Trump's Supreme Court

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SUNDAY NEWS JOURNAL DELAWAREONLINE.COM SUNDAY, DECEMBER 18, 2016

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Barring an insurrection tomorrow when the state electors cast their votes for president, the forty-fifth president of the United States will be Donald J. Trump.

What does that mean for the Supreme Court?

Garland goes back to the lower court

For starters, it means that Merrick Garland’s nomination is effectively moot. President Trump, not President Obama, will choose Justice Antonin Scalia’s successor.

Does that mean that the Republican Senators’ stonewalling of the Garland nomination was a brilliant strategic move? It was if partisan advantage is all that matters, but this partisan victory came at high price to our democracy.

Just ask yourself these questions: Do you believe Americans’ interests are best served when public officials use the Constitution’s checks and balances as weapons for partisan advantage? Or do you believe those checks and balances were intended to force officials to collaborate and find common ground?

Surely, citizens are better served by collaboration than conflict. But collaboration requires public officials to exercise their power in good faith. When Justice Scalia passed away at a time when political power was split between a Democratic president and a Republican-controlled Senate, it was a golden opportunity for officials to demonstrate this good faith.

President Obama acted in that spirit by nominating Judge Garland, a political moderate who had previously won high praise from Republicans when President Bill Clinton nominated him to the United States Court of Appeals for the District of Columbia. At that time, Republican Senator Orrin Hatch of Utah said of Garland:

“I know of his integrity, I know of his legal ability, I know of his honesty, I know of his acumen, and he belongs on the court. I believe he is not only a fine nominee, but is as good as Republicans can expect from this administration. In fact, I would place him at the top of the list.”

Good faith required Republican Senators at

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Bench Press

What will President Trump’s agenda be as he turns to Supreme Court appointment?

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12/18/2016
December 19, 2016 11:18 am (GMT +5:00)

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Can Democrats put the kibosh on Trump's nominee?

Trump has said he would like to appoint someone "in the mold" of Justice Scalia and has circulated a list of candidates from which he plans to choose the nominee.

The list includes such conservative stalwarts as Eleventh Circuit Judge William Pryor Jr., who has called Roe v. Wade "the worst abomination of constitutional law in our history."

Technically, any nominee needs only a majority of the Senate to be approved, which is easy for Republicans who have 52 of the Senate’s 100 seats. But Democrats could filibuster the nomination, and under the Senate’s rules 60 votes would be needed to break the filibuster.

When used prudently and sparingly, the filibuster is an important tool for ensuring that minority interests are respected. Democrats could use the filibuster, but this option comes with risks, including that Republicans might exercise the "nuclear option" and eliminate the right to filibuster Supreme Court nominees.

Republicans could fairly say that Democrats set the precedent for such extreme action when Harry Reid eliminated the filibuster for presidential appointees including lower court judges. Reid justified his action as necessary to address wholesale blocking of Obama appointments by Republicans, but he refrained from taking the extreme action of eliminating the filibuster for Supreme Court nominees.

The question now is whether Republicans would be brash enough to take that next drastic step. Some Republicans Senators have already suggested they would. Senate Majority Whip John Cornyn (R-Texas) ominously warned "We’re going to confirm the president's nominee one way or the other. And there’s an easy way and there’s a hard way." Democrats, Cornyn advised, “need to accept that reality.”

The impact of a Trump appointment

Of course, if Trump appoints a Scalia-like judge to replace Scalia, the Supreme Court will be back to where it was before his passing. That would be a Court with four reliably conservative justices (Roberts, Thomas, Alito, and the Scalia replacement) and four reliably liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan). The wild card is Justice Anthony Kennedy, who usually joins with his conservative colleagues but occasionally joins with the liberals.

Kennedy has aligned with the liberals on some of the Court's most high profile issues:

Abortion: Kennedy was a co-author of the Court's landmark 1992 decision reaffirming the basic rule of Roe v. Wade that a woman can terminate a pregnancy at any time before a fetus would be viable outside the mother's womb. Kennedy has been more willing than his liberal colleagues to uphold regulations of the abortion procedure, such as the federal partial-birth abortion law, but he still joined the liberal justices in the Court's last term to strike down restrictive abortion regulations in Texas.

The right to same-sex marriage: Kennedy has written all of the Court's leading decisions on gay and lesbian rights including the same-sex marriage decision.

Limitations on the death penalty: Kennedy has joined with the liberal justices in restricting the application of the death penalty to minors and the mentally disabled.

Affirmative action: Kennedy has frequently sided with conservatives in wanting to restrict the use of affirmative action, but in the Court's last term he wrote the opinion upholding the University of Texas' affirmative action program.

In all of these areas, it would take more than one Trump appointment to change the Court's direction.

Unfortunately for liberals, these decisions were mostly decided by slim 5-4 margins.

If Trump gets a chance to appoint a second Scalia-like justice to replace either Kennedy or one of the liberal justices, these precedents could be vulnerable. Liberals had better pray that Ginsburg (age 83), Kennedy (age 80), and Breyer (age 78) are eating well and regularly exercising.

There are other areas where Kennedy has consistently joined with his conservative colleagues. Replacing Scalia with another Scalia-like justice would keep this jurisprudence intact.

Separation of church and state: Justice Kennedy often swings right in church and state cases, so replacing Scalia with a Scalia clone would simply maintain the five-four advantage conservatives already had in this area.

While Scalia was on the Court, there was a five justice majority to uphold prayers at a small town government's board meetings even though the prayers were often overtly sectarian and the prayer leaders almost entirely Christian. Similarly, a conservative five justice majority held that Hobby Lobby, a for-profit corporation, was entitled under the federal Religious Freedom Restoration Act to be exempted from providing its female employees with contraceptive coverage.

The right to bear arms: Kennedy joined with the conservative justices in finding a private right to bear arms. So far, the Court has recognized only a right to possess a handgun at home, and most justices have shown little interest in expanding that right. It might take a second Trump appointment to move the needle for further gun rights.

Ensuring our democracy works: The conservative justices have been reluctant to use the Constitution to check extreme partisan gerrymandering and have actively facilitated the tsunami of unrestricted campaign expenditures.

Kennedy wrote the Citizens United decision, and while he hasn’t ruled out the possibility of placing limits on partisan gerrymandering, he has yet to do so.

The right to vote: Replacing Scalia with another Scalia-like justice would only continue the conservative major- ity’s unwillingness to protect the right to vote aggressively (except, ironically, in Bush v. Gore). The conservative justices have thus far been unwilling to strike down voter ID laws and have voted to gut the pre-clearance procedure in the Voting Rights Act.

The Emoluments Clause?

Trump says so many contradictory things it’s hard to know what he stands for. But he is clearly passionate about protecting himself, his brand, and his business empire.

Given that, one can imagine him squirming whenever constitutional law scholars suggest that Trump might have to divest himself of his real estate holdings to avoid violating the Emoluments Clause in the Constitution, which forbids government officials from accepting gifts or payments from foreign governments. Otherwise, the Clause might be violated every time a foreign government books a room or arranges a gathering at a Trump hotel.

It’s not exactly clear how the Emoluments Clause would be applied or if there is anyone who could even bring a claim under it. But one can imagine the first question Trump might have for any Supreme Court nominee: “So, what do you think about the Emoluments Clause?”

Alan Garfield is a professor at Delaware Law School.