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# Politicizing the Supreme Court by Senators Not Doing their Duty (forthcoming)

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# POLITICIZING THE SUPREME COURT BY SENATORS NOT DOING THEIR DUTY

Vincent J. Samar\*

The recent passing of conservative Supreme Court Justice Antonin Scalia has left a vacancy on the U.S. Supreme Court for which Article 2 of the U.S. Constitution requires the President to nominate a replacement and the United States Senate to offer advice and consent on the president's nominee. However, because Justice Scalia's death occurred during a presidential election year, and because this particular election is perhaps fought with greater vitriol than most of the recent past, the Republican leadership, announced within a day or two of Justice Scalia's death, that the Senate will not afford a hearing, let alone a vote on confirmation, of any candidate the Democratic President, Barack Obama's, might nominate for fear that it might shift the Court in a more liberal direction.<sup>1</sup> President Obama has since named Judge Merrick Garland to be his nominee, but the Senate Republican leadership has continued to refuse to hold confirmation hearings, notwithstanding that the Senate had previously confirmed Judge Garland to be Chief Judge of District of Columbia Court of Appeals with some Republican Senators voting in his favor, that he

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<sup>1</sup> See "Senate GOP: No Hearing for Supreme Court Nominee", February 23, 2016, <http://www.cnn.com/2016/02/23/politics/joe-biden-supreme-court-senate-republicans/index.html>.

has “18 years of federal judicial service ... [a] reputation as one of the most outstanding judges in the country, ...[and] a lifetime devotion to public service as a prosecutor, justice official, judge, and lawyer.”<sup>2</sup>

In this article, I will argue that Senators have a duty to consider a nomination in a timely way, even if (push comes to shove) courts would find the matter nonjusticiable. I will argue that the obligation for the Senate to fulfill its constitutional duty within a reasonable time is a very important political obligation the Constitution imposes directly on the Senators to preserve the integrity of the Court and the constitutional process itself. Under our system of government, Senators are occasionally summoned to a higher law calling, even if far less frequently than judges. Of course, recognizing when this call occurs and how Senators should respond will require an examination of what the Constitution actually says, what the Framers intended the language of the Constitution to mean by way of the institutions they set up, and normatively how what the Constitution provides might be most responsibly addressed in the present crisis.

Section 1 sets forth relevant constitutional provisions along with evidence of the Framers intention to make the Supreme Court a separate and independent branch of government that operates outside normal politics. Section 2 explains the concerns of judicial conservatives about the direction the Court might take now that Justice Scalia has passed on, and how they are attempting to affect the confirmation process to insure that any appointee be a judicial conservative. Section 3 then sets forth guidelines for just how far such an evaluation of the nominee’s judicial philosophy can go before it begins to undermine the confirmation process itself. Section 4 provides a brief but robust discussion of a political philosophy for holding this

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<sup>2</sup> Martha Minnow and Dean ell Tacha, *US Needs a Government of Laws, Not People*, March 22, 2016, [http://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYElbtXCQyIM/story.html?s\\_campaign=8315](http://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYElbtXCQyIM/story.html?s_campaign=8315).

democracy together. Finally, the essay concludes with a brief comment about the importance of being open to higher law to the long term survival of the constitutional order.

## I. CONSTITUTIONAL REQUIREMENTS

Article 3, of the U.S. Constitution provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>3</sup> The decision to have the judicial branch of the federal government be separate and distinct from the two political branches—the Congress and the Presidency—was specifically intended by the Framers to insure that the Court would be able to provide an independent check on the two political branches to insure obedience to the constitutional plan. Nowhere is this intention made clearer than where Alexander Hamilton in *Federalist No. 81*, states the Framers’ opposition to those who would make the Supreme Court a part of the Congress:

That there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested. The reasons for it have been assigned in another place and are too obvious to need repetition. The only question that seems to have been raised concerning it is whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes in the whole or in a part of the legislative body. .... To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim requiring a separation of the departments of power. It shall, nevertheless, be conceded to them ... that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed

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<sup>3</sup> U.S. CONST. ART 3, SEC. 1.

the Constitution in the character of legislators would be disposed to repair the breach in the character of judges<sup>4</sup>

Nor is this the only place where the Framers' intention to keep the Court separate from the regular or normal politics of the political branches is expressed.

Article 3 of the Constitution further provides that the justices of the Supreme Court, along with all federal judges, are to hold "their offices during good Behaviour"<sup>5</sup>, the provision essentially granting them life tenure, subject only to impeachment for high crimes or misdemeanors by the House of Representatives<sup>6</sup> to be followed by a trial in the Senate.<sup>7</sup> In discussing the knowledge needed of those then appointed to so long a judicial tenure and that such knowledge not be overcome by partisan divides, Hamilton further writes:

There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; and in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party division, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice.<sup>8</sup>

As a further proof that partisan divides should not hamper the operation of the judiciary, the Constitution provides that the Congress may not diminish the compensation judges receive during "their Continuance in Office."<sup>9</sup> The limitation clearly shows an intent by the Framers to prevent Congress from politicizing the judiciary. What the Congress can do, should the judiciary

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<sup>4</sup> THE FEDERALIST NO. 81 (Alexander Hamilton).

<sup>5</sup> U.S. CONST. ART 3, SEC. 1.

<sup>6</sup> U.S. CONST. ART 1, SEC. 2.

<sup>7</sup> U.S. CONST. ART 1, SEC. 3.

<sup>8</sup> THE FEDERALIST NO. 81 (Alexander Hamilton).

<sup>9</sup> U.S. CONST. ART 3, SEC. 1.

and more especially especially the Supreme Court act contrary to its constitutional authority is to alter the Court's appellate jurisdiction<sup>10</sup> or, if necessary, add to the number of seats on the Court.<sup>11</sup> All this goes to show that while the Court is not totally outside the control of the political branches, it is nevertheless intended to act independently and separately from the political branches and, especially, from at least the normal politics that directs those branches. But what about the confirmation process for new appointees? Is this a place where partisan control is allowed to affect what was intended to be an independent and nonpolitical branch of government?

When a vacancy occurs on the Court because of death, resignation, or impeachment, the Constitution provides that the President "shall have Power,..., to nominate, and by and with the Advice and Consent of the Senate, appoint...Judges of the Supreme Court..."<sup>12</sup> He is also allowed "Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."<sup>13</sup> The two provisions establish that it lies solely within the constitutionally assigned power of the President to nominate whoever he pleases, subject only to good judgment, and this includes also to make recess appointments,

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<sup>10</sup> U.S. CONST. ART 3, SEC. 2.

<sup>11</sup> U.S. CONST. ART 1, SEC. 3 indicates that there will be one Chief Justice, but leaves unaddressed the number of justices on the Court. Initially, the Judiciary Act of 1789 set the number of justices at six. Since that time, the number has been expanded in keeping with the geographical expansion of the number circuit courts of the country, since every justice is assigned at least one circuit. During the The Franklin Delano Roosevelt Administration there was some discussion of expanding the size of the Court after several pieces of Roosevelt Administration's New deal legislation were held unconstitutional. However, no change in the number of seats on the Court ever occurred. Some have suggested this was due to Justice Roberts's switch to upholding New Deal legislation beginning with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See Brian T. Goldman, *The Switch in Time that Saved Nine: A Study of Justice Owen Roberts's Vote in West Coast Hotel Co. v. Parrish*, <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1181&context=curej>.

<sup>12</sup> U.S. CONST. ART 2, SEC. 2.

<sup>13</sup> *Id.*

even to the Supreme Court, if a regular one cannot be made. That said, while a President may make a recess appointment or only do so temporarily until the Senate returns and makes the appointment permanent, the fact that recess appointments will automatically expire is an indication that the Framers indeed intended the Senate to have an important role before any permanent appointment, especially to a lifetime judicial appointment, takes hold.<sup>14</sup>

The other constitutionally bestowed power that is important to mention here because it controls how the confirmation process goes forward is the power of each House of Congress “to determine the Rules of its Proceedings.”<sup>15</sup> This is the power that allows the Senate to decide when and where to hold hearings on, among other matters, confirming Supreme Court nominees. But what it does not do is provide the Senate the option of ignoring its obligation to advise and consent on a presidential nominee? If that were the case, it would contradict the clear meaning of the word “shall” in the President “shall have Power..., to nominate, and by and with the Advice and Consent of the Senate, appoint...Judges of the Supreme Court...” Reading the language of Article 1 consistently with the language of Article 2 would certainly not allow the Senate to simply ignore its obligation to advise and consent on a presidential nominee, especially when, by its own acknowledgement, it is doing so because it is a presidential election year. For that would be a most blatant attempt to insert politics into the confirmation of judges to what was intended to be a nonpolitical branch of government.

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<sup>14</sup> In fact, recess appointments have occurred in at least two instances where they were later confirmed to permanent appointments after the Senate returned into session. Recess appointments to the Supreme Court, which were eventually confirmed, include Chief Justice Earl Warren and Justice Brennan, both by President Eisenhower. On June 26, 2014, the Supreme Court in unanimous decision, *National Labor Relations Board v. Noel Canning*, set out some criteria including how long the Senate must be out of session to determine if a recess appointment is constitutionally appropriate.

<sup>15</sup> U.S. CONST. ART 1, SEC. 5.

Therefore, in fulfillment of its constitutional duty and to preserve its own integrity the Senate should heed the Framers intent to keep the Supreme Court outside normal politics by doing its job of advising and consenting (or not consenting as the case may be) that the Constitution provides. Unfortunately, this obligation of the Senate is unlikely to be overseen by the federal courts because of a longstanding doctrine recognized by the Supreme Court to keep the Court outside normal politics. Ever since its decision in *Marbury v. Madison*, the Supreme Court has held that political questions were not justiciable, meaning that unlike legal questions involving the interpretation of existing federal law, political questions could not be answered by the courts. And although the description I have offered of what the Senate is or should be doing can be seen as interpreting existing law, because there will be places where discretion will be necessarily operative, it is unlikely the courts would find it justiciable.

*Marbury v. Madison* was a case for a mandamus to the U.S. Secretary of State to deliver certain commissions which the outgoing President John Adams had signed and which bore the seal of the United States.<sup>16</sup> Although by the end of the case Chief Justice Marshall found a mandamus could not issue from the Supreme Court for other reasons, along the way to his decision he drew a distinction regarding the responsibilities of the office of the Secretary of State that is arguably relevant for judicial confirmation proceedings. Marshall noted that if the responsibilities were purely ministerial, they were reviewable by the courts; other functions which are discretionary (including those that might be labeled “political”), as when the Secretary advises the President on matters of foreign policy, are not justiciable.<sup>17</sup> The point is important because setting a hearing for a presidential nominee may at first appear to be a purely ministerial act, but when one looks behind

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<sup>16</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> *Id.* at 141.



the ministerial act to the Senate getting the best nominee from the point of view of the Senators who are subject to party and constituent control, along with what research they deem necessary to make that determination, let alone what questions to pose to the nominee at the hearing, the hearing is certainly going to be political.

In *Marbury*, Chief Justice Marshall noted, with regard to the commissions that they had been completed before the prior administration went out of office; all that was left was there delivery. As to that “[t]hese duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges.”<sup>18</sup> I point this out because there have been cases where state courts of appeal have ordered city councils, for example, to take a vote when it was thought that a definite ruling on a matter could aid the court in determining whether a law had been broken.<sup>19</sup> This would not be true where the issue is when, where, and how to hold a hearing for a Supreme Court nominee, since no law is broken by this exercise of discretion and what is really at stake in these cases are the political concerns of the Senate. The Constitution does not say when such hearings must be held or anything else about how they might go forward, leaving those matters solely to the Senate’s own Rules of Procedure. So, on the matter of judicial enforcement of the constitutional requirements for filling Supreme Court vacancies, it does not appear that the courts are the place for insuring that the Senate will do its job. But, if not the courts, where does enforcement for filling vacancies lie once the President has submitted a nomination? Could it lie

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<sup>18</sup> *Id.* at 141-42.

<sup>19</sup> In *Royal Properties v. The City of Knoxville*, No. 186612-2 (August 25, 2015), the Court of Appeals of Tennessee remanded to the Knoxville City Council (via the trial court) for a definite ruling on the construction of a parking lot. In so doing, the court noted that “a crucial testing distinguishing legislative from administrative acts is whether the action taken (resolution or ordinance) makes new law or executes one already in existence.” I take this to be the relevant distinction between a ministerial act and a discretionary act for this state court purpose. This would require a vote of the city council, as the court ordered.

in the Senate itself? Remember the Senate is a political branch ultimately subject to the will of the people.

## II. WHY THE POLITICAL RIGHT FEARS PRESIDENT OBAMA CHOOSING THE CANDIDATE THAT REPLACES JUSTICE SCALIA

It is fairly safe to say that some of the most contentious cultural issues of our time, like recognition of same-sex marriage, whether a person has a constitutional right to possess a gun for legal purposes like personal safety, and whether a woman has a legal right to an abortion, have all been resolved by very close votes on the Supreme Court.<sup>20</sup> With just nine justices on the Court (now eight with Justice Scalia's death) many of these decisions like the Second Amendment gun case and the same-sex marriage case are thought to be vulnerable to various legal challenges from those who claim religious objections to marriage<sup>21</sup> and those who claim that the Second Amendment does not extend to automatic weapons.<sup>22</sup> And other cases are working their way up to the Court, including one case that just got decided this past January involving application of the federal Religious Land Use and Institutionalized Persons Act to a Muslim prisoner being prevented by

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<sup>20</sup> *Roe v. Wade*, 410 U.S. 113 (1973), was a seven to two vote in favor of a woman's rights to choose. However, since then, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), support for a woman's right to an abortion on the Supreme Court has narrowed to five to four. In *Obergefell v. Hodges*, 134 S. Ct. 2751 (2014), the case establishing a right to same-sex marriage, the margin of victory was again five to four. *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Second Amendment gun case, was also only resolved by a five to four margin.

<sup>21</sup> See Bob Burnett, *The Republican "Religious Right" Tactic*, [http://www.opednews.com/articles/The-Republican-Religious-by-Bob-Burnett-Discrimination\\_Justice\\_LGBT\\_Law-150702-553.html](http://www.opednews.com/articles/The-Republican-Religious-by-Bob-Burnett-Discrimination_Justice_LGBT_Law-150702-553.html).

<sup>22</sup> See *Caetano v. Massachusetts*, 577 U.S. \_\_\_ (2016), slip op. at 1 (per curiam) (holding that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" and that "the Second Amendment right is fully applicable to the States".)

prison rules from growing a half inch beard,<sup>23</sup> and another still pending review, involving reconsideration by the lower court of the Court's prior holding regarding Texas University's affirmative action program.<sup>24</sup> Needless to say, the holding in the pending cases if put over to the next term and others yet to make it to the Court will be influenced by whoever is finally appointed and what his or her judicial philosophy is. So this is why conservatives are so concerned. By the same token, it should also be noted that the Court "[l]acking a ninth justice for what might extend to 12 or more months risks leaving critical matters unresolved, freezing individuals, businesses, and communities in limbo and uncertainty."<sup>25</sup>

While Justice Scalia was on the Court he generally held to a judicial philosophy of following the plain meanings of what the legislature said when interpreting a federal statute, and what the Framers of the Constitution and its Amendments most likely foresaw as would be the consequences of their writings.<sup>26</sup> This philosophy which Scalia calls Textualism and more specifically Originalism, when applied to interpreting the Constitution, is what conservatives believe might be lost by Obama appointing Merrick Garland or any nominee to replace Justice Scalia.<sup>27</sup> Justice Scalia was, within some limits, a fairly predictable proponent of outcomes

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<sup>23</sup> *Holt v. Hobbs*, 135 S. Ct. 853 (2015), prison policy that prevented Muslim prisoner from growing a half inch beard violated Religious Land Use and Institutionalized Persons Act (RLUIPA).

<sup>24</sup> *Fisher v. University of Texas*, docket number 14-981.

<sup>25</sup> Minow and Tacha, *supra* note 2, at 3. It should also be noted that "[t]wo-thirds of Americans want Senators to do their job: Meet Garland, hold a fair hearing, and vote to approve or disapprove." *Id.*

<sup>26</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997). It should be noted that the legal philosopher, Ronald Dworkin, that Scalia's two forms of interpretation are not the same. Scalia's interpretation of federal statutes looks to semantic intention by considering primarily the words adopted by the Congress. In contrast, Scalia's approach to Constitutional law focuses on the expectations of what the Framers thought would be the likely outcomes of what they wrote.

<sup>27</sup> *Id.* at 23-28, 119-27.

conservatives supported.<sup>28</sup> Additionally, Justice Scalia was by way of the rhetoric of his often vehement dissents a supporter of much of what conservatives thought.<sup>29</sup> So, the real reason for not considering President Obama's nomination of Merrick Garland, if the Senate Republican majority continues to hold to its announced position, may be less what Senate Majority Leader, Mitch McConnell said, is a matter of principle to allow the American people to decide who should be on the Court by who they elect as President in 2016, and more a political ploy in the hope of getting a more favorable nominee should a Republican be elected President in November.<sup>30</sup> Of course, should a Democrat be elected in November, if the Republicans then hold a confirmation vote on Merrick Garland before the president-elect takes office in January, it will be obvious that McConnell's so-called principled statement was nothing more than a naked partisan ploy from the very beginning, an attempt to have politics intrude on the confirmation process so as to, in effect, politicize the Court. What is perhaps even more troubling by the Republican leadership's obstructionism is that it will create a very dangerous precedent for future Supreme Court nominees, whenever the presidency and the leadership of Senate are in the hands of different political parties.

### III. WHAT POLITICAL GUIDELINES DOES OUR SYSTEM OF GOVERNMENT PROVIDE TO AVOID PROBLEMS SUCH AS THESE FROM ARISING?

In this section I will suggest a set of political guidelines that are not legally justiciable in the sense that they cannot be enforced in a court of law, but which operate under the radar to guarantee rule of law. The guidelines emerge from the system of government our Founders sought to provide

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<sup>28</sup> See *Supreme Court Antonin Scalia Dies at 79: Ardent Conservative Fought Liberalism's Tide*, L.A. TIMES, March 24, 2016, <http://www.latimes.com/local/lanow/la-me-antonin-scalia-20160213-story.html>.

<sup>29</sup> See *id.*

<sup>30</sup> *McConnell Tells Supreme Court Nominee: Senate Will Not Act*, NY TIMES, March 16, 2016.

combined with a decent respect for differences between the political and judicial branches of the government. While the guidelines may not be justiciable, they do nevertheless carry weight in the court of public opinion. For as the philosopher H.L.A. Hart might have stated, the U.S. Constitution, along with its various interpretations by the Supreme Court, provides the Rule of Recognition that affords final public legitimacy to everything else the Congress or the President does.<sup>31</sup> If this is correct, then the process by which the requirements of the Constitution are satisfied to guarantee that the Court remains nonpolitical cannot be brushed aside when it is merely politically convenient to do so. But this raises a number of related questions, beginning with: In what way is the process being mishandled if, as was noted in section one above, the political is an inherent part of the process by virtue of the President nominating and the Senate confirming judges? Following upon that would be how the adherence to the guidelines might help restore to its rightful legitimacy in the public's mind the constitutional process by which judges get appointed.

Here I would begin by noting what the Constitution does not say. Nowhere in the description of how a replacement jurist is found is there any suggestion that this period could be artificially held off. To the contrary, the language of the Constitution uses “shall”, not “may” in prescribing the duties of the President and the Senate. At the very least, this would suggest as our first guideline that any wait, should it occur, be limited only by the needs of the institution or the situation insofar as those needs are not blatantly political. When the Constitution was written those needs would have no doubt included time for messages to be sent to and from, and travel time for the nominee to get to Washington, D.C. Next among the guidelines should be the plain acknowledgement that under the system of government the Constitution establishes, namely, a

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<sup>31</sup> See H.L.A. HART, *THE CONCEPT OF LAW*, 2<sup>nd</sup> ed. 145 (1961).

representative democracy, not a direct democracy (as was practiced in the ancient Greek city state of Athens), it is the people's *current* representatives, and not the people themselves, who get to appoint the justices to the Supreme Court. In the case of all federal appointments, the first representative is the incumbent President who has the duty to nominate by virtue of having been duly elected to office. After the President comes the members of the Senate who, by way of their rules of procedure, are duly entrusted to ensure that the nominee is fit for the position and suffers no disqualification.

Next, or third, would follow how the confirmation itself should proceed. This will involve two distinct events, which cannot be separated. First, the Senate must plan to hold hearings with time for a proper investigation into the background of the candidate, as might be relevant to the office or any position of trust of the United States. Second, the Senate needs to then vote on whether or not to confirm the nominee, unless the nominee were to remove himself from further consideration. (That there should first be a prior vote in the Judiciary Committee before the full Senate votes, is a matter of Rules of Procedure the Senate follows.)

This may appear, at first glance, to be merely a ministerial function, until one considers matters of timing (especially in a presidential election year), background research, and related matters, all of which will be political. Second, the President and the Senate have a constitutional responsibility to see to it that their duties to the institutions under their charge, even if only limitedly for the purposes of nominating and advising and consenting on the nominee, be properly satisfied. This means the Senators have a duty not to be merely perfunctory in selecting any candidate but to be mindful of their obligation to select a well-qualified candidate.

Here, a fourth guideline that the Senators should bear in mind concerns the ability of the nominee to handle adequately the matters which come before the Supreme Court. Those will often

be of the most serious moment, where both sides have important arguments to be heard, and where the justices themselves will often split on which side has the better argument. In these situations, which are not at all unusual (but may on occasion involve cultural/religious conflicts or fundamentally different interpretations of the Constitution or federal law), the failure to have a full set of justices to fully decide the matter will often lead to the denial of important rights. This is the point at which the Senate should deliberate to determine if the nominee is right for the job both intellectually and temperamentally, and not put off the deliberation (or not provide it at all), with statements like let the people decide in the upcoming election. Remember, as a representative democracy the people don't decide this question directly. More importantly, the American people have already made this decision when they choose who would be the current President and who would be in the current Senate, at the last election. This is the proper politics of the situation; proper in the sense that it respects the plan of government the Founders put together to not politicize the judiciary and especially the Supreme Court.

Politics in the sense I am using it here is not the politics of waiting until an election to see who wins and if a better deal can be struck. Politics in my sense is the higher law of the Constitution that seeks consensus around a candidate based not only on whether he or she can physically perform the job in a mentally competent way, but also on whether the candidate will be sensitive to the concerns of the political branches, including exhibiting concern for the rights the people are thought to already possess, along with the need for good relations among the institutions of government, and other matters that might bear on those institutions, including the candidate's respect for international law. What should not be sought is a promise (either direct or implied) from the candidate regarding how they will decide a particular case that has yet to come before the Court. While such a promise would not be enforceable, requiring it, or even appearing

to require it, by those who get to decide would delude the legitimacy of the Court in the minds of the public and make the institution appear to be less impartial and not an independent reviewer of the cases before it.

But having said this, the question will arise from various constituencies will this candidate protect my rights—whether it be my right to an abortion, to possess a firearm, or to entering into a same-sex marriage? Accordingly, the fifth guideline is for the President and the Senators to be circumspect both to determine if from the candidate’s testimony, published writings, or prior judicial opinions, he shows a deference to those concerns, since in the end the Constitution is “We the People...”, but this information should be gotten (to the extent appropriate) from the candidate’s prior scholarly writings or judicial opinions in a thoughtful and deliberative way. So, politics may enter but only in this more limited and circumscribed way. Here it is important to remember why the Framers set up the judiciary separate from the political branches. The political branches can operate on a much wider array of crasser concerns, including how adopting one position over another might benefit one’s reelection, unless it were to become an outright bribe. Courts do not have this luxury. When judges decide cases they must do so on what the law says, not on what they may wish it to say, as the late Justice Scalia long advocated.<sup>32</sup> Of course, a judge can resign if he or she believes following the law would be grossly immoral. But short of that, judges are bound by precedent, unless there is now a good reason based on public evidence to believe that a prior decision was wrongly decided.<sup>33</sup>

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<sup>32</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 653. (Scalia, J., dissenting, 1996) (arguing contrary to the Majority’s interpretation of the Constitution, that their decision to strike down Colorado’s Amendment 2 was “an act not of judicial judgment, but of political will); see also SCALIA, *supra* note 26, at 22.

<sup>33</sup> Good evidence, like with *Brown v. Board of Education*, 347 U.S. 483 (1954), include social science data about the effects of separate educational systems on majority children.



Granted it takes discretion in the weak sense that Professor Ronald Dworkin talks about for everything to be so nicely compartmentalized.<sup>34</sup> For people are inevitably influenced, if only unconsciously, by their own personal background and life experiences. But that doesn't mean that a judge who is personally more liberal cannot decide a case in a more moderate direction if that is what the law calls for; similarly, a more personally conservative judge should be able to move to the moderate position to be in keeping with the law and what the Constitution requires. My own understanding here is that judges, from whatever position they start, may often find it necessary, as so often they do, to adopt a view of a case different from where they may have started as judges, since facts are a funny thing, especially when judges are sworn to abide by the law.<sup>35</sup>

#### IV. POLITICAL PHILOSOPHY

More generally, it is worth noting that the abilities we look for from our judiciary fit a well-known philosophical framework for political liberalism generally. The Philosopher John Rawls asks the question: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”<sup>36</sup> His answer is that society must be well-ordered and united not in its moral

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<sup>34</sup> Professor Dworkin uses the example of a sergeant ordered to select his five best persons to go on patrol. The order may not specify how to make the selection. Nevertheless, the mission provides criteria that allow criticism where judgment is poorly applied. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 69 (1977).

<sup>35</sup> For example, it was Justice Sandra Day O'Connor, a Reagan appointee, who wrote the plurality majority opinion in *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), that upheld *Roe v. Wade*. See generally VINCENT J. SAMAR, *JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY*, especially Ch. 3 (1998).

<sup>36</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 4 (1993). I would note here that the Philosopher Alan Gewirth distinguishes universal morality, which he believes reason and human purpose-fulfillment get you to and which ought to apply to everyone, from more particularist moralities (of particular groups, often churches) that may legitimately operate within universal morality to provide their members a unique kind of self-fulfillment, provided respect is shown for the universal rights of

beliefs, but in its political conception of justice, where justice becomes the focus of an overlapping consensus of reasonable comprehensive doctrines.<sup>37</sup> However well Rawls' statement applies to the current American political climate, it is nonetheless the case that his idea of a well-ordered society is advanced when citizens from very different backgrounds and beliefs accept, at least, that they are equal before the law and that the judiciary will insure that equality. For many of the most pernicious disagreements that most profoundly divide people occur over religion, metaphysics, and ethics, even though the views "are not seen by them as fully general and comprehensive;" thus, attempts from the political side to force a single view to govern a wide range of situations "makes[s] citizens with opposing views and interests highly suspicious of one another's arguments."<sup>38</sup> This is where rule of law comes apart, to be replaced by crass partisan politics. Still, once this is understood as the potential danger it is to the democratic order, the possibility of real consensus materializes even among those who might otherwise seriously disagree. That consensus arises only if the laws are based not on some metaphysical idea of justice, but on social cooperation, founded on common interests, to discover the common good. It is at this point that the judiciary plays a pivotal role, provided they have not been so politicized by the process which forms them to no longer be able to serve their function or to no longer be viewed by the public as truly independent and nonpolitical.

Especially is this true when fundamental constitutional questions are at stake, which have their origin prior to "certain ideas of society and person of a political conception, much less in a shared public conception", but, nevertheless, come about by a *modus vivendi*, much like

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those not members of the group or those wanting to leave the group. ALAN GEWIRTH, *SELF-FULFILLMENT*, Ch. 4 (1998). I point this out because law, especially our constitutional rights, has to operate universally within our society.

<sup>37</sup> GEWIRTH, *supra* note 36, at 35.

<sup>38</sup> RAWLS, *supra* note 36, at 160, 162.

toleration.<sup>39</sup> Such constitutional consensus initially “establishes democratic electoral procedures for moderating political rivalry within society” and includes “agreement on certain basic political rights and liberties”, which includes “the right to vote and freedom of political speech and association, and whatever else is necessary for electoral and legislative procedures of democracy.”<sup>40</sup> Turmoil and instability arises in the move from the constitutional consensus to overlapping consensus where interests take greater hold, but only if the fleshing out of specific rights and liberties has not been taken out of the political agenda.<sup>41</sup> This is why the Supreme Court, operating as it does not from a specific political platform but as “exemplar of public reason” in a constitutional democracy is so important—to establish a principled ideal of the basic rights and liberties that constitute higher law, and to guarantee that these fixes not succumb to the frailties of the day to day changing political agenda. So why do questions like whether the Senate should do its job and hold confirmation hearings for a judicial nominee even arise?

They arise because American politics exhibit primarily a short-term view of the public interest, which often makes it appear closely aligned to private interests.<sup>42</sup> Two factors may account for this. First, the country is relatively young by European and Asian standards, and so there is not a whole lot of history to support longer term public interests. Second, the American election cycle for electing a President every four years, two state Senators every six years in

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<sup>39</sup> *Id.* at 158.

<sup>40</sup> *Id.* at 158, 159.

<sup>41</sup> *Id.* at 161.

<sup>42</sup> This is based on polling showing voters’ response to the question: What made you decide for a particular candidate. More often than not, the decision is based on the immediate state of the economy, fear of terrorism, or some other immediate pressing concern, rather than more long-term concerns like global warming or what constitutional rights and duties might be affected. See e.g., Anthony Salvanto, Jennifer De Pinto, Sarah Dutton and Fred Backus, *CBS/NYT Poll: Donald Trump Leads, Strong on Terrorism, Economy*, Dec. 10, 2015, <http://www.cbsnews.com/news/cbsnyt-poll-donald-trump-leads-strong-on-terrorism-economy/>.

staggered order, and the total membership of the House of Representatives every two years, accounts for it. Consequently, much of the political disruption that appears to infect higher law can be attributed to these relatively short turn bouts for political office that necessarily focus on short-term interests.

That is why it is so important that every candidate for public office—from the President down to the Members of Congress, to the Judiciary—when they swear an oath or affirm that they will support the Constitution, should understand their longer-term obligations, at least regarding matters like the appointment of federal judges who essentially have life tenure.<sup>43</sup> What the Constitution as higher law requires is that these longer-term positions should not suffer at the polls. For the Constitution does not allow for only short term politics to dominate, but requires, especially in those instances where the very plan of government might be at stake, those who hold public office to follow the higher law the Constitution mandates. This is why the Founders were so adamant in insuring the judiciary be non-political. And it is why the Senate too must at times be less political if the Constitution is not to be just a bunch of words with little or no lasting effect on our constitutional representative democracy. Democracy is not always easy, and a constitutional representative democracy may be even a harder path to follow, but it is the path we have.

## CONCLUSION

In this essay, I have sought to appeal to the current U.S. Senate Republicans better nature under our constitutional system to perform the job, which the Constitution obligates them to perform. I have also sought to show that the issue of holding hearings and taking an honest vote on President

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<sup>43</sup> U.S. CONST. ART 6, SEC. 3.

Obama's nominee of Merrick Garland should not be reduced to the same kind of day-to-day politics that accompanies normal lawmaking. That, at least, in cases of Supreme Court nominees, where what can be at stake is the integrity of the constitutional order itself, something more circumspect is required. What that something more is is the long-term vision of the constitutional plan itself and an understanding of what it would mean to every American if they no longer could feel that their rights are protected by an independent and nonpolitical judiciary. Absent adherence to the obligations of the plan, the Senate risks deterioration of the social contract and potentially the end of the constitutional form of government we have come to know over the past more than two hundred years. This certainly cannot be what the Founders intended would result when they began their effort with those now famous words: "We the People..."