely resembling a constitutional norm—to the contrary.

#### IV. ESCAPING THE DOWNWARD SPIRAL

Senate Majority Leader Mitch McConnell's announcement that he would refuse to consider any nomination to replace Justice Antonin Scalia prior to the 2016 election did not occur in a vacuum. Although unprecedented (and, in my view, unwarranted), it occurred against a backdrop of ever increasing polarization and conflict in the judicial nomination process.

Since the mid-1980s, the judicial confirmation process has been in a downward spiral of increasing obstruction and dysfunction.<sup>86</sup> Over this period, each side has engaged in an escalating game of tit-for-tat, using Senate

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<sup>84</sup> See Kar & Mazzone, *supra* note 82, at 95 (citations omitted).

<sup>85</sup> Professor Tillman would go farther and challenge the claim that Congress's power to control the size of the Court includes the "lesser" power to hold a seat open, as the two powers are exercised by different entities. See Seth Barrett Tillman, *Why Senate Inaction As a Response to a Presidential Nomination Is Constitutional*, NEW REFORM CLUB (Apr. 1, 2016), <http://reformclub.blogspot.com/2016/04/part-4-why-senate-inaction-as-response.html>. The bottom-line point remains the same, however, as this applies equally to the Supreme Court and the lower courts.

<sup>86</sup> Credit for the characterization of the increasing politicization and obstruction goes to Larry Solum. See Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659,

majorities (and, sometimes, Senate minorities) to block the confirmation of highly qualified judicial nominees, including by refusing to consider nominations, particularly when such nominations occurred in election years. Senate Republicans may have been particularly obstructionist of President Obama's judicial nominees, retaliating for Democratic obstruction of Republican nominees, and then some. The same could be said of Senate Democrats' treatment of Bush nominees, Republican treatment of Clinton nominees and so on.

Asserting that the Senate has some form of constitutional obligation to act on a judicial nominee amounts to an effort to break the logjam by playing a trump card. It is as if to say that prior obstruction was acceptable (if regrettable) but this time—*this time*—a constitutional rule has been violated. If only it were so. As the above examination of text, structure, and historical precedent seeks to show, there is no constitutional obligation for the Senate to consider a presidential nomination to the Supreme Court. There are strong political and prudential arguments for prompt consideration of all nominees, but not particularly strong constitutional ones.

Ending the ever-worsening conflict over judicial nominations will not be achieved by playing an imaginary constitutional trump. Rather, it will occur when the competing sides of this conflict are willing to recognize the harm this conflict does to the judiciary, and the importance of a more regular and rational confirmation process. It will also likely occur only when each side is willing to engage in compromise. In short, the answer to the judicial confirmation mess lies in politics, and not in overstated appeals to constitutional principle.

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661 (2005) (“Recent events, particularly the filibuster of several judicial nominees and the use of the recess appointments power to circumvent the filibusters, may constitute a downward spiral of politicization.”).