

Confirmation of Merrick Garland to The U.S. Supreme Court

Copyright 2016 by Ronald B. Standler

No copyright claimed for quotations.

No copyright claimed for works of the U.S. Government.

Overview

This document is a terse history of the confirmation of Merrick Garland to the U.S. Supreme Court. Actually, this essay is *not* about Judge Garland, because the Republican majority in the U.S. Senate in 2016 refused to hold confirmation hearings for *any* nominee to the U.S. Supreme Court who was nominated by President Obama.

I have previously written a history of the nomination and confirmation of Harriet [Miers](#), Samuel [Alito](#), Sonia [Sotomayor](#), and Elena [Kagan](#) to the U.S. Supreme Court. When Merrick Garland was nominated in 2016, I was busy chronicling the civil war in [Syria](#), so this document is more terse than my previous histories of U.S. Supreme Court nominees.

Here is a terse synopsis of what happened with the nomination and confirmation of Merrick Garland to the U.S. Supreme Court:

1. On 13 February 2016, Justice Antonin Scalia died.
2. On 16 March 2016, President Obama nominated Judge Merrick Garland to fill Scalia's chair on the U.S. Supreme Court. See Obama's speech posted at the [White House](#) website.
3. On 16 March 2016, Mitch McConnell, the U.S. Senate Majority Leader, refused to schedule confirmation hearings for Garland. The Republicans in the U.S. Supreme Court wanted to wait for a Republican president to be elected on 8 November 2016, then let the new president nominate a conservative person to the U.S. Supreme Court.
4. But in July 2016, the Republican party nominated Donald Trump — a real estate mogul with *no* experience in government — as their presidential candidate. By October 2016, it was clear from opinion polls of likely voters that Hillary Clinton, the Democratic candidate, would win the presidency in the Electoral College. Republican senators then [began](#) to speak of refusing to confirm *any* Supreme Court nominee by President Clinton, assuming that the Republicans continue to have a majority in the U.S. Senate.
5. On 9 November 2016, Trump won the election, with severe consequences for the U.S. Supreme Court, as explained [below](#).
6. Finally, I include a [section](#) that reminds us that Democrats in the U.S. Senate refused

to consider some of George W. Bush's judicial nominees. This shows us that Democrats can also be obstructionists.

The relevant law is tersely stated:

The U.S. Constitution (Article II, Section 2, Clause 2) says the president "by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court, and"

The number of Justices on the U.S. Supreme Court is *not* specified in the U.S. Constitution, instead the number of nine justices is specified in the Judiciary Act:

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.
28 U.S.C. §1.

Statements from Mitch McConnell

On 13 February 2016, mere hours after Scalia's death was announced, Mitch McConnell (R-Ky), leader of the Republican majority in the Senate, issued a press statement, part of which said:

.... Through the sheer force of his intellect and his legendary wit, this giant of American jurisprudence almost singlehandedly revived an approach to constitutional interpretation that prioritized the text and original meaning of the Constitution.

....

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.
Mitch McConnell, "Justice Antonin Scalia," [McConnell](#), 13 Feb 2016.

See the insightful analysis about *why* McConnell took this position: Chris Cillizza, "Why Senate Republicans made a big mistake on the Scalia Supreme Court opening," [Washington Post](#), 15 Feb 2016.

On 15 March 2016, Mitch McConnell spoke on the floor of the U.S. Senate:

Mr. President, in the last national election, the American people elected a Republican Senate. Since then, we have accomplished a lot of important things for our country — landmark education reform, permanent tax relief for families and small businesses, significant action to repair America's roads and bridges — and, just last week, decisive steps to address the prescription opioid and heroin epidemic. The Republican Senate has been able to lead on many important issues because we focused on areas where both sides can agree, rather than just fight about issues where we don't.

Everyone knows one issue where we don't agree; that is, whether the American people deserve a voice in filling the current Supreme Court vacancy. Republicans think the people deserve a voice in this important vacancy. The President and Senate Democrats do not.

Whoever is chosen to fill the Supreme Court vacancy could radically change the direction of the Court for a generation. The American people obviously deserve a voice in such an important conversation. They can continue making their voices heard, and we can continue doing our work in the Senate to move America forward on important issues.

Americans elected this Republican Senate to serve as a check-and-balance to the President. It is natural that both parties will disagree in some areas. It is natural we will find common ground in others. Let's keep focused on those areas of common ground. Mitch McConnell, "Filling The Supreme Court Vacancy And Genetically Modified Food Labeling Bill," 162 Congressional Record at S1475, 15 March 2016.

My comment is that McConnell is speaking in code. What McConnell is trying to say is that the American people should decide on a president in an election on 8 November 2016, and that new president should nominate a replacement for Justice Scalia. There are at least four problems with McConnell's position.

First, the American people do *not* understand constitutional law. McConnell said: "the American people obviously deserve a voice" in finding a replacement for Justice Scalia. Except for attorneys, very few people read judicial opinions, which is necessary to evaluate a judge who is nominated to the U.S. Supreme Court. The nomination and confirmation process is best left to attorneys who advise the president and members of the U.S. Senate Judiciary Committee.

Second, when we vote for a president, we have *no* idea of who they will nominate to the U.S. Supreme Court. For example, Hillary Clinton might nominate a moderate judge, to avoid a big confirmation battle in the Senate. Or Hillary Clinton might nominate a young, liberal judge who would shift the balance in the U.S. Supreme Court.

Third, even if we know the politics of a nominee at the time of confirmation, that person might change after confirmation to the Supreme Court. That happened with Justice Brennan who was appointed by conservative President Eisenhower, but Brennan later became one of the most liberal Justices on the Supreme Court.

And fourth, the U.S. Constitution gives the power of nomination of U.S. Supreme Court Justices to the current president, and the power of confirmation (or rejection) to the U.S. Senate. It's their job.

Note also that McConnell's position applies to *any* nominee by Obama. On 15 March, Obama had not yet announced the name of his nominee to fill Scalia's chair at the U.S. Supreme Court.

On 16 March 2016, Mitch McConnell spoke on the floor of the U.S. Senate:

Mr. President, the next Justice could fundamentally alter the direction of the Supreme Court and have a profound impact on our country, so of course — of course the American people should have a say in the Court's direction.

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

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

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

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

Chairman Biden went on.

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

That was Chairman Joe Biden.

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

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

[Page S1524]

Americans are certain to hear a lot of rhetoric from the other side in the coming days, but here are the facts they should keep in mind.

- The current Democratic leader said the Senate is not a rubberstamp, and he noted that the Constitution does not require the Senate to give Presidential nominees a vote. That is the current Democratic leader.
- The incoming Democratic leader did not even wait until the final year of George W. Bush's term to essentially tell the Senate not to consider any Supreme Court nominee the President sent.
- The Biden rule supports what the Senate is doing today, underlining that what we are talking about is a principle and not a person.

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

I yield the floor.

Mitch McConnell, "Filling the Supreme Court Vacancy,"
162 Congressional Record at S1523-S1524, 16 March 2016.
Copy at [McConnell](#) press releases.

My comment is that McConnell wants to postpone any decision about Justice Scalia's replacement until after there is a new president in January 2017. McConnell said: "Instead of spending more time debating an issue where we can't agree, let's keep working" on legislation "where we can" agree. That sounds nice, but the replacement for Justice Scalia will still be controversial in 2017, regardless of who is elected president.

Further, I comment that this so-called "Biden rule" is *not* in the U.S. Constitution, and it is *not* in the federal statutes. The "Biden rule" is *not* even a rule of procedure in the U.S. Senate. The "Biden rule" is a partisan political speech made in June 1992, when Biden was the Chairman of the Senate Judiciary Committee. Democrats were then the majority in the Senate and Biden wanted to avoid considering a hypothetical judicial nominee from President George H.W. Bush, a Republican. (See, e.g., [NY Times](#).) The real reason that McConnell cites the "Biden rule" is that McConnell wants to hoist Democrats with their own petard.

Note that McConnell quoted Biden extensively, but without supplying a source for Biden's remarks. The citation is: Biden, "Reform Of The Confirmation Process," 138 Congressional

Record at S8862-S8865 (25 June 1992).

On 20 March 2016, Senator Mitch McConnell appeared on four Sunday morning television news programs and explained why Republicans in the U.S. Senate were refusing to hold confirmation hearings for Judge Garland. Here are excerpts from those programs, as contained in a press release at Senator McConnell's website. I quote the entire press release:

LOUISVILLE, KY — The following are excerpts from Senate Majority Leader Mitch McConnell's interviews this morning:

FOX News Sunday

I can't imagine that a Republican majority in the United States Senate would want to confirm in a lame duck session a nominee opposed by the National Rifle Association, the National Federation of Independent Business that represents small businesses — that have never taken a position on the Supreme Court appointment before — they're opposed to this guy. I can't imagine that a Republican majority Senate even if it were assumed to be a minority, would want to confirm a judge that would move the court dramatically to the left. That's not going to happen.

Look, Barack Obama calling judge — this judge a moderate doesn't make him a moderate. This judge would move the court dramatically to the left. He's enthusiastically supported by MoveOn.org.

The Senate has a role to play here. The president nominates, we decide to confirm. We think the important principle in the middle of this presidential year is that the American people need to weigh in and decide who's going to make this decision. Not this lame duck president on the way out the door, but the next president.

NBC Meet the Press

The American people are about to weigh in on who is going to be the president. And that's the person, whoever that may be, who ought to be making this appointment.

... the Senate has been quite active. This year we have another year which we have a great chance of passing every single appropriation bill for the first time since 1994. The Senate is not doing nothing during this election season. But we're not giving lifetime appointments to this president on the way out the door, to change the Supreme Court for the next 25 or 30 years.

ABC This Week

Well, the Senate has been very much at work for the last 15 months. We've passed a lot of legislation that the president has signed and it should — the president's chief of staff knows we're very much at work.

The principle is — the American people are in the middle of choosing who the next

president is going to be. And that next president ought to have this appointment, which will affect the Supreme Court, for probably a quarter of a century.

... the last time the American people voted was in 2014 and they elected a Republican Senate. And under the Constitution, we have shared responsibility. This is not something he does alone.

CNN State of the Union

Who ought to make the decision? A lame-duck president on the way out the door, or the president we're in the process of electing right now? ... we know what their tradition is. This nomination ought to be made by the president we're in the process of electing this year.

If you want to discuss the nominee just for a minute, even though Barack Obama calls him a moderate, he's opposed by the NRA. He's opposed by the National Federation of Independent Business which has never taken a position on a Supreme Court nominee before. The New York Times said it would move the court dramatically to the left. But this is not about this particular judge — this is about who should make the appointment. We're in the process of picking a president, and that new president ought to make this appointment which will affect the Supreme Court maybe for the next quarter of a century.

"Senate Majority Leader discusses Garland nomination, rules out lame-duck confirmation and highlights Senate legislative action on Sunday morning news programs," [McConnell](#), 20 March 2016.

My comment is that McConnell's remarks about "lame-duck president" are bogus. If the current president were a conservative Republican, then the Republicans in the U.S. Senate would surely have *no* problem holding confirmation hearings for a conservative nominee from a Republican president. And confirming a conservative nominee from a lame-duck Republican president — instead of waiting for the next president to nominate someone — would avoid the possibility that voters might elect a liberal Democrat as the next president, who would nominate a liberal judge to replace Justice Scalia.

Technically, a lame-duck president exists only from the November election in which the president's successor is chosen until the inaugural of the new president in January. McConnell expanded the lame-duck period to include the interval from March until January, thereby shortening the presidential term from 48 months to 38 months.

The Senate is *supposed* to hold hearings in its Judiciary Committee, vote in that Committee about the nominee, and then the full Senate is supposed to vote on the nominee. But McConnell seems satisfied that Merrick Garland is unqualified because two nongovernmental organizations (i.e., the National Rifle Association, and the National Federation of Independent Business) have opposed Garland and one liberal organization (i.e., MoveOn) has endorsed Garland. McConnell abdicates the Senate's constitutional responsibility and is satisfied with the opinion of three nongovernmental organizations.

On 21 June 2016, the American Bar Association's committee unanimously gave Merrick

Garland its highest rating, "well qualified." [ABA](#).

backlog of judicial nominees at all levels

The Republicans in the U.S. Senate did more than just refuse to consider the nomination of Merrick Garland to the U.S. Supreme Court. On 21 Nov 2016, the Los Angeles [Times](#) published an op-ed by Carl Tobias, a professor at the University of Richmond School of Law. The op-ed said the Senate had a backlog of 94 judicial nominees to federal trial courts and federal intermediate appellate courts.

On 31 December 2016, the *Los Angeles Times* reported:

President-elect Donald Trump will take office with a chance to fill more than 100 seats on the federal courts, thanks mostly to an extraordinary two-year slowdown in judicial confirmations engineered by Senate Majority Leader Mitch McConnell of Kentucky.

Since Republicans took control of the Senate at the beginning of the 114th Congress last year [Jan 2015], senators have voted to confirm only 22 of President Obama's judicial nominees. That's the lowest total since 1951-52, in the final years of Harry Truman's presidency.

....

The vacancies reflect a long-term goal of McConnell and other leading Republicans to tilt the court system toward conservatives.

David G. Savage, "This Congress filled the fewest judgeships since 1952. That leaves a big opening for Trump," [LA Times](#), 31 Dec 2016.

Statements from Republican Senators

17 Oct 2016: John McCain

On 17 Oct 2016, John McCain — a U.S. Senator since 1987 and the Republican presidential candidate in 2008 — announced on WPHT radio in Philadelphia that Republicans would oppose *any* U.S. Supreme Court nominee from President Hillary Clinton. KYW posted a partial transcript of the radio interview by Giordano:

McCain: "The strongest argument I can make is to return Pat Toomey so we can make sure that there is not three places on the United State Supreme Court that will change this country for decades. I guarantee we'll be there."

Giordano: How would you be able to stop that when you weren't able to stop Sotomayor for example?

McCain: "I think in the case of Sotomayor they were able to convince some Republicans. I promise you that we will be united against any Supreme Court nominee

that Hillary Clinton, if she were president, she would put up. This is where we need the majority and Pat Toomey is probably as articulate and effective on the floor of the Senate as anyone that I have accounted for. And I think he's one of the most valuable members of the United States Senate and I know he's working hard and Pennsylvania is always the place where the action is."

Dom Giordano, "McCain On Trump: I've Been In A Lot Of Locker Rooms; I've Not Heard Comments Like That," [KYW](#) in Philadelphia, 15:49 EDT, 17 Oct 2016.

The Washington Post reported:

An issue that has been mostly absent from this year's Senate campaigns — the fate of the Supreme Court — suddenly erupted Monday [17 Oct] after Sen. John McCain indicated during a talk-radio appearance that Republicans would move to block any high-court nominee made by a President Hillary Clinton should the Democratic nominee win.

McCain (R-Ariz.) made his remarks on WPHT-AM radio in Philadelphia, during an interview in support of fellow Sen. Patrick J. Toomey (R-Pa.). "I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up," he said. "I promise you. This is where we need the majority, and Pat Toomey is probably as articulate and effective on the floor of the Senate as anyone I have encountered."

....

McCain's office issued a statement Monday [17 Oct] afternoon backing off his pledge of blanket opposition.

"Senator McCain believes you can only judge people by their record, and Hillary Clinton has a clear record of supporting liberal judicial nominees," spokeswoman Rachel Dean said. "That being said, Senator McCain will, of course, thoroughly examine the record of any Supreme Court nominee put before the Senate and vote for or against that individual based on their qualifications as he has done throughout his career."

Later in the day, during a campaign stop in Chandler, Ariz., McCain avoided the more strident position when responding to a question from local business officials about the court.

Mike DeBonis & Paul Kane, "Supreme Court is an issue again after McCain suggests Clinton blockade," [Washington Post](#), 17 Oct 2016.

See also:

- "McCain suggests GOP would oppose Clinton Supreme Court picks," [Associated Press](#), 15:38 EDT, 17 Oct 2016.
- "Sen. McCain Says Republicans Will Block All Court Nominations If Clinton Wins," [NPR](#), 21:44 EDT, 17 Oct 2016.

26 Oct 2016: Ted Cruz

On 26 October 2016, Ted Cruz — a U.S. Senator from Texas since 2013 and an unsuccessful candidate for the Republican nomination for U.S. president in 2016 — suggested the Republicans in the U.S. Senate would leave Scalia's chair vacant. That is the same thing as refusing to confirm *any* nominee by Hillary Clinton.

The Associated Press reported:

Speaking to reporters while campaigning for Republicans on Wednesday [26 Oct], Cruz was asked about Supreme Court vacancies.

"There will be plenty of time for debate on that issue, there is long historical precedent for a Supreme Court with fewer justices, just recently Justice (Stephen) Breyer observed that the vacancy is not impacting the ability of the court to do its job, that's a debate that we are going to have," Cruz said, in a quote later provided by his office.

Associated Press, [New York Times](#), 18:41 EDT, 26 Oct 2016.

Earlier, shorter version at:

Mary Clare Jalonick, "Cruz suggests leaving vacancy on Supreme Court," [Associated Press](#), 18:00 EDT, 26 Oct 2016.

The Washington Post reported:

Speaking to reporters after a campaign rally for a Republican U.S. Senate candidate [in Loveland, Colorado], Sen. Ted Cruz (R-Tex.) said that there was "precedent" for a Supreme Court with fewer than nine justices — appearing to suggest that the blockade on nominee Merrick Garland could last past the election.

"You know, I think there will be plenty of time for debate on that issue," said Cruz, when he was asked whether a Republican-controlled Senate should hold votes on a President Hillary Clinton's nominees. "There is certainly long historical precedent for a Supreme Court with fewer justices. I would note, just recently, that Justice Breyer observed that the vacancy is not impacting the ability of the court to do its job. That's a debate that we are going to have."

David Weigel, "Cruz says there's precedent for keeping ninth Supreme Court seat empty," [Washington Post](#), 18:08 EDT, 26 Oct 2016.

Cruz asserted: "There is certainly long historical precedent for a Supreme Court with fewer justices." Yes, but there have been nine justices on a full U.S. Supreme Court continuously since the year 1869. Cruz wants to take us back to an era before telephones, radios, automobiles, airplanes, etc. Further, in recent years the U.S. Supreme Court accepts fewer than 1% of the cases that are appealed to that Court. If there are fewer than nine justices, then the Supreme Court will need to accept fewer cases, because there will be fewer justices to write opinions. Accepting fewer cases means there will be less chance of reversing an unfair or unconstitutional decision by a lower court.

See also:

- "Darryl Glenn makes his closing argument in event with Ted Cruz," [Denver Post](#), 19:08 MDT, 26 Oct 2016. (cites *Washington Post* about SCOTUS vacancy)

- "Ted Cruz: There is 'historical precedent' for keeping Supreme Court seat vacant," [Dallas Morning News](#), 23:00 CDT, 26 Oct 2016.
- "Justice Clarence Thomas: 'We are destroying our institutions'," [McClatchy](#), 06:48 EDT, 27 Oct 2016.
- "Sen. Ted Cruz raises the prospect of lasting Supreme Court gridlock," [Los Angeles Times](#), 06:07 PDT, 27 Oct 2016. ("Cruz is widely viewed as one of the most conservative senators and one of the least willing to compromise.")
- "Ted Cruz is right: Senate Republicans could block Clinton Supreme Court nominees indefinitely," [Washington Post](#), (revision of 19 Oct commentary), 12:00 EDT, 27 Oct 2016.

1 Nov 2016: Richard Burr

On 1 Nov 2016, the Associated Press reported that two more Republicans are joining the dogma of having only eight Justices on the U.S. Supreme Court if Hillary Clinton becomes president.

The Supreme Court has existed with its full complement of nine justices for close to 150 years, no matter who occupied the White House. Now some Republican lawmakers suggest they would be fine with just eight for four years more rather than have Hillary Clinton fill the vacancy.

....

But several Republicans have said if the voters elect Clinton, they'll block her nominees, effectively abandoning their advice and consent role for her entire term.

"If Hillary Clinton becomes president, I am going to do everything I can do to make sure four years from now, we still got an opening on the Supreme Court," North Carolina Sen. Richard Burr said in an audio recording of his meeting with GOP volunteers on Saturday [29 Oct]. CNN obtained a copy of the audio.

GOP Sens. John McCain of Arizona and Ted Cruz of Texas have also suggested blocking any Clinton nominees. Sen. Rand Paul, R-Ky., said in a debate Monday night [31 Oct] that he "can't imagine" voting for any Clinton nominee though he stopped short of vowing to block a pick from a Democratic president.

Mary Clare Jalonick, "If Clinton wins, more in GOP say no to 9 on Supreme Court," [Associated Press](#), 14:02 EDT, 1 Nov 2016.

To find Burr's and Paul's remarks in context, I searched Google News at 15:30 EDT on 1 Nov 2016. I was *not* able to find a transcript of their remarks.

The big news from Burr is that he made an appallingly bad-taste joke about Hillary Clinton being shot. *The News & Observer* newspaper in Raleigh, North Carolina reported:

Burr, a Republican, was answering questions in a private gathering of Republicans in Mooresville. A recording of the 45-minute meeting was posted on [YouTube](#) and sent to CNN, which reported on the comment Monday evening [31 Oct].

....

In other highlights from the leaked recording:

Burr says he'll oppose any Clinton Supreme Court nominee: "If Hillary becomes president, I'm going to do everything I can do to make sure that four years from now, we're still going to have an opening on the Supreme Court," he said.

Burr's position matches that of U.S. Sen. John McCain, who recently said Republicans will block anyone Clinton might nominate to the Supreme Court.

He's proud of blocking President Barack Obama's court appointment: "This is not tough for me," he said of blocking a judicial nominee. "I had the longest judicial vacancy in the history of the United States on the Eastern District of North Carolina. Not many people know that."

Colin Campbell, "Richard Burr apologizes for joking about 'bullseye' on Hillary Clinton," [News&Observer](#), 18:26 EDT, 31 Oct 2016. [boldface in original] The CNN news story mentioned by *The News-Observer* was later revised and is quoted in the next paragraph.

Buried in the CNN news story about the *inappropriate* joke is the following:

[Richard Burr] also bluntly said that if Clinton is elected, he will do everything in his power to deny her the right to fill the vacant Supreme Court slot, aligning himself with Texas Sen. Ted Cruz's position on the issue.

"Well, my answer to you would be it isn't going to happen — period," Burr said when asked about the prospects of President Barack Obama's nominee, Merrick Garland, being confirmed in the lame-duck session of Congress.

Burr added: "And if Hillary Clinton becomes president, I am going to do everything I can do to make sure four years from now, we still got an opening on the Supreme Court."

Burr boasted that he is responsible for the "longest judicial vacancy in history" by denying the confirmation of an Obama judge to serve in the eastern district of North Carolina.

Manu Raju, "In private, Burr quips about gun owners shooting Clinton," [CNN](#), updated 11:37 EDT, 1 Nov 2016.

The *Citizen-Times* newspaper in Asheville, North Carolina reported:

U.S. Sen. Richard Burr, R-N.C., told Republican supporters Saturday [29 Oct] he would try to keep a vacant seat on the U.S. Supreme Court empty for four years if Hillary Clinton is elected president, a shift from his position in February.

Burr, who is in a tight contest for re-election with Democrat Deborah Ross, made the

comment in a surreptitiously recorded conversation in Mooresville first reported by CNN. He backed away from it somewhat in a statement Tuesday [1 Nov].

....

But in Saturday's meeting in Mooresville, Burr said, "If Hillary Clinton becomes president, I'm going to do everything I can to make sure that four years from now we've still got an opening on the Supreme Court."

Burr told supporters that an eight-member court would mean some rulings by lower courts like the one Garland sits on would stand as is, "But I think on the things that are important to the country, there's a better chance that the lower court or the appellate court will get the right answer before it gets to the Supreme Court."

....

In response to questions from the Citizen-Times on Tuesday [1 Nov], Burr took a more moderate stance than he did in the recorded conversation Saturday.

"I will assess the record of any Supreme Court nominee, but clearly Hillary Clinton has a long history of backing liberal judges," Burr said in an emailed statement Tuesday. "I believe any nominee for a lifetime appointment to the federal courts should judge impartially, and in accordance with the Constitution. I will reject any candidate whose record indicates they will use the Court to put in place their personal or political agenda, or who will not rule in accordance with law and the Constitution."

He did not explain the change in his position.

Mark Barrett, "Burr to oppose Clinton pick for Supreme Court," [Citizen-Times](#), 13:20 EDT, 1 Nov 2016.

By including Rand Paul together with Richard Burr, who does support keeping Scalia's seat vacant during a Clinton presidency, Mary Clare Jalonick's article (quoted above) for the Associated Press suggests that Senator Rand Paul (R-Ky) will vote to keep Scalia's seat vacant while Hillary Clinton is president. But that is *not* what Rand Paul actually said.

The Associated Press in Lexington, KY reported Senator Rand Paul's remarks:

Republican U.S. Sen. Rand Paul says he "can't imagine" voting for a Supreme Court nominee from Hillary Clinton, but stopped short of vowing to continue a blockade of Democratic appointments during the first and only televised debate with challenger Jim Gray.

Paul, who is seeking re-election in Kentucky after his failed bid for the Republican presidential nomination, said he would invite any Clinton nominee to his office for a "private discussion" and said he would support anyone who "pledges to uphold the separation of powers."

"It is going to be very difficult for me to vote for a candidate who is coming forward saying they want to abuse the Constitution," he said. "I can't imagine voting for a Clinton nominee unless she would appoint somebody that actually were someone who believes in the separation of powers as the founders wrote into the Constitution."

Paul's pledge to meet with a Democratic Supreme Court nominee is more than some of his colleagues in the Republican-controlled Senate has done. Led by Senate Majority Leader Mitch McConnell, also of Kentucky, the Senate has refused to fill a vacancy on the Supreme Court simply because it occurred less than a year from the presidential election. Since then, other Republican senators — including Ted Cruz of Texas and John McCain of Arizona — have suggested a Republican-controlled Senate would block any Democratic nominee indefinitely.

Gray, the mayor of Lexington, criticized Paul and other Republicans for not considering Obama's nominee, calling it "another example of gridlock and dysfunction."

Adam Beam, "Paul, Gray clash over Supreme Court in US Senate debate," [Associated Press](#), 21:56 EDT, 31 Oct 2016.

Copy at [The State-Journal](#) in Frankfort, KY.

Here is what a cable television news channel in Kentucky reported:

When asked whether he would vote for Clinton's Supreme Court pick if she's elected Nov. 8, Paul demurred.

"It's going to be very difficult for me to vote for a candidate who's come forward saying that they want to abuse the Constitution, abuse the people to allow power to gravitate to the presidency that's unconstitutional," he said.

"So I can't imagine voting for a Clinton nominee unless she were to appoint somebody that actually works under the belief in the separation of powers as the founders wrote into the Constitution."

[Paul's opponent, Lexington Mayor Jim] Gray called that "another illustration of the gridlock and the dysfunction in our system."

Kevin Wheatley, "Paul, Gray go head-to-head on myriad of issues in first — and last — debate," [CN/2](#), 23:50 EDT, 31 Oct 2016.

Senator Rand Paul wants a Justice on the U.S. Supreme Court who "believes in the separation of powers". My comment is that Paul picked the wrong legal jargon. The separation of powers is inherent in the design of three equal branches of the U.S. Government: executive, legislative, and judicial. Perhaps Paul intended to say he wanted Justices who were opposed to abortions.

9 Nov 2016: Trump elected president

A few days before the election, political experts were agreed that Hillary Clinton would win the presidential election. On 5 November, the [New York Times](#) published a news article with

the title: "Clinton Has Solid Lead in Electoral College; Trump's Winning Map Is Unclear". On the night of 6 November, the [Los Angeles Times](#) predicted Hillary would receive 352 Electoral College votes. (At least 270 votes are needed to win.) On the evening of 7 November, the [Huffington Post](#) predicted Hillary would win 323 electors and concluded: "Republican Donald Trump has essentially no path to an Electoral College victory." On 7 November, the [Washington Post](#) published a news article with the title: "Hillary Clinton has enough electoral votes to win the White House in final Fix map". *The Washington Post* said: "She has 275 electoral votes solidly or leaning her way — five more than she needs to win the White House...."

But by 21:30 EST on 8 November, the counting of votes in the election showed Trump winning a number of states (e.g., Florida, Ohio, Pennsylvania, Wisconsin, Michigan, North Carolina, etc.) that Hillary Clinton had been predicted to win. Not only did Trump win the presidency, but the Republican party retained their majority in both the U.S. House of Representatives and the U.S. Senate. In the end, Hillary Clinton had only 232 votes in the Electoral College, far short of the 270 votes needed to become president.

On the morning of 9 November, the [Washington Post](#) reported that Trump's victory "has enormous consequences for the Supreme Court" by "dismantling Democratic hopes for a liberal majority on the high court for the first time in nearly a half-century." The [Wall Street Journal](#) published a similar article. Later, the [NY Times](#) published an article on this topic. Above, in my comment on McConnell's 15 March 2016 speech, I said: "the American people do not understand constitutional law." I suspect few people who voted for Trump understood the severe consequences for the U.S. Supreme Court.

Several commentators recognized after the election that McConnell had won the battle with Obama over the confirmation of Merrick Garland to the U.S. Supreme Court. (See, e.g., [CNN](#); [Politico](#); [Forbes](#).) It seems clear that McConnell won, *but* he established a precedent for more partisan bickering in the future in the U.S. Senate, and the American people lost the opportunity for a Supreme Court that might have given them more personal freedom.

A more conservative U.S. Supreme Court threatens abortion rights, equal rights for homosexuals (e.g., same-gender marriage), and an expansion of the right to privacy. In my opinion, the so-called conservative judges threaten individual freedom to make choices according to personal values. I say "so-called conservative", because a real conservative would believe in a minimalist government, and maximum personal freedom for individual people. To be bluntly honest, the so-called conservative judges on the U.S. Supreme Court are really attempting to impose Catholic religious dogma — or fundamentalist Christian dogma — on *everyone* in the USA. In 2005, I wrote an essay titled *Freedom from the Majority in the USA* that explained the constitutional limits on the ability of the majority to impose their values on everyone. Unfortunately, the U.S. Supreme Court can change those constitutional limits at any time.

On 15 November, the [Associated Press](#) published a news article with the title: "Trump victory could imperil Roe v. Wade abortion ruling".

The severe consequences for the U.S. Supreme Court from President Trump's nominees

comes as *no* surprise to well-informed voters. Trump released an initial list of his possible nominees to the U.S. Supreme Court on 18 May 2016. [NY Times](#); [Reuters](#); [Associated Press](#); [Washington Post](#). Trump released an additional list of his possible nominees to the U.S. Supreme Court on 23 Sep 2016. [CBS News](#); [Washington Post](#).

Trump promised to nominate Supreme Court justices from the names on his two lists. Such a campaign promise is *not* legally enforceable, for reasons discussed in my [essay](#) in 2012.

From February 2016 through 7 November 2016, Republicans were afraid that Obama and Hillary Clinton would nominate liberal justices to the U.S. Supreme Court and change the direction of that Court for perhaps the next thirty years. But after the election on 8 November, it is the liberals who are worried that Trump will nominate conservative justices to the U.S. Supreme Court and change the direction of that Court for perhaps the next thirty years. In addition to Scalia's vacant seat, three justices are at least 78 years of age and they could retire or die during Trump's term as president.

Why Trump won

While this essay is about Obama's nomination of Merrick Garland to the U.S. Supreme Court in 2016, I can not resist including a brief explanation of *why* Trump won the election. The following quotation was written by a senior fellow at the Hudson Institute.

Prior to 2016, Americans imposed pretty clear resume requirements on their presidents. Every man elected as president between 1789 and 2012 had either been a vice president, a governor, a senator, a cabinet secretary, or a commanding general — with one exception. That exception was the foremost spokesman on the foremost issue of the day, and even he, Abraham Lincoln, had been a congressman.

So how did Donald Trump, a man who has held none of the positions listed above, beat a former senator and cabinet secretary to win the presidency? In an election focused on character, Trump won on the issues.

....

What's more, among the 14 percent of voters who thought *neither* candidate was qualified, Trump won by 54 points (69 to 15 percent). Among the 5 percent who thought both were qualified, he won by 48 points (70 to 22 percent). Among the 14 percent who thought neither candidate had the right temperament, Trump won by 59 points (71 to 12 percent). Among the 6 percent who thought both did, he won by 58 points (77 to 19 percent).

In other words, when Americans didn't view considerations of character or experience as decisive [39% of people in exit polls], they voted for Trump over Clinton by huge margins. They did so because four issues favored him — immigration, trade, the Supreme Court, and Obamacare — while no issues favored her.

....

Immigration is actually a big reason why. Among the one-eighth of voters who said immigration was the most important issue, however, Trump won by a 2-to-1 margin (64 to 32 percent)

....

The Supreme Court was a third issue favoring Trump. Among the 70 percent who said [Supreme Court appointments] were important, Trump won by 4 points (50 to 46 percent). Among the subset of that 70 percent who said the Court was the most important factor in their vote, Trump won by 15 points (56 to 41 percent). The more people cared about the Court, the more apt they were to vote for Trump.

....

Indeed, voters preferred Trump's views on the issues so overwhelmingly to Clinton's, or Obama's, that they were willing to break with 227 years of precedent and trust the presidency to a man who hadn't occupied any of the traditional stepping-stone political offices. This is really quite extraordinary.

Jeffrey Anderson, "Trump Won on the Issues," [Real Clear Politics](#), 18 Nov 2016.

A commentator at *Forbes* magazine saw it differently. He blamed Trump's win on Democrats who were repelled by Hillary, and who failed to vote.

[Trump] won because Hillary Clinton was less attractive to the traditional Democratic base of urban, minorities, and more educated voters. Running against Trump, any Democratic candidate should have ridden a wave of anti-Trump sentiment among these [Democratic] voters. It therefore took a strong distaste for Hillary Clinton among the Democratic base to not only undo this wave, but to lose many additional liberal votes.

.... ... the Democratic base did not turn out to vote as it did for Obama. Those sure-Democrats who stayed home handed the election to Trump.

Omri Ben-Shahar, "The Non-Voters Who Decided The Election: Trump Won Because Of Lower Democratic Turnout," [Forbes](#), 17 Nov 2016.

Opinion polls before the election show that *both* Trump and Hillary Clinton were disliked by many likely voters. Specifically, Hillary was seen as dishonest and untrustworthy by many likely voters. For example, on 25 July 2016, the [Washington Post](#) cites a [CNN](#) opinion poll that concludes "68 percent say Clinton isn't honest and trustworthy" and a [CBS](#) opinion poll that says: "But two in three voters continue to think she is not honest and trustworthy — just 29 percent saying that she is trustworthy." On 20 October 2016, [CNN](#) mentions an opinion poll in Ohio in which 59% of likely voters believed Hillary was "dishonest and untrustworthy", compared to 51% for Trump. I believe there is substance to Ben-Shahar's simple explanation for why Trump won.

Democrats are also obstructionist

The facts reported above clearly show that in 2016, the Republican party in the U.S. Senate is

obstructionist — blocking consideration of any Supreme Court nominee by a president who is a member of the Democratic party.

But it would be wrong to conclude that Republicans are more obstructionist than Democrats. History shows that Democrats have sometimes blocked consideration of a nominee by a president who is a member of the Republican party.

Back in 2001-2008, Democrats were refusing to confirm some judicial nominations by the Republican president (George W. Bush).

On 22 February 2003, President George W. Bush said in his weekly radio address:

On the Senate side, there is a crucial item of business that has been delayed for too long. We face a vacancy crisis in the federal courts, made worse by senators who block votes on qualified nominees. These delays endanger American justice. Vacant federal benches lead to crowded court dockets, overworked judges and longer waits for Americans who want their cases heard. Regional appeals courts have a 15 percent vacancy rate, and filings in those courts reached an all-time high again last year.

Since taking office, I have sent to the Senate 34 qualified mainstream nominees for the federal courts of appeals. To date, only half of them have received a vote in the Senate, and 12 of the remaining 17 nominees have been waiting more than a year for a floor vote.

It is my responsibility to submit judicial nominations. It is the Senate's responsibility to conduct prompt hearings and an up or down floor vote on all judicial nominees. Yet a handful of Democratic senators, for partisan reasons, are attempting to prevent any vote at all on highly-qualified nominees.

....

.... Yet after 21 months, [Miguel Estrada] still cannot get an up or down vote from the Senate. Democrats are stalling Miguel Estrada's nomination, while they search in vain for a reason to reject him. Some senators who once insisted that every appeals court nominee deserves a vote have abandoned that principle for partisan politics. Their tactics are unfair to the good man I have nominated, and unfaithful to the Senate's own obligations.

I call on the Senate Democratic leadership to stop playing politics, and permit a vote on Miguel Estrada's nomination [to the U.S. Court of Appeals for the DC Circuit]. Let each senator vote as he or she thinks best, but give the man a vote.

George W. Bush, "President's Weekly Radio Address," [White House](#), 22 Feb 2003.

On 9 May 2003, President George W. Bush said:

Today, we are facing a crisis in the Senate, and therefore, a crisis in our judiciary. Highly qualified judicial nominees are waiting years to get an up-or-down vote from the United States Senate. They wait for years while partisans search in vain for reasons to reject them. The obstructionist tactics of a small group of senators are setting a pattern that threatens judicial independence. Meanwhile, vacancies on the bench and

overcrowded court dockets are causing delays for citizens seeking justice. The judicial confirmation is broken, and it must be fixed for the good of the country.

....

Exactly two years ago, I announced my first 11 nominees to the federal appeals court. I chose men and women of talent and integrity, highly qualified nominees who represent the mainstream of American law and American values. Eight of them waited more than a year without an up-or-down vote in the United States Senate. As of today, three of that original group have waited two years. Their treatment by a group of senators is a disgrace.

Overall, I have sent to the Senate 42 superb nominees for federal courts of appeal. Eighteen of them are still waiting for a vote in the Senate; and eight of those 18 have been waiting more than a year. More appeals court nominees have had to wait over a year for a hearing in my presidency than in the last 50 years combined. This is not just business as usual; this is an abdication of constitutional responsibility, and it is hurting our country.

....

.... And the trend is clear: Of the 18 appeals court nominees awaiting a vote, all who have been rated by the American Bar Association have received well qualified or qualified ratings. Some Democratic senators have referred to those ratings as the gold standard. But those same senators have ignored those high marks, and instead of applying the gold standard, have applied a double standard to some of my nominees. The Senate has a constitutional responsibility to hold an up-or-down vote.

Throughout most of our history, the Senate has exercised this responsibility and voted promptly on judicial nominees. During the administration of former Presidents [George H.W.] Bush and Clinton, however, too many appeals court nominees never received votes. And today the situation is worse than ever, making the need for reform greater than ever.

George W. Bush, "President Calls for Judicial Reform," [White House](#), 9 May 2003.

Incidentally, Estrada withdrew his name from consideration in September 2003, without receiving any vote in the full U.S. Senate. Senator Orin Hatch (R-Utah), the Chairman of the Senate Judiciary Committee, said: "It is truly a sad record that the Senate, for the first time ever, has terminated a circuit court nomination by filibuster rather than by an up-or-down vote." 149 Congressional Record at S11097 (4 Sep 2003).

On 18 May 2005, CNN reported:

"In the last two elections, the American people made clear they want judges who will faithfully interpret the law, not legislate from the bench," Bush told a Republican Party event Tuesday evening.

"I have a duty to nominate well-qualified men and women to the federal judiciary. I have done just that, and I will continue to do so," he said.

"The Senate also has a duty — to promptly consider each of these nominations on the Senate floor, discuss and debate their qualifications and then give them the up or down vote they deserve."

During Bush's first term, Senate Democrats used filibusters to block 10 of his 218 court nominees. Bush renominated seven of them this year, and Senate Majority Leader Bill Frist is threatening to force a confrontation over the issue this week.

The filibuster, a form of extended debate that dates to the 1850s, can be overcome only by a three-fifths majority of 60 votes, a move known as invoking cloture.

With Democrats holding 44 seats in the 100-member Senate, they could hold up a vote on a nominee indefinitely. So usually only their threat of a filibuster has been sufficient to keep Republicans from bringing a nomination to the floor for a vote.

"Bush demands vote on judges," [CNN](#), 07:28 EDT, 18 May 2005.

In January 2006, liberal democrats in the U.S. Senate — including Ted Kennedy and John Kerry from Massachusetts — attempted a filibuster to prevent the full Senate from voting on the confirmation of Alito to the U.S. Supreme Court.

On 30 January 2006, *The Washington Post* reported on the end of the filibuster:

The Senate voted 72 to 25 to end debate on Alito's nomination and to allow a roll call on his confirmation today [30 Jan 2006], shortly before noon. Alito's supporters garnered a dozen more votes than the 60 they needed to choke off a Democratic filibuster effort, which would have allowed debate to continue indefinitely.

....

"The sword of the filibuster has been sheathed," [Senate Majority Leader Bill Frist (R-Tenn.)] told his colleagues moments before the roll call began. He scolded Democrats who pursued the stalling tactic on behalf of "the liberal activist agenda," and he warned that top lawyers may decline judicial nominations if they fear the confirmation process has become too brutal and partisan.

Charles Babington, "Senate to Vote On Alito Today," [Washington Post](#), 30 Jan 2006.

The White House reacted to the Senate invoking cloture and proceeding to confirm Justice Alito:

I am pleased that a strong, bipartisan majority in the Senate decisively rejected attempts to obstruct and filibuster an up-or-down vote on Judge Sam Alito's nomination. The Senate has a constitutional responsibility to hold an up-or-down vote on every judicial nominee — and throughout its 216-year history, the Senate has held an up-or-down vote on every Supreme Court nominee with majority Senate support. Judge Alito is extraordinarily well-qualified to serve on our Nation's highest court, and America is fortunate that this good and humble man is willing to serve. I look forward to the Senate voting to confirm Sam Alito as the 110th Justice of the Supreme Court.

White House, "President Pleased by Senate's Failure to Obstruct Vote for Judge Alito's Supreme Court Nomination," [White House](#), 30 Jan 2006.

Both political parties — Democrats and Republicans — are obstructionist, albeit at different times. The real problem is when the political party in the majority in the U.S. Senate is different from the political party of the president of the USA.

Conclusion

Assuming Hillary Clinton wins the presidency, and assuming the Republicans continue to have a majority in the U.S. Senate, then it appears in October 2016 — see quotes from McConnell, McCain, Cruz, and Burr cited above — that Scalia's chair on the U.S. Supreme Court could be empty for at least 5 years (i.e., from February 2016 to February 2021).

I think 28 U.S.C. §1 implies that there should normally be *nine* justices on the U.S. Supreme Court. If a justice dies or retires, I expect the president to promptly nominate a replacement, and I expect the Senate to promptly fulfill its Constitutional duty to either confirm or reject that nominee.

Since June 2014, I have been writing monthly essays about the dysfunctional Iraqi parliament, as part of my essays on the Syrian civil war and the U.S. war against ISIL in Iraq and Syria. Reading news reports about the dysfunctional Iraqi parliament has given me a new perspective on the current dysfunction in the U.S. Congress. In Iraq, former prime minister Maliki and others in parliament are frustrating current prime minister Abadi in his attempt to reform the Iraqi government. It is becoming commonplace for legislators in the U.S. Congress to refuse to listen to colleagues from the other political party, and for legislators to engage in stunts like shutting down the federal government over a budget dispute, or refusing to hold confirmation hearings on a nominee.

One of the worst stunts in 2015 was during President Obama's delicate negotiations with Iran to stop Iran from developing nuclear weapons. On 8 March 2015, 47 Republicans in the U.S. Senate wrote a letter to the president of Iran, informing him that the next president of the USA could repudiate any agreement with Iran, unless the agreement was approved by Congress. [NY Times](#); [Bloomberg](#); [Washington Post](#). That letter undercut the President of the United State, and interfered with the President's foreign policy.

One remembers the shameful confirmation hearings in the U.S. Senate for Judge Bork in 1987. While I disagree with Bork's judicial philosophy, he deserved a more dignified treatment by the U.S. Senate.

It *should* be a national scandal that purely partisan politics is more important to the U.S. Senate than the merit of nominees to the U.S. Supreme Court.

McConnell's refusal to hold confirmation hearings on any nominee to the U.S. Supreme Court during the last ten months of Obama's presidency was a dereliction of constitutional duty. Worse, the election of Trump to be president assures nomination of judges to the U.S. Supreme Court who will threaten abortion rights, equal rights for homosexuals (e.g., same-gender marriage), and an expansion of the right to privacy. President Trump and the

Republican majority in the U.S. Senate could change the U.S. Supreme Court for the next thirty years.

This document is at <http://www.rbs0.com/garland.pdf>
created 27 Oct 2016, modified 4 Jan 2017

Return to my [personal homepage](#).