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CONFIRMING SUPREME COURT JUSTICES IN A PRESIDENTIAL ELECTION YEAR

CARL TOBIAS*

Justice Antonin Scalia's death prompted United States Senate Majority Leader Mitch McConnell (R-Ky.) and Judiciary Committee Chair Chuck Grassley (R-Iowa) to argue that the President to be inaugurated on January 20, 2017—not Barack Obama—must fill the empty Scalia post.¹ Obama in turn expressed sympathy for the Justice's family and friends, lauded his consummate public service, and pledged to nominate a replacement "in due time," contending that eleven months remained in his administration for confirming a worthy successor.² Obama admonished that the President had a constitutional duty to nominate a superlative aspirant to the vacancy, which must not have persisted for more than one year, while the Senate had a constitutional responsibility to advise and consent on the nominee proffered.³ Because this dynamic affected efficacious Supreme Court operations and precipitated a constitutional standoff, the issue merits analysis.

Part I surveys the Constitution's words, policy, practical and political considerations, history, and custom. It ascertains that numerous phenomena demonstrate Obama should have recommended, and did expeditiously tap, a highly competent prospect whom the Senate ought to have promptly and carefully scrutinized. Although President Obama nominated U.S. Court of

* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for valuable suggestions, Katie Lehen for exceptional research, the *Washington University Law Review* editors for superb editing, Leslee Stone for excellent processing, as well as Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Remaining errors are mine.

1. Press Release, Senator Mitch McConnell, Justice Antonin Scalia (Feb. 13, 2016), <http://www.mcconnell.senate.gov/public/index.cfm/2016/2/justice-antonin-scalia>; Press Release, Senator Chuck Grassley, Grassley Statement on the Death of Supreme Court Justice Antonin Scalia (Feb. 13, 2016), <http://www.grassley.senate.gov/news/news-releases/grassley-statement-death-supreme-court-justice-antonin-scalia>; Jonathan Martin, *Republican Candidates Unite Against Obama on Replacing Scalia*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/politics/republicans-unite-against-president-obama.html>; see 162 CONG. REC. S897 (daily ed. Feb. 22, 2016) (statement of Sen. Grassley); *id.* at S925 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell).

2. White House, Office of the Press Sec'y, *Remarks by the President on the Passing of U.S. Supreme Court Justice Antonin Scalia* (Feb. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/13/remarks-president-passing-us-supreme-court-justice-antonin-scalia>.

3. See *id.*; White House, Office of the Press Sec'y, *Remarks by President Obama at U.S.-ASEAN Summit Press Conference* (Feb. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/16/remarks-president-obama-us-asean-press-conference>; see also Barack Obama, *A Responsibility I Take Seriously*, SCOTUSBLOG (Feb. 24, 2016 8:00 AM), <http://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/>. But see Chuck Grassley, *Coequal Branches of Government*, SCOTUSBLOG (Mar. 1, 2016), <http://www.scotusblog.com/2016/03/coequal-branches-of-government/>.

Appeals for the District of Columbia Circuit Chief Judge Merrick Garland on March 16, the upper chamber majority steadfastly refused to consider the nominee. Therefore, the piece investigates suggestions, especially for breaking the gridlock and according Judge Garland Senate review, which chamber members should have followed but did not consider.

I. REASONS FAVORING 2016 NOMINATION AND CONFIRMATION

Article II is clear: the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”⁴ The document assigns the chief executive power to affirmatively initiate selection. The Constitution also checks White House recommendation of judicial picks who lack the requisite qualifications by making the Senate advise and consent on the President’s nominees,⁵ but it excludes specific procedures for how lawmakers might discharge these responsibilities, thus allowing senators to institute or eschew a process.⁶

The Constitution in fact lacks any time sequence for exercising this presidential duty. Should the chamber reject or ignore the first nominee, the President may tender others until the Senate agrees to a nominee. The document concomitantly enables the President to use recess appointments in duly filling vacancies that materialize when the chamber recesses.⁷ However, senators now employ “pro forma” sessions, which leave the body perpetually in session, thereby denying Obama a recess appointment.⁸ The

4. U.S. CONST. art. II, § 2, cl. 2; see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS*, 16–38 (2000).

5. U.S. CONST. art. II, § 2, cl. 2; Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2236 (2013); see Betsy McCaughey & Michael B. Mukasey, *Opinion, Obama’s Ahistorical Scolding About the Supreme Court*, WALL ST. J. (Apr. 10, 2016, 4:29 PM), <http://www.wsj.com/articles/obamas-ahistorical-scolding-about-the-supreme-court-1460320194>.

6. Letter from Senator Charles E. Grassley, Chairman, Senate Judiciary Comm., et al., to Senator Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/SCOTUS%2C%2002-23-16%2C%20member%20signed%20letter%2C%20no%20hearings.pdf>. *But see* Letter from Senator Patrick Leahy et al., to Senator Charles E. Grassley, Chairman, Senate Judiciary Comm. (Feb. 23, 2016), <http://www.leahy.senate.gov/imo/media/doc/022316%20SJC%20Dems%20to%20SJC%20Reps%20on%20SCOTUS%20vacancy.pdf>; S.M., *The Folly of the GOP’s Preemptive Strike Over a Supreme Court Nominee*, ECONOMIST: DEMOCRACY IN AMERICA (Feb. 24, 2016, 5:43 PM), <http://www.economist.com/blogs/democracyinamerica/2016/02/replacing-antonin-scalia>.

7. U.S. CONST. art. II, § 2, cl. 3; see *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014).

8. *E.g.*, *Schedule for May 27, May 31, June 3, and Monday, June 6, 2016*, U.S. SENATE DEMOCRATS (May 27, 2016 12:30 PM), <https://democrats.senate.gov/2016/05/27/schedule-for-may-27-may-31-june-3-and-monday-june-6-2016/> (describing pro forma sessions held every 3–4 days over a Senate adjournment); Kelsey Snell, *Senate Republicans Don’t Plan to Let Obama Replace Scalia Over Senate Recess*, WASH. POST: POWERPOST (Feb. 23, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/senate-republicans-dont-plan-to-let-obama-replace-scalia-over->

President declared that a recess appointment was unnecessary because considerable time remained during his tenure for selecting and confirming a preeminent replacement.⁹

Policy and practical concerns also favor expediently seating Justices. The High Court, perhaps more than any tribunal, needs its full complement of members to operate efficiently. Filings are substantial, with the Court receiving 7,000 certiorari petitions annually from which it selects 100 for comprehensive treatment.¹⁰ Equally important, when the Justices are closely divided on plentiful questions, as today, 4-4 splits occur. This conundrum allows lower court opinions to govern and could leave numerous matters unresolved for extended times, while the problem squanders judicial resources directly necessitated by later reargument of many cases.¹¹ Indeed, two clear examples had already arisen by March 2016: issuance of the 4-4 opinion in *Friedrichs v. California Teachers Ass'n*¹² and of the unusual order which requested supplemental briefing in *Zubik v. Burwell*.¹³ Waiting until the next President nominated and confirmed a successor meant that the new Justice might not actually join the Court until October 2017, relegating the Justices to working absent a full contingent for one and a half Terms.¹⁴

recess/; see *Noel Canning*, 134 S. Ct. at 2557.

9. See *supra* notes 2-3 and accompanying text.

10. JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015).

11. Jess Bravin & Brent Kendall, *Protracted Eight-Member Supreme Court Could Stymie Rulings on Host of Issues*, WALL ST. J. (Feb. 17, 2016, 4:17 PM), <http://www.wsj.com/articles/protracted-eight-member-supreme-court-could-stymie-rulings-on-host-of-issues-1455736163>; Adam Liptak, *Rulings and Remarks Tell Divided Story of an 8-Member Supreme Court*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html>; Dahlia Lithwick, *The Supreme Court is Bored out of Its Mind*, SLATE (June 1, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_is_bored_out_of_its_mind.html. But see Josh Blackman & Ilya Shapiro, Opinion, *Only Eight Justices? So What*, WALL ST. J. (Feb. 23, 2016, 7:01 PM), <http://www.wsj.com/articles/only-eight-justices-so-what-1456272088>; Chuck Grassley, Opinion, *Sky Won't Fall With One Less Justice*, DES MOINES REG. (Apr. 10, 2016, 7:00 PM), <http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2016/04/10/grassley-sky-wont-fall-one-less-justice/82794878/>.

12. 136 S. Ct. 1083 (2016) (per curiam); see Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html>.

13. 2016 WL 1203818 (Mar. 29, 2016) (mem.); see Adam Liptak, *Supreme Court Hints at Way to Avert Tie on Birth Control Mandate*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/politics/supreme-court-hints-at-way-to-avert-tie-on-birth-control-mandate.html>. This order seemed to resemble administrative agency notice-comment rulemaking more than the Court's usual practice. The Justices ultimately remanded the appeals to the lower courts for resolution. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam); see Dahlia Lithwick, *The Supreme Court Is Not Doing Its Job*, SLATE (May 19, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/the_supreme_court_doesn_t_work_with_only_eight_justices.html; Editorial, *The Crippled Supreme Court*, N.Y. TIMES (May 17, 2016), <https://www.nytimes.com/2016/05/17/opinion/the-crippled-supreme-court.html>.

14. Confirmation seemed unlikely before June 2017 when the Court Term concluded. See Bravin

Political factors deserve consideration as well and supported expeditiously filling the opening. The Republican Party's refusal to scrutinize a nominee recommended by the Democratic President ostensibly so a chief executive from its party would have the opportunity to appoint the Justice might undermine public confidence about the selection process, the Court, and the Senate. Chief Justice John Roberts has always been concerned as to citizen perceptions that the Justices seemingly are politicians while the Supreme Court appears like a political branch.¹⁵

Senator McConnell's claim that the next President must replace Scalia to give the public some voice in the selection process and Grassley's corresponding assertion that Justices have not received confirmation during a presidential election year lacked support.¹⁶ First, the people had already spoken twice—in 2008 and 2012—by electing Obama President. Second, constitutional wording makes no distinct provision for selection across a President's concluding year, while specifically inserting a recess appointments clause, which envisions that appointments can happen any time over a presidency's duration.¹⁷ The historical record offers clear illustrations throughout America's existence of Justices whom the Senate confirmed in presidential election years.¹⁸ In 1932, Herbert Hoover

& Kendall, *supra* note 11; S.M., *supra* note 6; see also Robert Barnes, *Scalia's Death Affecting Next Term Too? Pace of Accepted Cases at Supreme Court Slows*, WASH. POST (May 1, 2016), https://www.washingtonpost.com/politics/courts_law/scalias-death-affecting-next-term-too-pace-of-accepted-cases-at-supreme-court-slows/2016/05/01/1d304d1c-0ecb-11e6-bfa1-4efa856caf2a_story.html. However, the Senate did confirm Justice Neil Gorsuch in April 2017, so that the jurist was able to serve for part of the Court's October 2016 Term. 163 CONG. REC. S2442-43 (daily ed. Apr. 7, 2017); Adam Liptak & Matt Flegenheimer, *Court Nominee is Confirmed After Bruising Yearlong Fight*, N.Y. TIMES, Apr. 8, 2017, at A1.

15. Brent Kendall & Jess Bravin, *John Roberts Looks to Steer Supreme Court Through Political Winds*, WALL ST. J. (Feb. 19, 2016, 9:53 PM), <http://www.wsj.com/articles/john-roberts-looks-to-steer-supreme-court-through-political-winds-1455926092>; Dahlia Lithwick, *Order in the Court!*, SLATE (Feb. 23, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/john_roberts_will_not_let_there_be_chaos_at_the_supreme_court.html.

16. See S.M., *supra* note 6; Gary Wills, *The Next Justice? It's Not Up to Us*, N.Y. REV. BKS. (Feb. 15, 2016, 5:51 PM), <http://www.nybooks.com/daily/2016/02/15/next-supreme-court-justice-not-up-to-us/>; Geoffrey Stone, *Sen. Kirk, Here's How You Can Persuade the GOP to Consider Merrick Garland*, CHICAGO TRIB., Mar. 28, 2016, <http://www.chicagotribune.com/news/opinion/commentary/ct-mark-kirk-merrick-garland-supreme-court-perspec-0329-jm-20160328-story.html>. But see *supra* note 1; Mitch McConnell & Chuck Grassley, *Opinion, Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html; McCaughey & Mukasey, *supra* note 5; 162 CONG. REC. S1775 (daily ed. Apr. 7, 2016) (statement of Sen. McConnell).

17. See *supra* notes 6–7 and accompanying text.

18. Gregor Aisch et al., *Partisan Standoff Leaves Supreme Court Seat Empty for More Than 350 Days*, N.Y. TIMES (Feb. 1, 2017), <http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html>. One reason why more have not been confirmed is that few

appointed Benjamin Cardozo; during 1940, Franklin Roosevelt confirmed Frank Murphy; and in 1956, Dwight Eisenhower recess appointed William Brennan whom the Senate did ultimately confirm.¹⁹ The most recent, pertinent instance was Anthony Kennedy whom Ronald Reagan appointed on a 97-0 vote his final year when Democrats enjoyed a chamber majority.²⁰

In short, the arguments for employing Supreme Court nomination and confirmation procedures were more convincing than reasons which favored delay, although the parties share considerable responsibility for the confirmation wars and concomitant dilatory appointments. Therefore, Part II offers suggestions for proposing and scrutinizing High Court nominees and breaking gridlock.

II. SUGGESTIONS FOR NOMINATION AND CONFIRMATION

A. *Regular Order*

As demonstrated in Part I, it was preferable that the chief executive swiftly nominate a prospect to replace Scalia and the chamber promptly advise and consent by meticulously canvassing the selection. The President quickly sent a very qualified designee, as he promised.²¹ Obama's tapping of a sitting circuit judge, like nearly all present Supreme Court members, facilitated Senate consideration, as the Federal Bureau of Investigation (FBI) background check and American Bar Association (ABA) evaluation only needed to be updated.²² The President's Counsel had already compiled

Justices die in office, while most who resign avoid doing so in election years to minimize disputes like the present one. Since the Senate instituted hearings in 1916, all nominees have secured hearings. Leahy Letter, *supra* note 6.

19. Aisch et al., *supra* note 18; Bryan H. Wildenthal, *Memorandum on Supreme Court Vacancies and Confirmations During Presidential Election Years 6-7*, 15 (Thomas Jefferson Sch. of Law, Research Paper No. 2735256, 2016).

20. President Reagan nominated Kennedy in late 1987, and the Senate confirmed him 97-0 in 1988. Aisch et al., *supra* note 18; see David G. Savage & Michael A. Memoli, *In Supreme Court Battle, Does 'Advise and Consent' Still Work?*, L.A. TIMES, (Feb. 27, 2016, 11:35 AM), <http://www.latimes.com/nation/la-na-senate-court-20160226-story.html>.

21. See *supra* notes 2-3 and accompanying text; Editorial, *Name Your Supreme Court Pick, President Obama*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/opinion/name-your-supreme-court-pick-president-obama.html>. He should have and did rely on Vice President Joe Biden, a three-decade Judiciary panel member, who chaired Judge Robert Bork's process and enjoyed cordial relationships with many senators. See Tobias, *supra* note 5, at 2239; Joseph R. Biden, Jr., Opinion, *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>.

22. The Senate also confirmed Judge Garland once, and the jurist had a lengthy, accessible judicial record. See Tobias, *supra* note 5, at 2258 (discussing how all contemporary Presidents have attempted to elevate sitting federal judges, as that practice usually facilitates confirmation in part because the FBI background check and the ABA evaluation only needed to be updated while the Senate has already

a “short list” of individuals for his assessment.²³ The executive continued its assiduous consultation with and cultivation of both parties’ senators, especially leaders and committee members, pursuing guidance regarding both nomination and confirmation generally and specific potential nominees.²⁴

Senator Grassley initially remarked that he intended to await the President’s nomination before deciding whether the committee would schedule a public hearing.²⁵ Nevertheless, the Chair swiftly reneged on that promise.²⁶ For the reasons documented in Part I,²⁷ the senator should have relented and promptly set a hearing for Judge Garland.

The Judiciary Committee needed to stringently analyze the nominee by cooperating with the FBI, the ABA, and the Justice Department.²⁸ Once those entities concluded their investigations, the panel should then have conducted a several-day hearing which permitted members to robustly query the nominee.²⁹ Of course, while senators may probe any subject,

confirmed the nominee, who has compiled a judicial record).

23. Josh Gerstein, *Obama’s Supreme Court Short List*, POLITICO (Feb. 14, 2016, 6:58 AM), <http://www.politico.com/story/2016/02/antonin-scalia-replacement-219271>; Charlie Savage, *Potential Nominees Obama May Consider to Fill Antonin Scalia’s Seat*, N.Y. TIMES (Feb. 14, 2016), <http://www.nytimes.com/2016/02/15/us/politics/potential-nominees-obama-may-consider-to-fill-antonin-scalias-seat.html>.

24. Tobias, *supra* note 5, at 2240, 2258; Gardiner Harris & David M. Herszenhorn, *Obama and G.O.P. Senators Meet on Filling Scalia’s Seat, to No Avail*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/us/politics/obama-to-make-case-to-gop-senators-to-fill-supreme-court-seat.html>; Seung Min Kim, *Inside Obama’s Supreme Court Charm Offensive*, POLITICO (Apr. 10, 2016, 4:35 PM), <http://www.politico.com/story/2016/04/senate-obama-calls-garland-221717>.

25. Burgess Everett, *Grassley Won’t Rule Out Hearings on Obama’s SCOTUS Pick*, POLITICO (Feb. 16, 2016, 11:58 AM), <http://www.politico.com/story/2016/02/chuck-grassley-obama-supreme-court-219320>; Mark Landler & Jennifer Steinhauer, *President Raises Stakes in Supreme Court Nominee Battle*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/17/us/politics/senator-charles-grassley-hearings-supreme-court-nominee.html>.

26. Grassley, *supra* note 1; 162 CONG. REC. S897 (daily ed. Feb. 22, 2016) (statement of Sen. Grassley); *id.* at S1661 (daily ed. Apr. 5, 2016) (statement of Sen. Grassley); see Michael D. Shear, *Meeting Merrick Garland to Tell Him Why G.O.P. Won’t Hold Hearings*, N.Y. TIMES (Apr. 4, 2016), <http://www.nytimes.com/2016/04/05/us/politics/meetingmerrick-garland-to-tell-him-why-gop-wont-hold-hearings.html>; Kelsey Snell, *Why Won’t Grassley Hold Supreme Court Hearings? He Fears Republicans More than Democrats*, WASH. POST: POWERPOST (Apr. 5, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/04/04/grassley-sticks-to-republican-script-on-supreme-court-nomination/>.

27. See *supra* notes 4–20 and accompanying text. But see Mike DeBonis, *Grassley Holds Firm Against Supreme Court Action After Meeting with Garland*, WASH. POST: POWERPOST (Apr. 12, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/04/12/former-aba-presidents-push-for-supreme-court-action-as-garland-continues-meetings-with-gop-senators/>; David Herszenhorn, *Senator Grassley and Judge Garland Meet, and Rehash the Obvious*, N.Y. TIMES (Apr. 12, 2016), <http://www.nytimes.com/2016/04/13/us/politics/senator-chuck-grassley-merrick-garland-meet.html>.

28. See *supra* note 22 and accompanying text (because Garland had been comprehensively vetted, the analysis could be rather brief).

29. The nominee provides an opening statement, members employ fifteen-minute rounds to pose

certain questions are conventionally considered improper. Most obvious are queries that seek a nominee's views concerning topics which encompass issues, such as abortion, criminal law, and immigration, which the Justices currently are examining or may confront over the nominee's tenure.³⁰ The nominee might decline to answer by responding that the individual could evaluate the matter when a Justice, deferring so the nominee could avoid recusal, if confirmed. Different questions appear less clear. One area relates to the nominee's ideological perspectives.³¹ Queries which explore those views could be improper, but many senators and close observers find them appropriate, even though legislators who probe ideology often seem to do so for partisan reasons.³²

The Chair next ought to have expeditiously arranged a panel discussion and speedy ballot. All committee members routinely participate and the debate is often somewhat lengthy, controversial, and rigorous. Following comprehensive discussion, the panel votes. Even when there is a tie or negative ballot, the committee has typically sent nominees to the floor. Recent examples include then-Circuit Judge (now Justice) Clarence Thomas and Circuit Judge Robert Bork.³³

It was unclear whether the chamber would have blocked a floor debate and vote by mounting a filibuster. Republican presidential candidate Senator Ted Cruz (R-Tex.) proclaimed quickly after Scalia died that he

questions, and witnesses address the nominee's qualifications.

30. Adam Liptak, *Scalia's Absence Is Likely to Alter Court's Major Decisions This Term*, N.Y. TIMES (Feb. 14, 2016), <http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html>; see Laurence H. Tribe, *The Scalia Myth*, N.Y. REV. BKS (Feb. 27, 2016), <http://www.nybooks.com/daily/2016/02/27/the-scalia-myth/>.

31. See generally *Judicial Nominations 2001: Should Ideology Matter? Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 1 (2001); *Judicial Activism: Assessing the Impact, Hearings Before the Subcomm. on the Const., Federalism, & Property Rights of the S. Comm. on the Judiciary*, 105th Cong. 63 (1997).

32. Not answering fails to disqualify nominees, but senators frequently state that they consider refusal in casting panel and floor votes. E.g., S. Judiciary Comm., *Attorney General Nomination* (2015), <http://www.judiciary.senate.gov/meetings/attorney-general-nomination> (last visited May 14, 2016) (providing examples of senators' statements about the effect they accord nominees' refusal to answer questions); see *id.* (announcing the record would remain open for a week so members could tender written questions).

33. Neil A. Lewis, *Judiciary Panel Deadlocks, 7-7, on Thomas Nomination to Court*, N.Y. TIMES (Sept. 28, 1991), <http://www.nytimes.com/1991/09/28/us/thomas-nomination-judiciary-panel-deadlocks-7-7-thomas-nomination-court.html>; Steven V. Roberts, *9-5 Panel Vote Against Bork Sends Nomination to Senate Amid Predictions of Defeat*, N.Y. TIMES (Oct. 7, 1987), <http://www.nytimes.com/1987/10/07/us/9-5-panel-vote-against-bork-sends-nomination-senate-amid-predictions-defeat.html>; see Letter from Senator Patrick J. Leahy, Chairman, Senate Judiciary Comm. & Senator Orrin G. Hatch to Senate Colleagues (June 29, 2001), <https://www.leahy.senate.gov/imo/media/doc/6-29-2001%20CR%20-%20P JL-Hatch%20Letter.pdf> (Chair and Ranking Member informing Senate colleagues that committee practice is to report Supreme Court nominees, even when a committee majority opposes a nominee).

would effectuate a filibuster.³⁴ Obstructing ballots for Court nominees has been rare. The first modern illustration occurred in 1968, when the GOP employed this measure to defeat President Lyndon Johnson's nomination of Supreme Court Justice Abe Fortas to the vacant Chief Justice post. In 2006, then-Senator Obama and his party colleagues filibustered Justice Samuel Alito's nomination to the Court.³⁵ If Republicans had decided to filibuster, the nominee must have earned fourteen GOP votes for cloture.³⁶ McConnell insisted that Obama should not be permitted to appoint Scalia's replacement.³⁷

However, prior Senates have arranged many confirmation processes, notably floor debates and votes, over presidential election years. Thus, the Majority Leader should have relented, but he refused to conduct the normal thirty-hour debate and yes or no ballot.³⁸ He should have rapidly orchestrated debate which comprehensively and robustly scrutinized the many issues pertinent to Court service, while being dignified and respectful of the designee and contrary perspectives. After ventilating numerous questions, the chamber must have supplied an expedient roll call vote.

34. Martin, *supra* note 1; Elise Viebeck, *Cruz Vows to Filibuster Any Obama Nominee to Replace Scalia*, WASH. POST (Feb. 14, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/14/cruz-vows-to-filibuster-any-obama-nominee-to-replace-scalia/>.

35. BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 512–22 (1988); John T. Bennett, *Alito Filibuster Vote Haunts Obama*, ROLLCALL (Feb. 17, 2016, 4:13 PM), <http://www.rollcall.com/news/alito-filibuster-vote-haunts-obama>. A favorable cloture vote ends a filibuster and allows for a debate and a final vote.

36. The “nuclear option” left the sixty-vote rule intact for Supreme Court nominees. Gregory Dickinson, *One Justice, Two Justice, Red Justice, Blue Justice: Dissecting the Role of Political Ideology in Supreme Court Nominations*, 2017 U. ILL. L. REV. 345, 368; see Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121, 131 (2015) (analyzing Democrats' 2013 explosion of the nuclear option); David Weigel, *The Nuclear Option: Because No One's Ever Going to Filibuster a Supreme Court Nominee Anyway*, SLATE (Nov. 1, 2013, 9:26 AM), http://www.slate.com/blogs/weigel/2013/11/01/the_nuclear_option_because_no_one_s_ever_going_to_filibuster_a_supreme_court.html.

37. See *supra* note 1.

38. Lincoln Caplan, *GOP Obstruction and the Supreme Court*, NEW YORKER (Feb. 25, 2016), <http://www.newyorker.com/news/news-desk/g-o-p-obstructionism-and-the-supreme-court>; see *supra* note 24. A few GOP senators favored processing and some did meet with Garland after they had voiced opposition. However, most Republican senators remained opposed to a hearing or vote. Herszenhorn, *supra* note 27; Emmarie Huetteman, *Court Nominee's First Meeting with Opposition Portends a Hard Path*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/us/politics/merrick-garland-collins-boozman-grassley.html>; Seung Min Kim & Burgess Everett, *Conservatives Pounce Over Garland Meetings*, POLITICO (Apr. 4, 2016, 7:35 PM), <http://www.politico.com/story/2016/04/kelly-ayotte-meet-merrick-garland-supreme-court-221538>; see Mike DeBonis, *A Hundred Days Later, White House Isn't Giving up on Replacing Antonin Scalia*, WASH. POST: POWERPOST (May 25, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/25/a-hundred-days-later-white-house-isnt-giving-up-on-replacing-antonin-scalia/>.

B. Suggestions When the GOP Rejected Regular Order

When the GOP failed to process Obama's nominee, the President and Democratic senators could have employed multiple approaches to break the gridlock. Obama could have withdrawn Judge Garland and proffered another nominee who seemed more palatable to opposition senators, although he pledged to, and did, eschew this approach.³⁹ Republicans' claim that principle animated their resistance concomitantly meant that other nominees may not have proved more acceptable. Obama could have reviewed, and perhaps deployed, rather controversial notions. The administration might have compromised about the type of stellar, diverse, consensus nominees whom Obama found preferable and tendered a candidate viewed as comparatively acceptable to Republicans vis-à-vis considerations, including age, ethnicity, gender and ideology.⁴⁰ However, Judge Garland exemplifies these attributes; "compromising" even further seemed, and proved, unacceptable.⁴¹ Similar ideas would have been elevation of lower court jurists whom GOP administrations confirmed and Obama designees whom Republicans powerfully supported because, for instance, the politicians suggested their nominations or the judges could bring experiential diversity as former prosecutors, which the senators regularly favor.⁴²

The President and Senate Democrats might have contemplated, and possibly implemented, related compromises, but they chose not to do so. A

39. Anne Gearan, *No Political Influence in Clinton Email Probe, Obama Says*, WASH. POST (Apr. 10, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/04/10/no-political-influence-in-clinton-email-probe-obama-says/>; Ben Wolfgang, *Obama Vows Never to Pull Nomination of Merrick Garland to Supreme Court*, WASH. TIMES (Apr. 10, 2016), <http://www.washingtontimes.com/news/2016/apr/10/obama-vows-never-to-pull-nomination-of-merrick-gar/>.

40. Obama, *supra* note 3; see Tobias, *supra* note 5, at 2259. If Republicans had applied regular order, Obama could have eschewed a deal. Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 13–14, 36 (2016); James B. Stewart, *Republicans Have a Stake in Making a Deal on a Supreme Court Justice*, N.Y. TIMES (Mar. 3, 2016), <http://www.nytimes.com/2016/03/04/business/a-way-to-a-deal-on-a-supreme-court-nomination.html>. If not, he may assess these options, as few remain.

41. When I first wrote this piece, it stated that I was using solely for illustrative purposes these factors and the 63-year-old, white, male, centrist, who was on short lists and had GOP support. Nolan D. McCaskill, *Obama: I Could Have Nominated a Black Lesbian*, POLITICO (Apr. 7, 2016, 5:41 PM), <http://www.politico.com/story/2016/04/obama-supreme-court-black-lesbian-221697>; *supra* note 23 (speculating about potential nominees); see S.M., *supra* note 6 (assessing other candidates). *But see* David Sherfinski & Dave Boyer, *Merrick Garland Has 'Very Liberal View of Gun Rights'*, WASH. TIMES (Mar. 16, 2016), <http://www.washingtontimes.com/news/2016/mar/16/merrick-garland-has-very-liberal-view-gun-rights/>.

42. For instance, Obama elevated to the Fourth Circuit President George W. Bush's appointee District Judge Henry Floyd and confirmed many present and former prosecutors for whom most GOP senators voted. Tobias, *supra* note 5, at 2260.

salient example would have been “trades.” For instance, Obama and lawmakers could have adopted a ten-Justice Court, thus allowing each party to submit a new member.⁴³ This would have cabined the number of 5-4 opinions, yet it may have provoked 5-5 determinations while raising the specter of “court packing” and the question why new strictures govern when a Democratic President recommends a selection.⁴⁴ Less drastic might have been allowing Republicans to propose the nominee for the circuit vacancy which may have been created when the White House decided to elevate a circuit court judge.⁴⁵

Had Democrats chosen to institute those endeavors and they foundered on GOP resistance, Obama and Democratic senators could have entertained more confrontational, albeit comparatively ineffective, approaches. For example, Obama could have escalated his resort to the bully pulpit for holding senators accountable, promoted confirmation by taking the issue to the nation and framed the important need to fill Scalia’s vacancy as a critical election year issue.⁴⁶ The President could have attempted a recess appointment, but he stated that was unnecessary and the Supreme Court’s *Noel Canning* opinion apparently precluded this tactic.⁴⁷ Senate Democrats might have boycotted Judiciary Committee nominee hearings and meetings

43. Jeff Redding, *The Two Justice Solution*, FACULTY LOUNGE (Feb. 15, 2016, 3:05 PM), <http://www.thefacultyounge.org/2016/02/the-two-justice-solution.html>; see F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L. J. 645 (2009) (discussing reasons for, and impacts of, modifying the Court’s size).

44. JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); see Tobias, *supra* note 40, at 36.

45. See Tobias, *supra* note 36, at 140 (proposing Democrats offer Republicans the ability to designate a D.C. Circuit appointment); *supra* note 22. This and the ten-Justice proposition might have inaugurated a bipartisan judiciary that allowed the party lacking the White House to suggest some percentage of nominees, a long-term reform that could have ended the confirmation wars. 2016 was a presidential election year when both parties did not know who would win and benefit from change but would have wanted to appear confident that their nominees would be elected, so they may have favored permanent solutions. Thus, although the confluence of gridlock and the presidential election year seemingly presented an ideal moment for reform, legislative consideration of the bipartisan judiciary possibility may have overloaded the system. See Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L. J. ONLINE 2051 (2016).

46. See 158 CONG. REC. S1065 (daily ed. Feb. 28, 2012) (statement of Sen. Durbin) (condemning the failure to approve judicial nominees); David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008).

47. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); Amber Phillips, *How Obama Could Appoint Merrick Garland to the Supreme Court, And Why It’ll Never Happen*, WASH. POST: THE FIX (Mar. 21, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/21/how-obama-could-appoint-merrick-garland-to-the-supreme-court-and-why-itll-never-happen/>; see *supra* notes 8–9 and accompanying text. See generally Symposium, *Is the Appointments Process Broken? Insights from Practice, Process, and Theory*, 64 DUKE L. J. 1499 (2015) (evaluating numerous problems with the modern confirmation process and recess appointments’ inability to remedy them).

or chamber floor activity,⁴⁸ or they could have even attempted to bypass the committee and have a final vote.⁴⁹ Most of these notions could have leveraged Republicans through dramatizing and publicizing how the Supreme Court opening eviscerated justice.

CONCLUSION

The Constitution's phraseology, policy, practice, politics, history, and conventions show that President Obama rapidly and correctly proffered an experienced, mainstream nominee and the Senate should have promptly discharged its constitutional responsibility to furnish advice and consent, even when a Supreme Court vacancy arose in a presidential election year. Therefore, after Obama had carefully marshaled a profoundly qualified nominee, the Senate should have comprehensively and fairly evaluated the individual. When the Republican majority continued refusing to process Judge Garland, Obama and Senate Democrats may have wanted to, but did not, seriously consider and implement the rather confrontational approaches detailed in the paragraph above.

EPILOGUE

The GOP chamber majority did not follow the suggestions proffered above, because it refused to grant Chief Judge Merrick Garland any consideration by strenuously arguing that the people should decide this

48. "Shadow" hearings would be similar. Dahlia Lithwick, *Democrats Should Hold Hearings for Obama's Supreme Court Nominee*, SLATE (Feb. 24, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/senate_democrats_should_hold_shadow_hearings_for_obama_s_s_upreme_court_nominee.html; see Jess Bravin, *Democrats Stage Mock Garland Hearing Without Republicans or Garland*, WALL ST. J.: WASH. WIRE (May 18, 2016, 4:15 PM). Boycotts can stop lower court processing.

49. Gregory L. Diskant, Opinion, *Obama Can Appoint Merrick Garland to the Supreme Court If the Senate Does Nothing*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301_story.html; Seung Min Kim, *How Democrats Could Force a Supreme Court Vote*, POLITICO (Mar. 29, 2016, 2:44 PM), <http://www.politico.com/story/2016/03/chuck-grassley-supreme-court-vote-merrick-garland-221344>. *But see* Jonathan H. Adler, Opinion, *No President Obama CANNOT Appoint Merrick Garland to the Supreme Court If the Senate Does Nothing*, WASH. POST (Apr. 11, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/11/no-president-obama-cannot-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/>; Ilya Somin, Opinion, *Can President Obama Appoint Merrick Garland to the Supreme Court Without the Consent of the Senate?*, WASH. POST (Apr. 11, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/11/can-president-obama-appoint-merrick-garland-to-the-supreme-court-without-the-consent-of-the-senate/>.

question through the election of the next President.⁵⁰ Republican inaction dramatically transformed the story recounted earlier into a cautionary tale. The party's activity set a dangerous, even radical, precedent because the conduct was *sui generis* and devoid of a limiting principle.⁵¹ This meant that the Court functioned without all the Justices in substantial portions of two Terms, undermining the Court's role as expositor of national law. It exacerbated the striking partisanship, strident divisiveness, and systematic paybacks that suffuse the present Supreme Court appointments process, further undercutting the quality of, and citizen regard for, this severely deteriorated regime while additionally politicizing the Supreme Court.⁵²

Individuals and entities participating in the effort to fill the High Court opening should have fully contemplated ideas for discharging their responsibilities, although the GOP distinctly rejected the concepts tendered. President Donald Trump and Republican and Democratic senators should have carefully earned and restored public confidence in selection and the Court. They needed to begin this essential initiative by maximizing cooperation during nomination and confirmation and working to make the procedures open, comprehensive, robust, dignified, and consistent with other significant values, including privacy and healthy respect for the diverse views of senators and the nominee. Trump seemed to cautiously accord filling the Court vacancy high priority, assign upper echelon officials, particularly White House Counsel, lead responsibility, and furnish sufficient resources for the nomination and confirmation processes to insure success, because the Court must possess all of the Justices in order to effectively discharge its duties, as experience following Scalia's death

50. See *supra* note 16 and accompanying text.

51. Especially problematic was the spectre of GOP senators, namely Ted Cruz (Tex.) and John McCain (Ariz.), who intimated that they might consider no Supreme Court nominee over four years when it appeared that Hillary Clinton would capture the presidency. Amber Phillips, *Ted Cruz is Right: Senate Republicans Could Block Clinton Supreme Court Nominees Indefinitely*, WASH. POST: THE FIX (Oct. 27, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/john-mccain-is-right-senate-republicans-could-block-a-clinton-supreme-court-indefinitely/>; Sabrina Siddiqui, *Republican Senators Vow to Block Any Clinton Supreme Court Nominee Forever*, GUARDIAN (Nov. 2, 2016, 9:02 AM), <https://www.theguardian.com/law/2016/nov/01/republican-senators-oppose-clinton-supreme-court-nominee>.

52. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); see *supra* note 15 and accompanying text; see also Linda Greenhouse, Opinion, *Will the Supreme Court Stand Up to Trump?*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/04/opinion/sunday/will-the-supreme-court-stand-up-to-trump.html>. These phenomena, which were previously confined to the Supreme Court process or reserved for the appellate court regime, now infect the district court process with similar effects. Carl Tobias, *Confirming Judges in the 2016 Senate Lame Duck Session*, 19 U. PA. J. CONST. L. 1 (2016). It bears emphasis that the phenomena witnessed differed in kind rather than degree from the unprecedented failure to consider Judge Garland.

reveals.⁵³

I. THE NOMINATION PROCESS

In the presidential campaign, Trump aides compiled, with Federalist Society and Heritage Foundation assistance, two discrete lists encompassing twenty-one candidates from which Trump promised to select his nominee for the High Court.⁵⁴ The lists included many highly regarded, politically conservative sitting federal appeals court judges and state Supreme Court Justices.⁵⁵

Trump purportedly met with some of these aspirants before his inauguration.⁵⁶ On January 24, the chief executive announced that he would nominate a candidate in the coming days while hosting meetings to review the nomination and confirmation processes with, and solicit proposals from, McConnell, Grassley, Senate Minority Leader Chuck Schumer (N.Y.), and Judiciary Committee Ranking Member Dianne Feinstein (Cal.).⁵⁷ Across

53. The Court granted relatively few appeals and experienced 4-4 ties. *See supra* notes 11–14 and accompanying text. *But see* Eric Segall, *Eight Justices are Enough: A Proposal to Improve the United States Supreme Court* (Jan. 16, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2900555>; Michael Stokes Paulsen, *Eight is Enough (Justices That Is): Let the Court Unpack Itself*, NAT'L REV. (June 23, 2015, 12:18 PM), <http://www.nationalreview.com/bench-memos/420188/eight-enough-justices-let-court-unpack-itself-michael-stokes-paulsen>.

54. Adam Liptak, *Trump's Supreme Court List: Ivy League? Out. The Heartland? In.*, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/15/us/politics/trump-supreme-court-justices.html>; Kyle Peterson, *Opinion, Trump's Supreme Court Whisperer*, WALL ST. J. (Feb. 3, 2017, 6:46 PM), <https://www.wsj.com/articles/trumps-supreme-court-whisperer-1486165573>; Alan Rappeport & Charlie Savage, *Trump Offers a List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

55. Josh Gerstein, *A Closer Look at Trump's Potential Supreme Court Nominees*, POLITICO (Jan. 3, 2017, 6:38 AM), <http://www.politico.com/story/2017/01/trumps-supreme-court-nominees-233115>; *see* Adam Liptak, *Trump Promises Fast Action on Supreme Court Nomination*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/supreme-court-nomination-trump.html>; sources cited *supra* note 54. Trump pledged to, and did, nominate soon after his inauguration, announcing his nomination of Circuit Judge Neil Gorsuch on January 31 in a White House ceremony.

56. Shane Goldmacher, Eliana Johnson & Josh Gerstein, *How Trump Got to Yes on Gorsuch*, POLITICO (Jan. 31, 2017, 11:09 PM), <http://www.politico.com/story/2017/01/trump-supreme-court-gorsuch-234474>; Shawn Johnson, *Milwaukee's Diane Sykes Interviewed for SCOTUS Vacancy*, WIS. PUB. RADIO (Jan. 30, 2017), <http://www.wpr.org/milwaukees-diane-sykes-interviewed-scotus-vacancy>; David Lat, *Supreme Court Update: Trump Has Started Interviewing Candidates*, ABOVE THE LAW (Jan. 15, 2017, 9:27 AM), <http://abovethelaw.com/2017/01/supreme-court-update-president-elect-trump-has-started-interviewing-scotus-candidates/>.

57. Peterson, *supra* note 54; Sean Sullivan, *Senate Leaders Meet with Trump on Supreme Court Vacancy*, WASH. POST: POWERPOST (Jan. 24, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/24/mcconnell-says-senate-leaders-to-meet-with-trump-on-supreme-court-vacancy/>. On January 30, Trump accelerated nomination to January 31, reportedly to distract attention from the firestorm of opposition created by his January 28 issuance of controversial executive orders governing immigration. *See* Chris Geidner, *The Supreme Court Nomination Fight Might Now Be About Trump's Ban*, BUZZFEED (Jan. 29, 2017, 4:45 PM), <https://www.buzzfeed.com/chrisgeidner/the>

the ensuing period, numerous media outlets in turn speculated that three “finalists”—Judges Neil Gorsuch, Thomas Hardiman and William Pryor—had emerged.⁵⁸

The finalists tapped seemingly indicated a preference for federal circuit judges, as their experience most directly resembles that of the contemporary Justices.⁵⁹ Neil Gorsuch supplies impeccable qualifications, which putatively equal those of then-Judge Scalia, when the Senate approved him,⁶⁰ or Judge Garland. The principal consideration apparently was merit, characterized as consummate intelligence, diligence, ethics, independence and balanced judicial temperament. Gorsuch should possess, and senators needed to verify that he retains, (1) perspectives within the “mainstream” of Supreme Court jurisprudence, defined as not overly politically conservative or liberal, (2) substantial respect for High Court precedent and many state and federal legislative and executive branch initiatives, and (3) no prejudgments on the merits of the essential concerns to be addressed.⁶¹

supreme-court-nomination-fight-might-now-be-about-trumps; David A. Graham, *How Trump Can Use the Supreme Court To Get Conservatives in Line*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/01/how-trump-can-use-the-supreme-court-to-get-conservatives-in-line/514959/>. But see Dahlia Lithwick, *Trump’s Supreme Court Reality Show Was Not a Distraction*, SLATE (Jan. 31, 2017, 10:59 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/trump_s_supreme_court_reality_show_was_not_a_distraction.html.

58. They serve on the Tenth, Third and Eleventh Circuits, respectively. Nicholas Fandos, *The Top 3 Contenders for Trump’s Supreme Court Nomination*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/hardiman-gorsuch-pryor-justice.html>; Brent Kendall & Jess Bravin, *Who’s Who: Donald Trump’s Potential Supreme Court Picks*, WALL ST. J. (Jan. 31, 2017), <http://graphics.wsj.com/gallery/2016-supreme-court-names>.

59. Justice William Brennan, whom President Dwight Eisenhower elevated from the New Jersey Supreme Court, was the last Justice to be directly elevated from a state Supreme Court. However, Judge Diane Sykes, whom Bush elevated from the Wisconsin Supreme Court to the Seventh Circuit, received serious consideration from Trump. Kim Janssen, *Bad News for Diane Sykes? SCOTUS Nominee is a ‘He,’ Trump Spokesman Says*, CHI. TRIB. (Jan. 30, 2017), <http://www.chicagotribune.com/news/chicagoinc/ct-diane-sykes-scotus-out-0131-chicago-inc-20170130-story.html>.

60. E.g., Jacob Gershman, *Gorsuch: A Justice Made in Scalia’s Image?*, WALL ST. J.: L. BLOG (Jan. 31, 2017, 8:04 PM), <http://blogs.wsj.com/law/2017/01/31/gorsuch-a-justice-made-in-scalias-image/>; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html>; Peterson, *supra* note 54; see also *infra* note 88 and accompanying text.

61. Both President Trump and Secretary Clinton erred by making campaign promises to nominate Supreme Court aspirants based on choices’ views of specific issues, namely abortion, which the Court will address. E.g., Michele Gorman, *Donald Trump and Hillary Clinton Clash Over Supreme Court, Guns, Abortion*, NEWSWEEK (Oct. 19, 2016, 10:47 PM), <http://www.newsweek.com/2016-presidential-debate-trump-clinton-tackle-supreme-court-guns-abortion-511848>; Richard Wolf, *Supreme Court Debate: Stark Contrasts Emerge Between Trump, Clinton*, U.S.A. TODAY (Oct. 20, 2016, 1:48 PM), <http://www.usatoday.com/story/news/politics/elections/2016/10/20/supreme-court-debate-clinton-trump-guns-abortion/92452362/>. But see Saikrishna Prakash & John Yoo, *Opinion, Mr. President, Use a Litmus Test to Choose Your Supreme Court Nominee*, L.A. TIMES (Jan. 29, 2017, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-prakash-yoo-trump-litmus-test-supreme-court-20170128-story.html>.

Several ideas complicate the nomination process' description and evaluation. The lack of transparency, which may have been instigated somewhat by the perceived need to move swiftly, privacy concerns, and the compelling necessity to simultaneously and efficaciously create a new government and fill a prolonged Supreme Court vacancy acutely frustrate much cogent assessment.

Nevertheless, the process could apparently have been more systematic, rigorous, comprehensive, and transparent. Purportedly outsourcing a selection process so critical for the nation is a questionable practice, although President Bush seemed to employ comparatively analogous measures.⁶² President Trump's putative deployment of litmus tests, specifically regarding the very divisive abortion issue, was especially problematic.⁶³

The White House ought to have insistently considered the broadest spectrum of expertise and views, particularly individuals, commissions, and government officials engaged in earlier modern nominations and confirmations, for astute ideas, constructive practices, and specific prospects. Trump should have been especially solicitous of Democrats, particularly Schumer and Feinstein, because this could have facilitated the process of selection.⁶⁴ For instance, avid, robust consultation between President Bill Clinton and then-Judiciary Chair Senator Orrin Hatch (R-Utah) and other Republicans directly aided the smooth nominations and confirmations of Associate Justices Ruth Bader Ginsburg and Stephen Breyer,⁶⁵ especially in comparison with the confirmations of Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, Elena Kagan, and Clarence Thomas, and the failed nomination of Judge Robert Bork.⁶⁶

62. See *supra* note 54 and accompanying text; see also Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER, Apr. 17, 2017, at 24; Jeffrey Toobin, *In the Balance: The Supreme Court Has Leaned Right for Decades: Is That About to Change ?*, NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/magazine/2016/10/03/in-the-balance>; Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <http://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html>. See generally AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

63. See *supra* note 61; see also Adam Liptak, *Reading Between the Lines for Gorsuch's Views on Abortion*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/us/politics/reading-between-the-lines-for-gorsuchs-views-on-abortion.html>.

64. President Trump did conduct one meeting with the Democratic leaders, but it was brief, private and apparently procedural, not substantive, while the session came after he chose the finalists. See *supra* note 57 and accompanying text.

65. ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 179–80 (2002); see Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 783 (2010).

66. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S

In fairness, the three jurists who emerged from the selection process are well qualified, highly regarded, ideologically conservative appellate court judges. Observers who disagree with the aspirant ultimately submitted or the procedures used to select them may want to remember that President Trump strongly campaigned on an election-year pledge to nominate and confirm Justices who are conservative.⁶⁷

II. THE CONFIRMATION PROCESS

The Senate confirmation process needed to maximize thoroughness and openness, so that lawmakers could have ably fulfilled their constitutional duty to advise and consent on nominees while proceeding in a rapid, fair, and dignified manner, which carefully safeguarded applicable privacy concerns and respected different insights of colleagues and the nominee. The White House should have kept assertively consulting and cultivating both parties' senators, as regular, open lines of communication may have alerted participants to specific problems which could have derailed smooth, expeditious processing. Republican and Democratic legislators ought to have fully collaborated throughout nominee review.

At the outset, Democrats confronted, and ostensibly solved, a conundrum: whether to cooperate with the nomination or retaliate for the GOP's unprecedented denial of any consideration to Garland, Obama's nominee, which analysts characterize as that President's "stolen" High Court appointment.⁶⁸ The party should have probably resisted the

REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. Times, Aug. 6, 2010, <http://www.nytimes.com/2010/08/06/us/politics/06kagan.html>; David Kirkpatrick, *Democrats Are Split on Questioning Roberts*, N.Y. Times, Aug. 22, 2005; Charlie Savage, *Sotomayor Confirmed by Senate 68-31*, N.Y. Times, Aug. 6, 2009, <http://www.nytimes.com/2009/08/07/us/politics/07confirm.html>; Sheryl Gay Stolberg, *Hearings a Test for Democrats and Alito*, N.Y. Times, Jan. 8, 2006, <http://www.nytimes.com/2006/01/08/politics/politicsspecial1/hearings-a-test-for-democrats-and-alito.html>.

67. Press Release, White House, Office of the Press Sec'y, *Doing What He Said He Would: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee* (Jan. 31, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/31/doing-what-he-said-he-would-president-trumps-transparent-principled-and>; Goldmacher et al., *supra* note 56; *see* Graham, *supra* note 57; Ariane de Vogue, *President Trump Nominates Neil Gorsuch for Supreme Court*, CNN (Feb. 1, 2017, 5:05 AM), <http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/>; *supra* note 62.

68. *E.g.*, Burgess Everett, *Senate Dems Will Filibuster Trump's Supreme Court Nominee*, POLITICO (Jan. 30, 2017, 12:05 PM), <http://www.politico.com/story/2017/01/senate-democrats-filibuster-supreme-court-pick-234368>; Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html>; Editorial, *When the GOP Stole Merrick Garland's Supreme Court Seat, They Set the Stage for a Miserable Battle*, L.A. TIMES (Jan. 31, 2017, 5:00 AM), [http://www.latimes.com/opinion/editorials/la-](http://www.latimes.com/opinion/editorials/la)

temptation to retaliate at least initially, especially if members deemed Gorsuch a mainstream nominee,⁶⁹ because matching Republican obstruction would have likely ensued and could have propelled the appointments regime's counterproductive downward spiral.⁷⁰

Democrats and Republicans should have coordinated to ensure that the Judiciary panel assumed the lead in conducting an open, comprehensive, fair, and expeditious investigation into the nominee. The staff ought to have facilitated the prospect's ABA evaluation and FBI inquiry. The committee questionnaire was apparently thorough and equitable, while the nominee should have clearly, promptly, and completely responded to the queries lodged.⁷¹ The hearing was scheduled for a period which ostensibly granted the nominee and members sufficient latitude for comprehensive preparation. The session needed to proffer lawmakers adequate time, so that the officials could meticulously probe all substantive questions with pertinence for nominee High Court service. They must have actually related

ed-supreme-court-nomination-20170131-story.html.

69. Democrats generally and Schumer particularly admonished the GOP to nominate a mainstream, bipartisan candidate. Eric Bradner, *Schumer Vows Opposition to Any 'Out of the Mainstream' Supreme Court Pick*, CNN (Jan. 22, 2017, 10:48 AM), <http://www.cnn.com/2017/01/22/politics/chuck-schumer-trump-cabinet/>; Linda Greenhouse, *Opinion, Neil Gorsuch and the Search for the Supreme Court Mainstream*, N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/2017/02/01/opinion/neil-gorsuch-and-the-search-for-the-supreme-court-mainstream.html>; Amber Phillips, *Why the Battle Over Trump's Supreme Court Nominee Could Center on One Word*, WASH. POST: THE FIX (Feb. 1, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/why-the-battle-over-trumps-supreme-court-nominee-could-center-on-one-word/>.

70. Jim Newell, *Democrats Have No Play on Neil Gorsuch*, SLATE (Feb. 2, 2017, 3:23 PM), http://www.slate.com/articles/news_and_politics/politics/2017/02/democrats_need_to_be_careful_with_neil_gorsuch.html; Manu Raju & Ted Barrett, *Democrats Consider Backing Off Big Battle Over Trump's Supreme Court Pick*, CNN (Jan. 31, 2017, 8:29 PM), <http://www.cnn.com/2017/01/30/politics/democrats-supreme-court-battle/>; Editorial, *Democrats Shouldn't Go Scorched-Earth on Trump's Supreme Court Nominee*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/opinions/democrats-shouldnt-go-scorched-earth-on-trumps-supreme-court-nominee/2017/01/30/5c284e2c-e71d-11e6-bf6f-301b6b443624_story.html; see *supra* note 52 and accompanying text. *But see* Everett, *supra* note 68.

71. UNITED STATES COMMITTEE ON THE JUDICIARY, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT (2017). Most circuit judges felicitously complete these questionnaires, because the jurists compiled them when first appointed. However, some Trump Executive Branch nominees have experienced difficulties completing their questionnaires or ethics reports in a timely manner. Ylan Q. Mui & Ed O' Keefe, *Treasury Nominee Initially Omitted More than \$100 Million from Disclosures, Democratic Memo Says*, WASH. POST: WONKBLOG (Jan. 19, 2017), <https://www.Washingtonpost.com/news/wonk/wp/2017/01/19/treasury-nominee-initially-omitted-more-than-100-million-from-disclosures-democratic-memo-shows/>; Alan Rappoport, *Issues of Riches Trip up Steve Mnuchin and Other Nominees*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-confirmation-hearing.html>; see Elizabeth Warren, *Trump's Nominees Are Putting Us All At Risk By Ignoring Ethics Laws*, WASH. POST: POSTEVERYTHING (Jan. 19, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/01/19/the-gop-is-putting-the-country-in-danger-by-ignoring-ethical-rules-for-appointees/>.

to nominee merit, characterized vis-à-vis intelligence, diligence, ethics, independence, and temperament and embraced whether the nominee properly fit in the jurisprudential mainstream.⁷²

Legislators have traditionally scrutinized, and need to keep evaluating, attributes which have relevance for being a Justice. Lawmakers have customarily posited any queries which they wanted, but ones that seek perspectives on matters which the nominee may face, once confirmed, have conventionally been deemed inappropriate.⁷³ However, senators occasionally pose these specific questions, even though nominees rather frequently decline to respond, inaction that politicians may consider when voting on nominees. Examples of such topics include the scope of authority to legislate under the Constitution's initial Article, the meaning of the Fourteenth Amendment Due Process and Equal Protection Clauses and the constitutional "right to privacy." Analogous, but deemed comparatively appropriate, have been more general inquiries or those which explore ideology.⁷⁴ For example, senators query nominees about the constitutionality of acts passed by Congress or states, how to properly interpret the measures, separation of powers, and federalism while evaluating ideology. All of these phenomena were on display in the committee hearing.⁷⁵ The nominee ought to have responded clearly, directly, and completely, but his responses occasionally appeared to be comparatively unclear and perhaps somewhat evasive.⁷⁶ Members usually have one week for tendering written questions, which the nominee answered promptly, candidly, and comprehensively.⁷⁷

A few weeks after the hearing, the Judiciary Chair scheduled an Executive Business Meeting in which numerous panel members rigorously discussed the nominee.⁷⁸ Lawmakers vigorously, frankly and completely dissected each issue which proved relevant to High Court service. After the panel fully examined these matters, it conducted a ballot which resulted in

72. See *supra* note 61 and accompanying text; see also Greenhouse, *supra* note 52.

73. I rely in this and the next two sentences on *supra* note 30 and accompanying text.

74. I rely in this and the next sentence on *supra* notes 31–32 and accompanying text; see *Judicial Nominations 2001*, *supra* note 31; Greenhouse, *supra* note 52.

75. SENATE JUDICIARY COMM., Hearing on Judge Neil Gorsuch to be Associate Justice of the United States Supreme Court, Mar. 21–23, 2017.

76. *Id.*; see Linda Greenhouse, *The Empty Supreme Court Confirmation Hearing*, N.Y. TIMES, (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/opinion/the-empty-supreme-court-confirmation-hearing.html>.

77. Senate Judiciary Comm., Nomination of Judge Neil Gorsuch To Be Associate Justice of the United States Supreme Court, Questions for the Record (March 2017).

78. SENATE JUDICIARY COMM., *Executive Business Meeting*, Apr. 3, 2017.

a party line vote.⁷⁹ Even when the aspirant does not garner a majority, the committee has traditionally agreed on sending the nominee to the chamber.⁸⁰

Once Judge Gorsuch reached the floor, the Majority Leader needed to expeditiously arrange a chamber debate and vote. When members filibustered the nominee, Senate rules mandated thirty hours of discussion before permitting a cloture ballot, which required sixty votes.⁸¹ This debate ought to have been respectful, dignified, and fair while comprehensively ventilating all concerns which are pertinent for Court service. Legislators, who believe that picks are entitled to yes or no ballots or seek to protect the minority's rights, occasionally vote for cloture but against confirmation.⁸²

When all Republicans favored cloture and insufficient Democrats voted for cloture, the motion was defeated.⁸³ Republicans then detonated the nuclear option which permitted them to secure cloture.⁸⁴ The leader next set a prompt floor debate, which completely, respectfully, equitably, and candidly scrutinized all particular considerations involving the aspirant.⁸⁵ Finally senators voted and ostensibly premised substantive decisions on a nominee's qualifications expressed vis-à-vis merit and whether the nominee possesses jurisprudential views that come within the mainstream.⁸⁶

Justice Gorsuch rapidly assumed his Supreme Court position soon after the confirmation and served the remainder of the October 2016 Term.⁸⁷

79. *Id.*; see Matt Flegenheimer, *Senate Judiciary Committee Approves Gorsuch in Party-Line Vote*, N.Y. TIMES (Apr. 03, 2017), <https://www.nytimes.com/2017/04/03/us/politics/gorsuch-confirmation.html>.

80. See *supra* note 33 and accompanying text.

81. STANDING RULES OF THE SENATE, R. XXII, S. Doc. No. 113-18, at 16–17 (2013). When Democrats ignited the nuclear option with a majority vote which allowed lower court nominees to be confirmed by majority vote, they left intact the 60-vote rule for Supreme Court nominees. See sources cited *supra* note 36; see also Matt Flegenheimer, *Trump Says 'Go Nuclear' As Democrats Gird for Gorsuch Fight*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/neil-gorsuch-supreme-court-trump.html>; John Wagner & Ashley Parker, *Trump Endorses Use of 'Nuclear Option' to Confirm His Supreme Court Pick*, WASH. POST (Feb. 1, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/01/trump-endorses-use-of-nuclear-option-to-confirm-his-supreme-court-pick/>.

82. A trenchant example was Seventh Circuit Judge David Hamilton who received ten GOP senators' votes for cloture, even as nine opposed his confirmation on the merits. See Tobias, *supra* note 5, at 2245–46.

83. 163 CONG. REC. S2,388-90 (daily ed. Apr. 6, 2017); see Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES, Apr. 6, 2017, at A1.

84. 163 CONG. REC. S2,388-90; see Flegenheimer, *supra* note 83.

85. 163 CONG. REC. S2,391-2404 (daily ed. Apr. 6, 2017); *id.* at 2435-42 (daily ed. Apr. 7, 2017).

86. 163 CONG. REC. S2,442-43; see Liptak & Flegenheimer, *supra* note 14.

87. Robert Barnes & Ashley Parker, *Neil M. Gorsuch Sworn In as 113th Justice*, WASH. POST (Apr. 10, 2017), https://www.washingtonpost.com/politics/courts_law/gorsuch-to-be-sworn-in-to-supreme-court-today-in-two-ceremonies/2017/04/10/9ac361fe-1ddb-11e7-ad74-3a742a6e93a7_story.html?utm_term=.737379b9c933; Julie Hirschfeld Davis, *Highlight for President, Gorsuch is Sworn in*

Gorsuch's nascent service prompted numerous observers to remark on his extremely conservative perspectives, which perhaps eclipsed the views of Justice Scalia whose vacancy Gorsuch assumed.⁸⁸

In sum, affording Judge Garland no process was unprecedented and further subverted public regard for the Supreme Court and the confirmation process, while the nomination and confirmation of Justice Gorsuch may have had similar effects. Thus, GOP and Democratic senators and the President must collaborate to ensure smooth appointment procedures by following the suggestions proffered, should Mr. Trump have the opportunity to nominate Supreme Court Justices in the future.⁸⁹

as *Court's 113th Justice*, N.Y. TIMES, Apr. 11, 2017, at A19.

88. Robert Barnes, *Gorsuch Casts Death-Penalty Vote in One of His First Supreme Court Cases*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/politics/courts_law/gorsuch-casts-death-penalty-vote-in-one-of-his-first-supreme-court-cases/2017/04/21/2d9bc5dc-26a8-11e7-a1b3-faff0034e2de_story.html?utm_term=.557ad2d5c6d9; David Savage, *Gorsuch is Already Pushing the Supreme Court Right on Religion, Guns and Gay Rights*, L.A. TIMES (June 29, 2017), <http://www.latimes.com/politics/la-na-pol-gorsuch-court-20170628-story.html>; see *supra* note 60 and accompanying text.

89. Ariane de Vogue, *Anthony Kennedy Retirement Watch at a Fever Pitch*, CNN.COM (June 26, 2017) <http://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html>; Julia Glum, *No Kennedy Retirement Announcement Means Trump Won't Get Another Supreme Court Justice....Yet*, NEWSWEEK.COM (June 26, 2017) <http://www.newsweek.com/kennedy-retirement-rumors-supreme-court-629028>; see Carl Reiner, *Justice Kennedy, Take it From Me: Never Retire*, N.Y. TIMES, July 9, 2017, at SR2.