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PRESIDENT-SHOPPING FOR A NEW SCALIA:  
THE ILLEGITIMACY OF “MCCONNELL MAJORITIES” IN  
SUPREME COURT DECISION-MAKING

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*WASHINGTON, June 29—By the slimmest of margins, the Supreme Court today ended its decades of protecting abortion rights and overruled Roe v. Wade,<sup>1</sup> the 1973 decision that established abortion as a constitutional right.<sup>2</sup>*

The breaking news one day in June 2019 is the demise of *Roe v. Wade*. By a vote of 5-4, the Supreme Court has overruled the precedent and left the protection of abortion rights to the sole discretion of lawmakers. There had been no majority for such a decision until President Trump had the chance to make two appointments to the Court. One of those appointees wrote the majority opinion. Perhaps fittingly, the author of the opinion was the successor to the late Justice Antonin Scalia, who strove for this goal more vigorously than any member of the Court since 1973. Of course, every supporter of abortion rights realizes that the Trump appointee now sits on the High Court only because President Obama’s nominee for the same seat was ignored by the Senate for eleven months. The overruling of *Roe* is directly traceable to that stonewalling and its mastermind—the majority leader, Senator Mitch McConnell of Kentucky. Why should supporters of abortion rights accept the legitimacy of a Court decision handed down by a bare majority that owes its fifth vote to Mitch McConnell’s Supreme Court Justice?

The answer is that they would not, nor should they. Contrary to McConnell’s repeated claims, his posture of determined inaction

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> Cf. Linda Greenhouse, *The Supreme Court: High Court, 5-4, Affirms Right to Abortion but Allows Most of Pennsylvania’s Limits*, N.Y. TIMES (June 30, 1992), <http://www.nytimes.com/1992/06/30/us/supreme-court-high-court-5-4-affirms-right-abortion-but-allows-most-pennsylvania.html?pagewanted=all> (discussing a 1992 re-affirmation of abortion as a fundamental right by the narrowest possible margin).

was not consistent with historical precedent.<sup>3</sup> Never before had the United States Senate closed its eyes, covered its ears, and pretended that a Supreme Court nominee did not exist, even to the point of refusing a simple courtesy meeting.<sup>4</sup> Nor was McConnell's rhetoric of populism coherent. There was never a convincing explanation for how a President with nearly a quarter of his term remaining somehow lacked a sufficient popular mandate for the legitimate exercise of his constitutional powers.<sup>5</sup> Nor was there ever a convincing explanation for why a vacancy that easily could have been filled in time to avoid disrupting the Court's next Term should have been kept deliberately unfilled for most of that Term.<sup>6</sup> People aggrieved by a Court decision are entitled to question the legitimacy of that decision if it is directly traceable to what they may fairly regard as outright "President-shopping"—that is, deliberately keeping a Supreme Court seat vacant until a more ideologically compatible nominator takes office.

The Senate has broad discretion in carrying out its "advice and consent" function.<sup>7</sup> Even President-shopping might be within its constitutional authority. The practice nevertheless represents a major new degeneration of the already dysfunctional confirmation process and one that is already ripe for expansion beyond a mere one-year delay.<sup>8</sup> The ideological stonewalling could easily reach

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<sup>3</sup> See Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html>; see also Gardiner Harris & David M. Herszenhorn, *Obama and G.O.P. Senators Meet on Filling Scalia's Seat, to No Avail*, N.Y. TIMES (Mar. 1, 2016), [https://www.nytimes.com/2016/03/02/us/politics/obama-to-make-case-to-gop-senators-to-fill-supreme-court-seat.html?\\_r=0](https://www.nytimes.com/2016/03/02/us/politics/obama-to-make-case-to-gop-senators-to-fill-supreme-court-seat.html?_r=0) ("Republicans have made clear . . . they would not treat this nomination the way it had been historically treated through American history."); David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected*, N.Y. TIMES (Feb. 23, 2016), <https://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html> ("This would be a historic and unprecedented acceleration of politicizing a branch of government.")

<sup>4</sup> See Lyall, *supra* note 3; Harris & Herszenhorn, *supra* note 3 ("Something that has never been done before, never in the history of the country.")

<sup>5</sup> See, e.g., Harris & Herszenhorn, *supra* note 3 (noting that the same issue was raised in 2012 and the President won as he was elected to a full four-year term, and the Constitution requires the President to nominate someone and the Senate to hold hearings on that nomination).

<sup>6</sup> See *id.* (noting that Obama followed the normal process and asked the Republicans to submit names for consideration); see also Lyall, *supra* note 3 ("[Republicans] repeatedly would reiterate that it wasn't about [the nominee himself]—that he was incredibly impressive and well qualified, but this was about politics.")

<sup>7</sup> See *Senate Legislative Process*, U.S. SENATE, [https://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm](https://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm) (last visited Mar. 14, 2017).

<sup>8</sup> See Editorial, *A Coup against the Supreme Court*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/07/opinion/a-coup-against-the-supreme-court.html> (criticizing the suggestion to keep the seat vacant for an entire presidential term).

such a magnitude that the Court is left limping along for years on end with one, two, or even more vacancies or operating with the stopgap substitute of temporary Justices serving on recess appointments. The infamous history of staffing the National Labor Relations Board may provide an unseemly preview.<sup>9</sup> That the Senate might have the constitutional power to impair the confirmation process does not mean it should use it. A practice does not have to be unconstitutional to be an abuse of power.<sup>10</sup>

While there may be few options for preventing or reversing an effort at President-shopping, it should not be normalized. At the very least, it can be identified when it happens. The resulting impairment of the Court's legitimacy can be confronted rather than ignored. For its part, the Court could try to avoid rendering 5-4 decisions that depend on the vote of a Justice who owes his or her seat to the kind of President-shopping that McConnell has now pioneered. When the Court does render such decisions, they should be identified as owing their existence to an illegitimate "McConnell Majority." President-shopping undermines the legitimacy of those decisions, and this impaired legitimacy should undermine their authority as precedents.

#### I. DETERMINED INACTION

Mere hours after Justice Scalia died on February 13, 2016, Senate Majority Leader Mitch McConnell took a hard-line position against approving any replacement Justice chosen by incumbent President Barack Obama.<sup>11</sup> "The American people," McConnell said, "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."<sup>12</sup> Although President Obama responded by discharging what he called his "constitutional responsibility to nominate a

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<sup>9</sup> Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361, 1367-98 (2000).

<sup>10</sup> See *Unconstitutional*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Contrary to or in conflict with a [C]onstitution, esp[ecially] the U.S. Constitution."); cf. *Abuse of Power*, BLACK'S LAW DICTIONARY, *supra* ("The misuse or improper exercise of one's authority; esp[ecially], the exercise of a statutorily or otherwise duly conferred authority in a way that is tortious, unlawful, or outside its proper scope.").

<sup>11</sup> See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>; Senator Mitch McConnell, FACEBOOK (Feb. 13, 2016), <https://www.facebook.com/mitchmcconnell/posts/1021148581257166>.

<sup>12</sup> Press Release, Majority Leader Mitch McConnell, U.S. Senator for K.Y., Justice Antonin Scalia (Feb. 13, 2016), <http://www.mcconnell.senate.gov/public/index.cfm/2016/2/justice-antonin-scalia>.

successor,”<sup>13</sup> McConnell succeeded in holding Senate Republicans to his hard-line position. During the eleven remaining months of Obama’s presidency, the Senate declined to act on his March 16 nomination of Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit.<sup>14</sup> The task of filling the vacancy passed to Obama’s successor.<sup>15</sup>

McConnell and Senate Republicans had detailed their position before Obama even chose a nominee. On February 23, when the Senate first reconvened following Scalia’s death,<sup>16</sup> McConnell and others articulated three elements of their position. First, if Obama submitted a nomination, the Senate would “withhold” its consent and would “revisit the matter” only after the presidential election.<sup>17</sup> “This nomination,” McConnell said, “will be determined by whoever wins the presidency.”<sup>18</sup> Second, the Judiciary Committee, chaired by Senator Chuck Grassley, would “not hold hearings on any Supreme Court nominee until after [the] next President is sworn in on January 20, 2017.”<sup>19</sup> Third, Republican senators would decline to hold traditional courtesy meetings with any Obama nominee.<sup>20</sup> A fourth element of the position emerged several days later. McConnell and Grassley declined Obama’s invitation to offer their

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<sup>13</sup> *Death of Justice Scalia: Reaction and Analysis*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/obama-i-plan-to-fulfill-my-constitutional-responsibility-to-nominate-a-successor/>.

<sup>14</sup> 162 CONG. REC. S1,551 (daily ed. Mar. 16, 2016) (noting the Senate’s receipt of a formal nomination); *PN1258—Merrick B. Garland—Supreme Court of the United States*, LIBRARY OF CONG., <https://www.congress.gov/nomination/114th-congress/1258> (last visited Mar. 3, 2017); Carl Hulse, *Supreme Court Fight is New Front in Partisan Warfare*, N.Y. TIMES (Feb. 21, 2016), <https://www.nytimes.com/2016/02/22/us/politics/how-will-supreme-court-work-first-see-how-congress-works.html>; Lyall, *supra* note 3.

<sup>15</sup> See Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>; see also *PN1258—Merrick B. Garland—Supreme Court of the United States*, *supra* note 14 (noting that the nomination was returned to the President).

<sup>16</sup> Herszenhorn, *supra* note 3.

<sup>17</sup> 162 CONG. REC. S926 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell) (“Presidents have a right to nominate just as the Senate has its constitutional right to provide or withhold consent. In this case, the Senate will withhold it. The Senate will appropriately revisit the matter after the American people finish making in November the decision they have already started making today.”).

<sup>18</sup> Herszenhorn, *supra* note 3.

<sup>19</sup> Letter from Charles E. Grassley, Chairman, Senate Judiciary Comm. et al., to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016).

<sup>20</sup> See Mike DeBonis & Paul Kane, *Republicans Vow No Hearings and No Votes for Obama’s Supreme Court Pick*, WASH. POST (Feb. 23, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/?tid=a\\_inl&utm\\_term=.d0a8c6f29174](https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/?tid=a_inl&utm_term=.d0a8c6f29174). Only about a dozen Republican senators ever did have a courtesy meeting with Garland. See Lyall, *supra* note 3.

own suggestions for possible nominees for the vacancy.<sup>21</sup> Other than formally receiving any Obama nomination and automatically referring it to the Judiciary Committee, Senate Republicans would effectively behave as if no vacancy existed.

Taking McConnell and Senate Republicans at face value, their defense of this posture of determined inaction drew on two ideas: precedent and populism. First, the situation created by Scalia's death was, they claimed, "almost unprecedented."<sup>22</sup> McConnell explained that "[i]t has been more than [eighty] years since a Supreme Court vacancy arose and was filled in a presidential election year."<sup>23</sup> He added, moreover, that "[s]ince we have divided government today, it means we have to look back almost 130 years to the last time a nominee was confirmed in similar circumstances."<sup>24</sup>

Second, and relatedly, the supposed dearth of historical precedent about how to handle the vacancy gave the Senate the flexibility to innovate the populist idea of letting voters indirectly choose the Supreme Court nominee by choosing the President. Voters were, after all, already considering which presidential candidate they preferred for making Supreme Court nominations. As McConnell explained: "The [p]residential candidates are already debating the issue on stage. Americans are already discussing the issue among themselves, and voters are already casting ballots . . . with this issue very much in mind."<sup>25</sup> The lack of historical precedent, he said, freed the Senate to choose whether to "allow the people to continue deciding who will nominate the next Justice or" to "empower a lame duck President to make that decision on his way out the door."<sup>26</sup> McConnell's populist (or demagoguing) answer: "[L]et the people decide."<sup>27</sup>

This second point left some ambiguity that periodically surfaced among Senate Republicans. It was an ambiguity as to the duration of their pledge not to act on the nomination. Did the pledge extend all the way to the end of Obama's term or only through Election Day? Shortly after Garland's nomination, Senator Orrin Hatch of Utah suggested that the Senate might at least proceed with hearings after the election if the Democratic presidential nominee

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<sup>21</sup> See Harris & Herszenhorn, *supra* note 3.

<sup>22</sup> 162 CONG. REC. S926 (statement of Sen. McConnell).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

won the election because the vacancy would just end up being filled by another Democratic President anyway.<sup>28</sup> But having justified the determined inaction as a populist measure designed to allow the people to decide which presidential candidate would fill the vacancy, McConnell could not consistently endorse ignoring the supposed will of the people by proceeding with an Obama nominee after the election. McConnell rejected the idea and reaffirmed that the Senate would not act on a nomination to fill the Scalia vacancy until after the next President took office.<sup>29</sup> Although the question periodically re-emerged,<sup>30</sup> McConnell remained steadfast. When asked in August, for instance, about the possibility of proceeding with the Garland nomination after the election, McConnell flatly said, “No, we’re not going to confirm Garland this year. . . . Whoever the next President is will get to make that appointment.”<sup>31</sup> It would make no difference, he said, if the Democratic presidential candidate won the election: “I think the next President will have been chosen by the American people to make this appointment, and we have to live with whoever is ultimately chosen.”<sup>32</sup> Although McConnell’s position could have changed after the election in the face of a changed political calculus, he stuck to the position that, no matter what, the Senate would not act on any Supreme Court nominee until Obama’s successor was in office.<sup>33</sup>

In addition to grounding their position in populism and supposed lack of precedent, McConnell and Senate Republicans sought

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<sup>28</sup> Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html>; David M. Herszenhorn, *Merrick Garland Visits Capitol as G.O.P. Digs in Against Vote*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/2016/03/18/us/politics/obama-supreme-court-senate.html>.

<sup>29</sup> Nicholas Fandos, *Garland shouldn’t be Considered after Election, McConnell Says*, N.Y. TIMES (Mar. 20, 2016), <https://www.nytimes.com/2016/03/21/us/politics/merrick-garland-supreme-court-mitch-mcconnell.html>; Eric Lipton, *First Step in Conservatives’ Supreme Court Fight: Agreeing on a Message*, N.Y. TIMES (Mar. 20, 2016), <https://www.nytimes.com/2016/03/21/us/politics/first-step-in-conservatives-supreme-court-fight-agreeing-on-a-message.html>.

<sup>30</sup> See Susan Cornwell, *Senator Grassley could be Persuaded to Hold Hearing on Garland*, REUTERS (Aug. 30, 2016), <http://www.reuters.com/article/us-usa-court-garland-idUSKCN1152OK>.

<sup>31</sup> Alan Rappeport, *As Donald Trump Falts, Democrats Plan to Press Fight for Supreme Court*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/politics/donald-trump-democrats-supreme-court.html>; see Michael D. Shear & Jennifer Steinhauer, *More Republicans Say They’ll Block Supreme Court Nominee*, N.Y. TIMES (Feb. 15, 2016), [https://www.nytimes.com/2016/02/16/us/politics/more-republicans-say-theyll-block-supreme-court-nomination.html?\\_r=0](https://www.nytimes.com/2016/02/16/us/politics/more-republicans-say-theyll-block-supreme-court-nomination.html?_r=0).

<sup>32</sup> Rappeport, *supra* note 31.

<sup>33</sup> See Linda Greenhouse, *Under Trump, the Federal Courts Will Be Up for Grabs*, N.Y. TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/opinion/under-trump-the-federal-courts-will-be-up-for-grabs.html>.

additional political cover for their posture of determined inaction by looking across the partisan aisle for some affirmative precedent for it. In particular, they tried to equate their stance with positions that two Democrats had previously articulated. They initially focused on a July 2007 speech by Senator Chuck Schumer<sup>34</sup>—who at the time of the Scalia vacancy was already positioned to become the next leader of the Democratic conference—but the so-called “Schumer precedent”<sup>35</sup> offered only limited support. Later, McConnell and Senate Republicans shifted their principal focus to a June 1992 speech delivered on the Senate floor by Vice President Biden back when he was Chairman of the Senate Judiciary Committee.<sup>36</sup> Some of the propositions that Biden offered in that speech—which Senate Republicans quickly dubbed “the Biden rules”<sup>37</sup>—came somewhat closer than Schumer’s points to supporting the Republicans’ posture of determined inaction on Supreme Court vacancies during an election year but still fell short.<sup>38</sup>

To discuss the Schumer precedent first, it is true that in July 2007, Schumer came out against confirming any additional Supreme Court nominees who might have been submitted by President George W. Bush, who was then halfway through the seventh year of his presidency.<sup>39</sup> There was no vacancy at the time,<sup>40</sup> so Schumer was speaking hypothetically. Still, what he said was: “Given the track record of this President and the experience of obfuscation at the hearings, with respect to the Supreme Court, at least: I will recommend to my colleagues that we should not confirm a Supreme Court nominee [except] in extraordinary circumstances.”<sup>41</sup>

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<sup>34</sup> See Carl Hulse & Mark Landler, *After Antonin Scalia’s Death, Fierce Battle Lines Emerge*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html>.

<sup>35</sup> Carl Hulse, *24 Years Later, Joe Biden’s Words Haunt Democrats*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/24-years-later-joe-bidens-words-haunt-democrats.html>.

<sup>36</sup> See *id.*

<sup>37</sup> David M. Herszenhorn & Julie Hirschfeld Davis, *Joe Biden Speech from 1992 Gives G.O.P. Fodder in Court Fight*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-speech-from-1992-gives-gop-fodder-in-court-fight.html>.

<sup>38</sup> See *id.*

<sup>39</sup> See Carrie Budoff Brown, *Schumer to Fight New Bush High Court Picks*, POLITICO (July 27, 2007), <http://www.politico.com/story/2007/07/schumer-to-fight-new-bush-high-court-picks-005146>.

<sup>40</sup> See *id.*

<sup>41</sup> Charles E. Schumer, U.S. Senator, Keynote Address to the American Constitution Society (July 31, 2007), <https://www.acslaw.org/acsblog/text-of-senator-schumers-speech>.

The remarks, however, were only a weak precedent for McConnell's policy of determined inaction. Although Schumer was speaking sixteen months before the next presidential election, his objection had nothing to do with the upcoming election year.<sup>42</sup> Schumer's explicit concern was with maintaining ideological balance on the Court, and his criticism specifically centered on the difficulty of ascertaining the ideological predispositions of Republican nominees who had limited paper trails and gave evasive answers in confirmation hearings.<sup>43</sup> He cited Chief Justice Roberts and Justice Alito, both Bush appointees, as examples.<sup>44</sup>

Schumer's response to what he perceived as a problem was to "reverse the presumption of confirmation" in order to place the burden on nominees to "prove by actions—not words—that they are in the mainstream, rather than the Senate proving that they are not."<sup>45</sup> Far from some special rule against confirming Supreme Court nominees during a presidential election year, Schumer made clear that he was proposing a general principle that would be applicable "for the rest of this President's term and if there is another Republican elected with the same [judicial] selection criteria."<sup>46</sup> As Schumer himself also correctly observed later during the Garland controversy, nowhere in the 2007 remarks had he called for refusing to hold hearings or otherwise shutting down the usual confirmation process.<sup>47</sup>

The 1992 Biden speech came considerably closer to suggesting that the Senate adopt something like the McConnell posture of determined inaction during the waning months of George H.W. Bush's presidency. Like Schumer, Biden was speaking hypothetically because there was no vacancy at the time.<sup>48</sup> Also like Schumer, he was not focused exclusively on confirmations during a presidential election year. Rather, in lengthy and wide-ranging remarks,<sup>49</sup> Biden critiqued the confirmation process for Supreme

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<sup>42</sup> See *id.*; see also *2008 Presidential Election*, U.S. ELECTORAL C., <https://www.archives.gov/federal-register/electoral-college/2008/dates.html> (last visited Mar. 16, 2017) (noting that the U.S. general election for President and Vice President was held on November 4, 2008).

<sup>43</sup> See Schumer, *supra* note 41.

<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Chuck Schumer, *Republicans' Apples to Oranges Comparison on Supreme Court Nominees*, MEDIUM (Feb. 16, 2016), <https://medium.com/@SenSchumer/republicans-apples-to-oranges-comparison-on-supreme-court-nominees-83c0949fee02#.9hukkit15>.

<sup>48</sup> See Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html>.

<sup>49</sup> See 138 CONG. REC. 16,307–21 (1992) (statement of Sen. Joseph Biden).



Court nominees and proposed some changes both in the event of an immediate vacancy and also “for future nominations.”<sup>50</sup>

As with Schumer, Biden’s central concern was with maintaining ideological balance on the Court.<sup>51</sup> His premise was that Americans opting for a divided government meant that there was no popular mandate for either party “to remake the Court.”<sup>52</sup> In the face of what he regarded as efforts by Presidents Reagan and Bush to do precisely that, Biden proposed, as the “centerpiece” of a new approach to confirmations, “a frank recognition of the legitimacy of Senate consideration of a nominee’s judicial philosophy as part of the confirmation review.”<sup>53</sup> He reiterated his own extended defense of the prerogative of senators to consider the ideology of Supreme Court nominees.<sup>54</sup> Biden then outlined what he saw as three undesirable side effects of the Republican effort to remake the Court: (1) the confirmation process had developed a singular focus on the abortion issue;<sup>55</sup> (2) both conservative and liberal groups had begun scapegoating the confirmation process for what, in fact, was their own inability to persuade the public to their views;<sup>56</sup> and (3) the confirmation process had become vicious and personal.<sup>57</sup>

Biden proposed several changes as a way to reform the confirmation process. He proposed: (1) having greater presidential consultation with the Senate before a nomination is made;<sup>58</sup> (2) encouraging greater and earlier senatorial candor about the merits of nominees instead of withholding judgment and allowing outside groups to frame the issues;<sup>59</sup> (3) voting against nominees who were evasive in confirmation hearings;<sup>60</sup> and (4) undertaking more sensitive investigations of personal allegations directed at nominees.<sup>61</sup>

What McConnell and Senate Republicans focused on in 2016, however, was a passage in which Biden took the position that reforming the confirmation process would be impossible during the

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<sup>50</sup> *Id.* at 16307.

<sup>51</sup> *See, e.g., id.* at 16308, 16314, 16315.

<sup>52</sup> *Id.* at 16308.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 16308–14 (reprinting his own previous speech).

<sup>55</sup> *Id.* at 16314–15.

<sup>56</sup> *See id.* at 16315.

<sup>57</sup> *Id.* at 16315–16.

<sup>58</sup> *Id.* at 16317–18.

<sup>59</sup> *Id.* at 16318–19.

<sup>60</sup> *Id.* at 16319–20.

<sup>61</sup> *Id.* at 16320.

ongoing 1992 presidential campaign.<sup>62</sup> If an opening arose on the Supreme Court at that time, he proposed that President Bush consider “not nam[ing] a nominee until after the November election is completed,”<sup>63</sup> and that the Senate Judiciary Committee “seriously consider not scheduling confirmation hearings on the nomination until after the political campaign season is over.”<sup>64</sup> For what it is worth, Biden denied that his proposal was merely “an attempt to save the seat on the Court in the hopes that a Democrat would be permitted to fill it.”<sup>65</sup> His explicit focus in that passage of the speech was on the difficulty of trying to conduct a fair and constructive confirmation process during a presidential campaign.<sup>66</sup>

In justifying this recommendation for delaying action on any opening that might immediately arise, Biden offered a historical analysis aimed at demonstrating a “tradition against acting on Supreme Court nominations” during a presidential election year, a tradition that he characterized as “particularly strong when the vacancy occurs in the summer or fall of that election season.”<sup>67</sup> To support this position, he made several factual claims about the past handling of Supreme Court vacancies in presidential election years. First, he asserted that during the September or October before a presidential election, no Supreme Court nomination had ever been confirmed and that the only attempt to secure a confirmation that close to a presidential election had failed.<sup>68</sup> Second, he claimed that during the summer before a presidential election, only five Supreme Court nominations had ever been confirmed and that those vacancies had all arisen before summer.<sup>69</sup> Third, none of the six

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<sup>62</sup> *Id.* at 16316–17.

<sup>63</sup> *Id.* at 16317.

<sup>64</sup> *Id.*

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

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 16316.

<sup>68</sup> *See id.* (“[N]o Justice has ever been confirmed in September or October of an election year—the sort of timing which has become standard in the modern confirmation process. Indeed, in American history, the only attempt to push through a September or October confirmation was the failed campaign to approve Abe Fortas’ nomination in 1968.”).

<sup>69</sup> *See id.* (“[W]hile a few Justices have been confirmed in the summer or fall of a [p]residential election season, such confirmations are rare—only five times in our history have summer or fall confirmations been granted, with the latest—the latest—being the August 1846 confirmation of Justice Robert Grier. . . . Moreover, of the five Justices who were confirmed in the summer of an election year, all five were nominated for vacancies that had arisen before the summer began. Indeed, Justice Grier’s August confirmation was for a vacancy on the Court that was more than 2 years old, as was the July confirmation of Justice Samuel Miller, in 1862.”). Biden’s inclusion of Grier and Miller was erroneous, as those vacancies and nominations happened during congressional election years, not presidential ones.

vacancies that had arisen during the summer or fall before a presidential election, he said, had resulted in the confirmation of a nominee before the election—either because the President had declined to submit a nomination until after the election or because the Senate had refused to confirm nominations that were submitted.<sup>70</sup>

Despite making heavy rhetorical use of the “Biden rules,” McConnell and Senate Republicans had adopted a posture of determined inaction that strayed from Biden’s speech in two fundamental ways. First, Biden was speaking in June of a presidential election year, not February.<sup>71</sup> His explicit focus was on summer and fall.<sup>72</sup> To articulate his supposed tradition of inaction during presidential election years, Biden had drawn (and had been compelled by history to draw) careful distinctions between vacancies, nominations, and confirmations that had pre-dated summer and those that had not.<sup>73</sup> His “tradition” contemplated three different periods before a presidential election: (1) “fall” (i.e., September and October); (2) “summer” (August, July, and perhaps June); and, presumably, (3) winter and spring.<sup>74</sup> Biden offered no historical evidence whatsoever supporting any tradition of inaction during winter and spring, which was the time when Scalia died and Garland was nominated.<sup>75</sup> McConnell did not address the inadequacy of trying to use Biden’s speech as evidence of a tradition of inaction relating to a February vacancy and a March nomination.<sup>76</sup>

The second inconsistency between the McConnell posture of determined inaction and the so-called Biden rules concerned the duration of any suspension of the confirmation process. Biden repeatedly described his suggested restraint as lasting until the election. He suggested that President Bush refrain from making any nomination “until after the November election is completed.”<sup>77</sup>

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<sup>70</sup> *See id.* (“[S]ix Supreme Court vacancies have occurred in the summer or fall of a [p]residential election year, and never—not once—has the Senate confirmed a nominee for these vacancies before the November election. In four of these six cases—in 1800, 1828, 1864, and 1956—the President himself withheld making a nomination until after the election was held. In both of the two instances where the President did insist on naming a nominee under these circumstances, Edward Bradford in 1952 and Abe Fortas in 1968, the Senate refused to confirm these selections.”).

<sup>71</sup> *See id.* at 16305.

<sup>72</sup> *See id.* at 16316.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Cf., e.g.,* Herszenhorn & Hirschfeld Davis, *supra* note 37.

<sup>77</sup> 138 CONG. REC. 16,317 (1992) (statement of Sen. Joseph Biden).

He suggested that the Senate defer any confirmation hearings “until after the election.”<sup>78</sup> Indeed, Biden’s entire rationale for suggesting the delay focused on the impossibility of conducting a fair and constructive confirmation process *during* an election campaign. “[O]nce the political season is under way,” he said, “action on a Supreme Court nomination must be put off until after the election campaign is over.”<sup>79</sup> McConnell, in contrast, made clear that his policy of determined inaction should endure not merely until the end of the presidential campaign but until the end of the existing presidential term.<sup>80</sup> The primary justification, moreover, was not inability to conduct a fair confirmation process during the political season—although some Republican senators certainly cited that rationale<sup>81</sup>—rather, the primary justification was allowing voters to choose the President who would get to fill the vacancy.<sup>82</sup> When debates flared among Republicans about the possibility of proceeding with the Garland nomination after the election,<sup>83</sup> McConnell recognized that his populist justification for the posture of determined inaction was incompatible with ever confirming any Obama nominee, even after the election.

McConnell’s policy of determined inaction did not win acclaim among all Republicans. It was criticized by prior colleagues, such as former Senator Richard Lugar of Indiana and former Senator Olympia Snowe of Maine.<sup>84</sup> It was also criticized by Republicans such as Kenneth Starr and Michael Chertoff, who had been federal judges themselves.<sup>85</sup> Most notably among that class of critics, of course, was retired Justice Sandra Day O’Connor, who said: “We need somebody in there now to do the job and let’s get on with it.”<sup>86</sup> But McConnell and Senate Republicans resisted pressure to drop their policy of determined inaction and kept it going for eleven months with their appeals to precedent and populism.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Lipton, *supra* note 29.

<sup>81</sup> See, e.g., Rob Portman, *Portman: Why Supreme Court Choice Should Wait*, CINCINNATI ENQUIRER (Mar. 18, 2016), <http://www.cincinnati.com/story/opinion/contributors/2016/03/18/portman-supreme-court-choice-wait/81975494/>.

<sup>82</sup> See Press Release, *supra* note 12.

<sup>83</sup> See Hulse, *supra* note 14.

<sup>84</sup> See *id.*

<sup>85</sup> See Lipton, *supra* note 29.

<sup>86</sup> Amy R. Connolly, *Former Justice Sandra Day O’Connor: Obama should Name Scalia’s Replacement*, UNITED PRESS INT’L (Feb. 18, 2016), [http://www.upi.com/Top\\_News/US/2016/02/18/Former-Justice-Sandra-Day-OConnor-Obama-should-name-Scalias-replacement/9601455791740/](http://www.upi.com/Top_News/US/2016/02/18/Former-Justice-Sandra-Day-OConnor-Obama-should-name-Scalias-replacement/9601455791740/).

## II. PRECEDENT AND POPULISM

The vigorous use of the ideas of precedent and populism by McConnell and Senate Republicans in defending their posture of determined inaction in response to the Garland nomination necessarily places those ideas front and center. Probing those two ideas seems an important step in evaluating the propriety of the posture of determined inaction and the President-shopping that it enabled. How compelling are these two ideas as used in this context? Not very.

### *A. Precedent*

Given the pervasive claims that the posture of determined inaction is either consistent with historical precedent, or is at least not inconsistent with it, examining the actual precedent becomes crucial. Such an examination discloses that the posture of determined inaction adopted by McConnell and Senate Republicans in resisting the Garland nomination is not supported by historical precedent. It goes beyond the most aggressive examples of Senate stonewalling and is outright contradicted by other examples. Precedent is simply not a compelling defense of the behavior of McConnell and the others in this episode.

#### 1. Twenty-Five Precedents

Occasions for selecting and nominating new candidates for the Supreme Court can arise in several ways. Most obviously, a vacancy can simply happen without notice.<sup>87</sup> The tenure of a sitting Justice can be terminated either by death or by sudden retirement or resignation, leaving the seat vacant.<sup>88</sup> A vacancy obviously creates an occasion for nominating a new Justice, but it is not the only possibility.<sup>89</sup> Even before a vacancy happens, an occasion for a nomination can arise when a sitting Justice notifies a President that the Justice intends to retire or resign at some future effective date, such as when the Court's current Term ends or when a

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<sup>87</sup> See, e.g., Zachary A. Goldfarb & Lydia DePillis, *Why the Death of a Supreme Court Justice in Office is Unusual*, WASH. POST: WONKBLOG (Feb. 13, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/02/13/the-death-of-a-supreme-court-justice-in-office-is-unusual/?utm\\_term=.97f039cf220f](https://www.washingtonpost.com/news/wonk/wp/2016/02/13/the-death-of-a-supreme-court-justice-in-office-is-unusual/?utm_term=.97f039cf220f).

<sup>88</sup> See *id.*

<sup>89</sup> See, e.g., Kenneth R. Bazinet & James Gordon Meek, *Supreme Court Justice John Paul Stevens to Retire*, N.Y. DAILY NEWS (Apr. 9, 2010), <http://www.nydailynews.com/news/politics/supreme-court-justice-john-paul-stevens-court-oldest-member-retire-article-1.164461>.

successor is confirmed.<sup>90</sup> Like an immediate vacancy, the receipt of this advance notice of an impending vacancy also creates an occasion for selecting and nominating a new Justice even though a vacancy has not yet happened.<sup>91</sup> In addition, a new occasion for selecting and nominating a new Justice can arise well after an actual vacancy has happened if a prior nomination to fill that vacancy fails.<sup>92</sup> The prior nomination might be rejected, postponed, or tabled by the Senate; withdrawn by the President; terminated automatically if the Senate does not act upon it by the end of a session;<sup>93</sup> or spurned by a nominee who declines a commission to serve despite having been confirmed.<sup>94</sup> Any of these occurrences creates a new occasion for the sitting President to choose a nominee for the pre-existing vacancy.

Throughout the history of the Court, some twenty-five occasions for nominations have arisen one way or another during the twelve calendar months preceding a presidential election.<sup>95</sup> Ordered by increasing chronological proximity to their respective presidential elections, these twenty-five instances have consisted of the following:<sup>96</sup>

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<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See, e.g., Supreme Court Nominations, Present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Mar. 30, 2017) [hereinafter *Supreme Court Nominations*] (indicating the rejection of President Ronald Reagan's nomination of Robert Bork on October 23, 1987, which permitted the nomination of Anthony Kennedy on November 30, 1987).

<sup>93</sup> Since an 1843 amendment of the Senate's Standing Rules, a presidential nomination has been deemed to expire when the Senate adjourns at the end of a session. *See S. JOURNAL*, 27th Cong., 3d Sess. 171–72 (1843) (“[N]ominations made by the President to the Senate, and which are neither approved nor rejected during the session at which they are made, shall not be acted upon at any succeeding session without being again made by the President.”); *see also S. JOURNAL*, 40th Cong., 2d Sess. 345 (1868) (“[I]f the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned to the President, and shall not be afterwards acted upon, unless again submitted to the Senate by the President; and all motions pending to reconsider a vote upon a nomination shall fall on such adjournment or recess.”).

<sup>94</sup> *See, e.g., Supreme Court Nominations, supra* note 92 (indicating that Roscoe Conkling declined a nomination by President Chester Arthur on March 2, 1882, who subsequently nominated Samuel Blatchford on March 13, 1882).

<sup>95</sup> *See infra* text accompanying notes 97–106.

<sup>96</sup> Unless otherwise noted, the following information is taken from Appendix A to Henry Abraham's book, *The Judicial Process: An Introductory Analysis of the Court of the United States, England, and France*. *See* HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 414–17 (7th ed. 1998).

1. The November 7, 1987, withdrawal of Judge Ginsburg as an announced nominee;<sup>97</sup>
2. The November 12, 1975, retirement of Justice Douglas;
3. The November 16, 1939, death of Justice Butler;
4. The December 15, 1795, rejection of the recess appointment of Chief Justice Rutledge;
5. The December 18, 1843, death of Justice Thompson;
6. The January 2, 1916, death of Justice Lamar;
7. The January 12, 1932, retirement of Justice Holmes;
8. The January 22, 1892, death of Justice Bradley;
9. The January 26, 1804, resignation of Justice Moore;
10. The January 31, 1844, rejection of John Spencer's nomination;<sup>98</sup>
11. The February 2, 1796, decision of Justice Cushing to decline a Chief Justice commission;<sup>99</sup>
12. The February 13, 2016, death of Justice Scalia;<sup>100</sup>
13. The March 23, 1888, death of Chief Justice Waite;
14. The April 21, 1844, death of Justice Baldwin;
15. The May 31, 1860, death of Justice Daniel;
16. The June 10, 1916, resignation of Justice Hughes;
17. The June 13, 1968, retirement tender of Chief Justice Warren;<sup>101</sup>
18. The June 15, 1844, postponement of Edward King's nomination;<sup>102</sup>
19. The June 15, 1844, postponement of Reuben Walworth's nomination;<sup>103</sup>

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<sup>97</sup> Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES (Nov. 8, 1987), <http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html>.

<sup>98</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>99</sup> *Appointments and Proceedings*, in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 103, 103 (Maeva Marcus et al. eds., 1985); *but see* Ross E. Davies, *William Cushing: Chief Justice of the United States*, 37 U. TOL. L. REV. 597, 622 (2006) (suggesting February 5 as the proper date).

<sup>100</sup> Liptak, *supra* note 11.

<sup>101</sup> *Warren-Johnson Letters*, N.Y. TIMES (June 27, 1968), <http://query.nytimes.com/gst/abstract.html?res=9C05E5D61230E034BC4F51DFB0668383679EDE&legacy=true> (notifying the President privately); *but see* Fred P. Graham, *Warren to Leave Court; Some in G.O.P. Open Fight to Bar a Succession in '68*, N.Y. TIMES (June 22, 1968), <http://query.nytimes.com/gst/abstract.html?res=9F07E2D9173DE134BC4A51DFB0668383679EDE&legacy=true> (making notice of retirement public on June 21).

<sup>102</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>103</sup> S. JOURNAL, 27th Cong., 2d Sess. 344-45 (1844) (tabling the nomination by a vote of 27-20). For simplicity, I have omitted the flurry of withdrawals and re-nominations made by President Tyler two days later in a last-ditch effort to get a nominee confirmed for this seat. *See id.* at 353, 354 (noting withdrawal of the Walworth nomination, re-nomination of John

20. The July 19, 1852, death of Justice McKinley;
21. The August 25, 1828, death of Justice Trimble;
22. The August 31, 1852, expiration of Edward Bradford's nomination;<sup>104</sup>
23. The September 7, 1956, retirement notice of Justice Minton;<sup>105</sup>
24. The October 4, 1968, withdrawal of the Chief Justice nomination of Justice Fortas;<sup>106</sup> and
25. The October 12, 1864, death of Chief Justice Taney.

As the list indicates, fifteen of these occasions for nominations have resulted from immediate vacancies—eleven because of death and two each because of sudden retirements or resignations. In addition to the fifteen immediate vacancies, two more of the twenty-five nomination opportunities resulted from notices of intended retirement at a later date. Of the remaining eight occasions for nominations, five resulted from active or passive Senate repudiation of a previous nominee for the same position, two from the withdrawal of submitted or announced nominees for the same position, and one from a confirmed nominee's decision to decline the appointment.

Whatever the manner by which the occasion for a nomination arose, each of these twenty-five instances gave the sitting President a chance to nominate a new Justice during either the twelve months before a presidential election or the "lame duck" period after the election but before the end of his current term. Any sort of tradition of a President declining to submit or of the Senate refusing to process Supreme Court nominations in the vicinity of a presidential election and of saving nomination opportunities for the next President should be apparent among these twenty-five instances. In fact, however, there is little evidence of such a tradition, and no evidence to support a posture of determined inaction.

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Spencer, withdrawal of the new Spencer nomination, and re-nomination of Walworth). The Senate took no action on these re-nominations and allowed the final one to expire later that day when the Senate's session ended. *See id.* at 354.

<sup>104</sup> *Supreme Court Nominations*, *supra* note 92 (noting that the Senate took no action on the nomination); *see Dates of Sessions of the Congress, 1789-Present*, U.S. SENATE, <https://www.senate.gov/reference/Sessions/reverseDates.htm> (last visited Mar. 31, 2017) (noting the end of the first session of the 32nd Congress on August 31, 1852).

<sup>105</sup> Allen Drury, *Minton Retiring from High Court; Cites Ill Health*, N.Y. TIMES (Sept. 8, 1956), <http://www.nytimes.com/1956/09/08/archives/minton-retiring-from-high-court-cites-ill-health-truman-choice-65.html>.

<sup>106</sup> *See Fortas Withdrawal Official*, N.Y. TIMES (Oct. 5, 1968), <http://query.nytimes.com/gst/abstract.html?res=9D00E3D81E31E034BC4D53DFB6678383679EDE&legacy=true>.



## 2. Presidential Abstentions During Election Years?

Citing Biden's 1992 analysis, McConnell claimed that there were multiple instances in which Presidents have voluntarily refrained from making Supreme Court nominations in presidential election years and have saved nomination opportunities for their successors.<sup>107</sup> Biden identified four supposed examples—in 1800, 1828, 1864, and 1956.<sup>108</sup> McConnell seized on the 1864 example and emphasized that President Lincoln, whom President Obama regarded as something of a model for his own presidency, “exercised restraint and withheld from making a nomination until after the election.”<sup>109</sup> The problem is that the 1800 example is entirely spurious<sup>110</sup> and that the 1828, 1864, and 1956<sup>111</sup> examples do not support the interpretation McConnell put on them. There have actually been eight instances in which an occasion for a nomination arose before Election Day and persisted through the election without a nomination.<sup>112</sup> Still, not one of these examples supports the claim that Presidents have voluntarily refrained from making election-year nominations out of deference to the election campaign, the prerogatives of their potential successors, or the indirectly expressed will of voters. In fact, all eight examples affirmatively contradict McConnell's claim about supposed voluntary presidential abstention.

### a. *The Lincoln Example*

The vaunted Lincoln example illustrates the point clearly. It is true that Lincoln did not make a pre-election nomination when

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<sup>107</sup> See 162 CONG. REC. S926 (daily ed. Feb. 23, 2016).

<sup>108</sup> 138 CONG. REC. 16,316 (1992).

<sup>109</sup> 162 CONG. REC. S926 (daily ed. Feb. 23, 2016); see Ed Hornick, *For Obama, Lincoln Was Model President*, CNN (Jan. 18, 2009), <http://www.cnn.com/2009/POLITICS/01/17/lincoln.obsession/index.html?eref=onion>.

<sup>110</sup> There was no pre-election occasion to nominate a new justice in 1800. Although there was a vacancy created in 1800 by the resignation of Chief Justice Ellsworth, it was not a pre-election vacancy. Ellsworth dispatched his resignation letter from France on October 16 before the election, but it was not received by President Adams until December 15, well after the election. See Letter from Oliver Ellsworth, Chief Justice, U.S. Supreme Court, to John Adams, U.S. President, in THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 99, at 123. Adams can hardly have chosen to refrain from submitting a pre-election nomination for a vacancy he learned about only after the election.

<sup>111</sup> These three instances correspond to list numbers 21, 25, and 23, respectively, in the listing of occasions for nominations. See *supra* text accompanying notes 97, 105.

<sup>112</sup> These eight instances are numbers 15, 18, 19, 21 to 25 in the listing of occasions for nominations. See *supra* text accompanying notes 97–106.

Chief Justice Taney died on October 12, 1864.<sup>113</sup> But several factors contradict the claim that not making a pre-election nomination reflected some norm about refraining from making nominations during election years.

First and most obviously, Taney died on October 12, less than a month before the presidential election.<sup>114</sup> The close proximity to the election left Lincoln very little time to select a nominee before the election.

Second, and even more to the point, the congressional calendar prevented Lincoln from submitting a nomination before the 1864 election even if he had settled on a choice.<sup>115</sup> In examining older examples of nomination behavior, such as the one created by Taney's death, it is imperative to recognize how different the typical congressional calendar was before it was substantially reformed by the Twentieth Amendment in 1933.<sup>116</sup> Today, because of that reform, each Congress convenes for its first annual session on the January 3 following a November election,<sup>117</sup> when the terms of office of its members also begin.<sup>118</sup> The second session then convenes a year later on January 3 of what happens always to be an election year.<sup>119</sup> Before 1933, however, the congressional calendar was much different because of two constitutionally entrenched rules. First, the terms of office of members of Congress (as well as the President) ended on the March 4 following a November election, and the terms of their successors began.<sup>120</sup> Second, each annual session of Congress was scheduled to begin, by constitutional default, on the

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<sup>113</sup> Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1369 (1997); *Biographical Directory of Federal Judges: Taney, Roger Brooke*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2336&cid=999&ctype=na&instat=na> (last visited Mar. 30, 2017).

<sup>114</sup> See *id.*

<sup>115</sup> See U.S. CONST. amend. XX; see Edward A. Hartnett, *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process: Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 381 (2005).

<sup>116</sup> See U.S. CONST. amend. XX; see Hartnett, *supra* note 115, at 381.

<sup>117</sup> See U.S. CONST. amend. XX, § 2.

<sup>118</sup> See *id.* § 1.

<sup>119</sup> See Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 712.

<sup>120</sup> See *id.* at 710. The March 4 date was set in perpetuity when the old Congress under the Articles of Confederation chose March 4, 1789, as the date for the start of the terms of the first President and the first Members of Congress under the newly ratified Constitution. 34 JOURNALS OF THE CONTINENTAL CONGRESS, at 523 (1788) (focusing on the first Wednesday in March). The decision had the effect of locking the country into presidential and congressional terms that began and ended on the respective March 4.

first Monday in December.<sup>121</sup>

The interaction of these two rules produced a bizarre congressional calendar with four general periods. First, although terms of office began on March 4 of odd-numbered years, some four months after the preceding November elections, the first session of that newly elected Congress typically did not convene until early December, nine more months later.<sup>122</sup> A newly elected Congress thus typically would not convene until more than a year after it was elected, and Congress, including the Senate, was typically out of session for three-quarters of each odd-numbered year, from March 4 to early December.<sup>123</sup> Second, the first regular session of each Congress convened in early December in odd-numbered years, more than a year after the election in which its members had been chosen, and typically extended into the first half of the following year, which always happened to be either a presidential or congressional election year.<sup>124</sup> Third, the first session typically adjourned and thus left Congress out of session during the summer and fall of each election year.<sup>125</sup> This period is obviously crucial to keep in mind for anyone studying presidential nominations during an election year. Fourth, the second regular session of a typical Congress convened in December, a month after the new election, and had to adjourn by March 4, when the terms of office of its members expired and those of newly elected members began.<sup>126</sup> These constraints meant that this second regular session was typically shorter than the first session.<sup>127</sup> It also took place entirely during the lame duck period after an election in which its majority may have been sacked or the sitting President or his party may have been repudiated by voters.<sup>128</sup> The existence of this lame duck second session after every election is also important to keep in mind when examining presidential nomination behavior before 1933.

What does the old congressional calendar have to do with the Lincoln example highlighted by McConnell? Well, although Taney died on October 12 of an election year, one cannot read much of anything into Lincoln's failure to make a pre-election nomination, because the first session of the 38th Congress had already

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<sup>121</sup> See U.S. CONST. art. I, § 4.

<sup>122</sup> See Larson, *supra* note 119, at 710, 712.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.* at 712, 713–14, 717.

<sup>125</sup> See *id.* at 717–18; *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>126</sup> See Larson, *supra* note 119, at 712.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 712–14.

adjourned on July 4, more than three months before Taney died.<sup>129</sup> There was no Senate in session to receive or consider any pre-election nomination.<sup>130</sup> Indeed, Lincoln could have made a recess appointment to the Court, but there was no need for that either because the Court was also not in session during this period.<sup>131</sup>

The latter point highlights a third factor that helps to explain why Lincoln did not make a pre-election nomination: the Court's calendar. The Court's practice of commencing its annual Term in October dates only to 1873.<sup>132</sup> From 1844 to 1872, the Court's annual Term commenced in December;<sup>133</sup> from 1826 to 1843, it commenced in January;<sup>134</sup> and from 1802 to 1825, it commenced in February.<sup>135</sup> Before 1802, the Court had held not one, but two Terms a year, one commencing in February and the other in August.<sup>136</sup> The length of the Court's Term has also grown. Although the February 1820 Term, for example, lasted only about five weeks, the October 1873 Term lasted nearly seven months.<sup>137</sup> Understanding whether a President might have thought a particular vacancy did or did not threaten the Court's operation depends on recognizing what particular schedule was governing the Court's Terms at the time. Lincoln would have seen a Court that would be out of session for another two months.<sup>138</sup>

A fifth factor that bears on the explanation of Lincoln's failure to make a pre-election nomination was the existence of a rationale unrelated to any kind of deference to the campaign or to a potential successor or voters. In this instance, Lincoln is said to have "stalled" in making a choice for a completely unrelated reason. He

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<sup>129</sup> See Gerhardt, *supra* note 113, at 1369; *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* The Court's previous Term appears to have ended on April 18. See ANNE ASHMORE, DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: UNITED STATES REPORTS VOLUMES 2-107 (1791-1882), at 82, <https://www.supremecourt.gov/opinions/datesofdecisions.pdf>.

<sup>132</sup> Act of Jan. 24, 1873, ch. 64, 17 Stat. 419 (making the second Monday in October the opening day of the Court's annual Term). It was not until 1916 that Congress established the present practice of opening the Court's annual Term on the first Monday in October. See Act of Sept. 6, 1916, ch. 448, sec. 230, § 1, 39 Stat. 726.

<sup>133</sup> Act of June 17, 1844, ch. 96, § 1, 5 Stat. 676 (showing the first Monday of December).

<sup>134</sup> Act of May 4, 1826, ch. 37, § 1, 4 Stat. 160 (showing the second Monday in January).

<sup>135</sup> Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156 (showing the first Monday in February).

<sup>136</sup> Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73 (showing the first Mondays in February and in August).

<sup>137</sup> See ASHMORE, *supra* note 131, at 18-19, 112-17 (indicating that the 1820 Term ran from early February to mid-March and that the 1873 Term ran from mid-October to early May).

<sup>138</sup> *See id.* at 18-19.

delayed acting not in order to see who won the election, but to see if he could find a suitable nominee other than the leading choice, his own former Treasury Secretary Salmon P. Chase, whom Lincoln neither liked nor trusted.<sup>139</sup> A search takes time.

A final factor that merits consideration in assessing the Lincoln example is post-election behavior. McConnell's strong claim of a need to defer a nomination until the next President takes office eliminates the possibility of a nomination, confirmation, and appointment during the lame duck period between the election and the start of new terms of office.<sup>140</sup> Relevant to the interpretation of a President's failure to make a pre-election nomination is whether the President also refrained from making a post-election nomination. Once re-elected himself, Lincoln did not refrain from making a nomination until the voters' newly elected senators of the upcoming 39th Congress could take office and implement the recently expressed will of the people in making the confirmation decision.<sup>141</sup> Rather, Lincoln submitted the nomination of Salmon P. Chase on December 6,<sup>142</sup> a mere month after the election and one day after the outgoing Senate convened its second regular session of the lame duck 38th Congress.<sup>143</sup> There was some urgency to install a new Chief Justice, as the new annual Term of the Supreme Court also began on December 5.<sup>144</sup> The lame duck Senate confirmed Chase by voice vote on the same day that he was nominated.<sup>145</sup> If there is some tradition of refraining from making nominations during the lame duck period out of respect for the will of the people as expressed in the election, Lincoln disregarded it.

The simple fact is that Lincoln's failure to make a pre-election nomination tells us nothing about the propriety or impropriety of such nominations. Recreating the context in which Lincoln confronted Taney's death unmasks the absurdity of McConnell's

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<sup>139</sup> See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 97–98 (5th ed. 2008).

<sup>140</sup> Lydia Wheeler, *Judiciary Chair: 'Standard Practice' to Not Confirm SCOTUS Nominee in Election Year*, HILL (Feb. 13, 2016), <http://thehill.com/regulation/court-battles/269398-senate-judiciary-chair-wait-until-election-is-over-to-fill-scalias>.

<sup>141</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>142</sup> *Id.*

<sup>143</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104; Kenneth T. Walsh, *The Most Consequential Elections in History: Abraham Lincoln's Victory in 1864 Led to the End of the Civil War*, U.S. NEWS (July 30, 2008), <https://www.usnews.com/news/articles/2008/07/30/the-most-consequential-elections-in-history-abraham-lincolns-victory-in-1864-led-to-the-end-of-the-civil-war>.

<sup>144</sup> Act of Aug. 1, 1842, ch. 96, § 1, 5 Stat. 676 (showing that at the time, the annual Term of the Supreme Court began on the first Monday in December).

<sup>145</sup> *Supreme Court Nominations*, *supra* note 92.

attempt to use Lincoln's supposed responsible, pre-election forbearance as a morality tale for Presidents today. When Taney died on October 12, Lincoln knew that the Court had already concluded its previous Term in mid-April and that its new Term would not be commencing until early December.<sup>146</sup> He knew that the Senate had already adjourned in early July, that it was not in session to receive or consider a nomination, and that it would not reconvene until early December.<sup>147</sup> Why would anyone expect Lincoln to have somehow submitted a pre-election nomination in those circumstances? The fact that he did not dispatch an immediate nomination to an adjourned Senate to fill a vacancy on an adjourned Court in no way supports the haughty claim that Lincoln believed a responsible chief executive should refrain from making a Supreme Court nomination before an election. Nothing in the details of this episode supports the possibility that Lincoln refrained from making a pre-election nomination in order to give voters a chance to decide whether they preferred to have the nomination made by General George B. McClellan, the Democratic challenger whom Lincoln had famously sacked as commander of the Army of the Potomac.<sup>148</sup>

*b. Other Instances*

A similar conclusion also holds for the other seven instances in which a President did not make a pre-election nomination when an opportunity arose. In two of these instances, the Senate had adjourned its regular session before the nomination opportunity even arose. In 1828, when Justice Trimble died on August 25, the Senate had already adjourned on May 26,<sup>149</sup> and when it reconvened for its lame duck session after the election, President John Quincy Adams did submit a nomination, despite having just been defeated for re-election by President-elect Andrew Jackson.<sup>150</sup> Likewise, in 1956, when Justice Minton announced his impending retirement on Sept. 7, the Senate had already adjourned for the year on July 27.<sup>151</sup>

<sup>146</sup> ABRAHAM, *supra* note 139, at 97.

<sup>147</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>148</sup> See *George McClellan*, HISTORY, <http://www.history.com/topics/american-civil-war/george-b-mcclellan> (last visited Mar. 29, 2017).

<sup>149</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>150</sup> Dan McLaughlin, *The Garland Precedent Should Not Stop Gorsuch*, NAT'L REV. ONLINE (Mar. 20, 2017), <http://www.nationalreview.com/article/445904/neil-gorsuch-supreme-court-nominee-rejections-politics-has-lot-do-it>.

<sup>151</sup> *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104; Jeffrey Frank, *Ike, Ford, and a Lost Voice in Supreme Court Nominations*, NEW YORKER (Feb. 16, 2016),

In fact, President Eisenhower took the opportunity to recess appoint Justice Brennan on October 15 as the Court's new Term was beginning and even used his appointment of the Democrat to appeal to Eisenhower Democrats in the election.<sup>152</sup>

In four of the other instances in which a President did not make a pre-election nomination, he had already tried and failed to get a previous nominee confirmed for the same opening, and time did not realistically permit another try before the election. The most notorious case was in 1844, when the Court had two vacancies in an election year. The first arose when Justice Thompson died on December 18 of the previous year,<sup>153</sup> and the other arose when Justice Baldwin died on April 21, 1844.<sup>154</sup> President Tyler hardly refrained voluntarily from submitting a nomination in an election year. He submitted three different names in a series of nominations before the election, but the Senate did not confirm any of them.<sup>155</sup> So although two vacancies existed at the time of the election, further pre-election efforts to submit nominations to fill the vacancies were precluded by the adjournment of the Senate's first regular session on June 17.<sup>156</sup> During the lame duck second session following the election, from which Tyler had withdrawn as a presidential candidate, he submitted a total of four more names for the two vacancies and actually managed to get one, Justice Nelson, confirmed.<sup>157</sup> Plainly, nothing in this episode suggests any voluntary restraint by the President in order to preserve election-year vacancies for a successor.

Two similar instances are less dramatic but follow a similar pattern. In 1852, when Justice McKinley died on July 19, President Fillmore did submit a nomination until August 16.<sup>158</sup> When the Senate allowed the nomination to die on August 31, Fillmore could not submit another name because the Senate had adjourned that day.<sup>159</sup> So although a vacancy did exist going into the election, it

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<http://www.newyorker.com/news/daily-comment/ike-ford-and-a-lost-voice-in-supreme-court-nominations>.

<sup>152</sup> See *id.*

<sup>153</sup> *Smith Thompson, 1823-1843*, SUP. CT. HIST. SOC'Y, [http://www.supremecourthistory.org/timeline\\_thompson.html](http://www.supremecourthistory.org/timeline_thompson.html) (last visited Mar. 30, 2017).

<sup>154</sup> *Henry Baldwin, 1830-1844*, SUP. CT. HIST. SOC'Y, [http://supremecourthistory.org/timeline\\_baldwin.html](http://supremecourthistory.org/timeline_baldwin.html) (last visited Mar. 30, 2017).

<sup>155</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>156</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>157</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>158</sup> *John McKinley, 1838-1852*, SUP. CT. HIST. SOC'Y, [http://supremecourthistory.org/timeline\\_mckinley.html](http://supremecourthistory.org/timeline_mckinley.html) (last visited Mar. 30, 2017); *Supreme Court Nominations*, *supra* note 92.

<sup>159</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

was not because the President voluntarily refrained from filling it. After the election, in which Fillmore was denied his party's nomination to even run, he submitted two more names during the lame duck session, but the Senate did not confirm either of them.<sup>160</sup>

Much more recently, in 1968, when Chief Justice Warren announced on June 13 that he would retire whenever a successor was confirmed, President Johnson proposed to elevate Justice Fortas to Chief and, on June 26, submitted his nomination, along with the nomination of someone to fill the seat that Fortas would vacate to become Chief.<sup>161</sup> The Fortas nomination encountered unexpected resistance in the Senate, and Johnson withdrew both names on October 4, two days after the Senate rejected a cloture motion that would have ended a filibuster of the Fortas nomination.<sup>162</sup> The Republican minority leader, Senator Everett Dirksen said that sufficient time remained before the Senate's adjournment to confirm another nominee.<sup>163</sup> By October 8, however, the possibility of another nomination was beginning to interfere with the Senate's impending adjournment.<sup>164</sup> Johnson opted not to send another name<sup>165</sup> before the Senate adjourned on October 14.<sup>166</sup> Again, although a vacancy existed on Election Day, it was not because the President was voluntarily holding it for his successor. Talk persisted for a time after the election about the possibility of Johnson submitting another nomination, possibly of former Justice Arthur Goldberg, in late December or early January.<sup>167</sup> The possibility evaporated only when President-elect Nixon prevailed

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<sup>160</sup> See *Supreme Court Nominations*, *supra* note 92; *Millard Fillmore*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/millardfillmore> (last visited Mar. 30, 2017).

<sup>161</sup> David Stebenne, *Filling the Supreme Court Vacancy: Lessons From 1968*, U.S. NEWS (Feb. 26, 2016), <https://www.usnews.com/news/articles/2016-02-26/filling-the-supreme-court-vacancy-lessons-from-1968>; *Supreme Court Nominations*, *supra* note 92.

<sup>162</sup> See Stebenne, *supra* note 161; Domenico Montanaro, *7 Things to Know about Presidential Appointments to the Supreme Court*, NPR POL. (Feb. 14, 2016), <http://www.npr.org/2016/02/14/466723547/7-things-to-know-about-presidential-appointments-to-the-supreme-court>.

<sup>163</sup> 114 CONG. REC. S932 (daily ed. Feb. 23, 2016) (statement of Senator Durbin) (referencing the senator's statement in 1968).

<sup>164</sup> John W. Finney, *Adjournment of Congress Hinges on Johnson's Decision on Chief Justice*, N.Y. TIMES (Oct. 9, 1968) <https://timesmachine.nytimes.com/timesmachine/1968/10/09/77181214.html?pageNumber=25>.

<sup>165</sup> See Fred P. Graham, *Johnson Declines to Name 2d Man for Chief Justice*, N.Y. TIMES (Oct. 11, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9900E2D71E31E034BC4952DFB6678383679EDE>.

<sup>166</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104 (noting the end of the 2d session of the 90th Congress).

<sup>167</sup> Fred P. Graham, *Dirksen Tests G.O.P. Sentiment if Johnson Nominates Goldberg*, N.Y. TIMES (Dec. 13, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9C06E4D91730E034BC4B52DFB4678383679EDE>.



upon Warren to remain on the Court for another Term.<sup>168</sup> Nothing in either the Fillmore or Johnson instance indicates any voluntary choice to refrain from making an election-year nomination in order to save a vacancy for a successor.

The final instance reinforces the same conclusion, even though its facts are a little different. In 1860, when Justice Daniel died on May 31, the Senate was still in session but only for about four more weeks, counting a special session at the end.<sup>169</sup> President Buchanan did not rush to make a pre-election nomination during that period but instead, “moved slowly.”<sup>170</sup> He faced a challenging choice. The death of Daniel, a Virginian, had left the membership of the Court evenly split between four northerners and four southerners.<sup>171</sup> There was also no urgency to act immediately. The Court’s previous Term had just concluded on May 4,<sup>172</sup> and the next one would not begin until December 3,<sup>173</sup> when the lame duck second session of the 36th Congress would also convene.<sup>174</sup> Buchanan, who was not seeking re-election that year, first considered some moderate southerners for the nomination, then did actually “toy[] with the idea of leaving the post vacant for his successor to fill,” but ultimately chose a compromise candidate: Secretary of State Jeremiah Black, a Pennsylvania moderate who was not an abolitionist and was strongly pro-Union.<sup>175</sup> Even though the Court’s new Term began and the Senate reconvened on December 3, Buchanan did not actually submit Black’s nomination until February 5, 1861.<sup>176</sup> A speedy nomination of a Supreme Court Justice was probably not a high priority. Between the election of Lincoln in November and Black’s February 5 nomination, every

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<sup>168</sup> *Id.*; Fred P. Graham, *Nixon Said to Foil Johnson on Court: Goldberg Blocked for Chief Justice, Senator Charges*, N.Y. TIMES (Dec. 11, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9A01E2DA163AE433A25752C1A9649D946991D6CF>; R. W. Apple Jr., *Warren Consents to Nixon Request to Stay Till June*, N.Y. TIMES (Dec. 5, 1968), <http://query.nytimes.com/mem/archive/pdf?res=9B01EEDB1E38E134BC4D53DFB4678383679EDE>.

<sup>169</sup> *Peter V. Daniel, 1842-1860*, SUP. CT. HIST. SOC’Y, [http://supremecourthistory.org/timeline\\_daniel.html](http://supremecourthistory.org/timeline_daniel.html) (last visited Mar. 30, 2017); see *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>170</sup> ABRAHAM, *supra* note 139, at 92.

<sup>171</sup> *Id.*

<sup>172</sup> ASHMORE, *supra* note 131, at 74, 75.

<sup>173</sup> *Justices of the United States Supreme Court (by Term of Court)*, GREEN PAPERS, <http://www.thegreenpapers.com/Hx/JusticesUSSC.html> (last updated Oct. 2, 2016).

<sup>174</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>175</sup> ABRAHAM, *supra* note 139, at 92.

<sup>176</sup> *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104; *Supreme Court Nominations*, *supra* note 92.

state in the Deep South seceded from the Union.<sup>177</sup> By the time Buchanan finally submitted the nomination, only four weeks remained before the presidency and the Senate would both be flipping from Democratic to Republican control.<sup>178</sup> In actuality, secession had already made Democratic control of the Senate tenuous, as most of the uniformly Democratic senators from the seceding states had resigned or been expelled from the Senate.<sup>179</sup> On February 21, the Senate narrowly rejected Black's nomination by a vote of 25-26.<sup>180</sup> Even though Lincoln's inauguration was by then less than a month away, Buchanan considered submitting another name but opted against it.<sup>181</sup> Although Buchanan had earlier given some thought to leaving the Supreme Court vacancy to his successor, he ultimately did so only reluctantly after having one nominee rejected and running out of time to submit another.<sup>182</sup>

None of these eight episodes support the notion of some norm by which a President voluntarily leaves any election-year Supreme Court vacancy to the next President. There is literally no example of any President ever having done that, despite eight instances of opportunities to do so. As detailed in the next section, however, there are seventeen instances in which Presidents have made election-year nominations. McConnell's claim of some tradition of voluntary presidential abstention has no foundation whatsoever.

### 3. Senatorial Suspensions of Election-Year Confirmations?

Having considered and dismissed all eight instances of supposed presidential absentions, the question remains whether there might be at least a unilateral Senate tradition of suspending any confirmations of Supreme Court Justices sometime during an election year. There have been seventeen instances in which Presidents made pre-election nominations in response to

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<sup>177</sup> *Id.*; Martin Kelly, *Order of Secession During the American Civil War*, THOUGHT CO., <https://www.thoughtco.com/order-of-secession-during-civil-war-104535> (last updated Aug. 8, 2016).

<sup>178</sup> See *Abraham Lincoln*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/abrahamlincoln> (last visited Mar. 24, 2017); *James Buchanan*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/jamesbuchanan> (last visited Mar. 24, 2017); *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Mar. 24, 2017).

<sup>179</sup> *Theme: Congressional Drama*, CAPITOL VISITOR CTR., <https://www.visitthecapitol.gov/civilwar/html/section1.html> (last visited Mar. 30, 2017).

<sup>180</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>181</sup> See ABRAHAM *supra* note 139, at 92.

<sup>182</sup> See *id.*; John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WISC. L. REV. 172, 178.

opportunities that arose within the twelve months preceding a presidential election.<sup>183</sup> Of these seventeen nominations, six failed to achieve confirmation, but eleven were confirmed.<sup>184</sup> That division alone casts doubt on the existence of any consistent tradition against election-year confirmations, but a full understanding requires a separate look at the confirmation failures and the confirmation successes. Do the six confirmation failures provide historical support for McConnell's posture of determined inaction, and do the eleven confirmation successes contradict it? In both situations, the inquiry is whether there is a unilateral tradition of the Senate greeting election-year nominations with a McConnell-style posture of determined inaction in order to preserve a nomination opportunity for the next President. The short answer is no, despite some evidence of a limited practice of postponing late nominations until at least the lame duck session after an election.

Before turning to the two questions, a preliminary clarification is in order. In discussing historical precedents, McConnell emphasized the distinction between occasions for nominations that arose in times of divided government, in which the President's party does not control the Senate, and those that arose in times of unified government, in which it does.<sup>185</sup> He was correct to highlight that distinction, for it is highly relevant. Of the eleven pre-election nominations that were confirmed, most occurred in times of unified government, although three of them did not.<sup>186</sup> In contrast, of the six pre-election nominations that did not result in confirmations, all but one of the confirmation failures occurred in times of divided government.<sup>187</sup> The correlation between confirmation outcome and unified or divided government, though not perfect, is meaningful.

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<sup>183</sup> See *supra* text accompanying notes 97–103. These seventeen instances are numbers 1 to 14, 16, 17, and 20 in the listing of occasions for nominations.

<sup>184</sup> *Supra* text accompanying notes 97–103; see *Supreme Court Nominations*, *supra* note 92.

<sup>185</sup> See Carl Hulse, *For McConnell, a Case for Divided Government*, N.Y. TIMES: CAUCUS BLOG (Nov. 14, 2011), <https://thecaucus.blogs.nytimes.com/2011/11/14/for-mcconnell-a-case-for-divided-government/>.

<sup>186</sup> See *Gerald R. Ford*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/geraldford> (last visited Mar. 29, 2017); *Grover Cleveland*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/grovercleveland22> (last visited Mar. 29, 2017); *Party Division*, *supra* note 178; *Ronald Reagan*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/ronaldreagan> (last visited Mar. 29, 2017); *Supreme Court Nominations*, *supra* note 92.

<sup>187</sup> *Lyndon B. Johnson*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/lyndonbjohnson> (last visited Mar. 29, 2017); *John Tyler*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/johntyler> (last visited Mar. 29, 2017); *Millard Fillmore*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/millardfillmore> (last visited Mar. 29, 2017); *Party Division*, *supra* note 178; *Supreme Court Nominations*, *supra* note 92.

Of course, a “principle” that depends on which party’s ox is being gored is hardly worthy of the label. In any event, even the confirmation failures during times of divided government do not support the identification of a tradition of determined inaction as sweeping as the posture McConnell assumed. In fact, the evidence contradicts it.

*a. The Confirmation Failures*

Some pre-election nominations have ended in failure when the Senate did not confirm them.<sup>188</sup> Because a President did submit a nomination in each of these instances, they cannot support an inference of an inter-branch consensus against seeking to confirm a Justice in the vicinity of a presidential election. But they could at least support an inference of some sort of principled, unilateral Senate tradition against such confirmations.

If any of these instances does disclose a tradition against election-year confirmations, a few secondary questions arise. One concerns the starting time for any confirmation suspension. How early in the election season did any instance that supports the inference of an anti-confirmation tradition occur, particularly relative to the Garland timeline? A second question concerns the duration of any confirmation hiatus. Did the Senate oppose confirmations only through the election or also through the lame duck period following the election? Only the latter duration would fully support McConnell’s opposition to even a lame duck confirmation of Garland. A third question concerns the method by which the Senate disposed of the nomination. Did the Senate act on the nomination, report it out of committee, and dispose of it with floor vote, or did the Senate simply ignore it and allow it to expire? Again, only the latter behavior would fully support McConnell’s posture of determined inaction.

In the twelve calendar months preceding a November presidential election, there have been six instances of confirmation failures, in which a President made a pre-election nomination that the Senate did not confirm.<sup>189</sup> Focusing only on the summer or fall, Biden had correctly identified two instances during that time period: the 1968

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<sup>188</sup> See, e.g., Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 410. The Senate disposed of each of these nominations before the election, so there was no opportunity to confirm them after the election. See *id.* at 438.

<sup>189</sup> See *Supreme Court Nominations*, *supra* note 92.

nomination of Justice Abe Fortas in place of Chief Justice Earl Warren and the 1852 nomination of Edward Bradford in place of Justice John McKinley.<sup>190</sup> Three additional confirmation failures had arisen earlier, during the winter or spring before a presidential election, and they all date to 1844. They were the nominations of John Spencer in place of Justice Smith Thompson, Reuben Walworth also in place of Justice Thompson (following the Senate's rejection of Spencer), and Edward King in place of Justice Henry Baldwin.<sup>191</sup> The sixth instance of a confirmation failure was the determined inaction on the Garland nomination itself.

The question is whether any of these confirmation failures supports an inference of a principled Senate tradition against election-year confirmations. A review of each instance shows that at least four of them offer weak support for such an inference, but that none of them was free of other considerations or went as far as McConnell's posture of determined inaction.

Of the five historical instances, the two confirmation failures that Biden identified occurred closest to their respective presidential elections. The occasion for the 1968 Fortas nomination arose when Warren decided to retire and privately notified President Lyndon B. Johnson of his intention on June 13.<sup>192</sup> The notice became public on June 21.<sup>193</sup> The occasion for the 1852 Bradford nomination arose a month later in the election season, when Justice McKinley died on July 19.<sup>194</sup> In both of these instances, the Court's previous Term had already ended<sup>195</sup> or was ending.<sup>196</sup> As detailed above, none of the occasions for nominations that arose later in an election season led to pre-election nominations. In fact, the only other occasion for a nomination that arose in the summer and resulted in a pre-election nomination was the 1916 resignation of Justice Hughes on

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<sup>190</sup> See 138 CONG. REC. 8,862 (1992) (also showing an apparent typographical error in the Biden remarks, which erroneously dated the Bradford nomination to 1952); Mike DeBonis, *In 1992, Joe Biden Called for an Election-Year Blockade of Supreme Court Nominations*, WASH. POST (Feb 22, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/02/22/in-1992-joe-biden-called-for-an-election-year-blockade-of-supreme-court-nominations/?utm\\_term=.05e07d967eff](https://www.washingtonpost.com/news/powerpost/wp/2016/02/22/in-1992-joe-biden-called-for-an-election-year-blockade-of-supreme-court-nominations/?utm_term=.05e07d967eff); *Supreme Court Nominations*, *supra* note 92.

<sup>191</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>192</sup> See *Warren-Johnson Letters*, *supra* note 101.

<sup>193</sup> See Graham, *supra* note 101.

<sup>194</sup> *Supreme Court Nominations*, *supra* note 92; see TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 106 (2001).

<sup>195</sup> See ASHMORE, *supra* note 131, at 59 (indicating that the December 1851 Term had ended around May 27, 1852).

<sup>196</sup> See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 387 (1985) (identifying June 17, 1968, as the end of fall 1967 Term).

June 10, but that nomination *was* confirmed.<sup>197</sup> That confirmation success notably contradicts Biden's use of these two instances of failed confirmations or the lack of nominations to claim that no vacancy arising in the summer or fall of a presidential election year has ever led to a pre-election confirmation.<sup>198</sup> The one arising on July 14, 1916, did.<sup>199</sup>

Nominations in the Warren and McKinley instances were submitted within two-to-four weeks of the respective opportunities arising.<sup>200</sup> After receiving Warren's notice on June 13, 1968, Johnson nominated Fortas on June 26.<sup>201</sup> The Court's next Term would begin in early October, leaving more than three months for a confirmation before then.<sup>202</sup> There was ample time for a confirmation, as the Senate remained in session until October 14.<sup>203</sup> In the instance of McKinley's death on July 19, 1852, President Millard Fillmore nominated Bradford on August 16.<sup>204</sup> In this instance, the Senate's schedule did present a problem. Its adjournment on August 31, 1852, was barely two weeks away,<sup>205</sup> which suggests timing as a potential factor in this confirmation failure.

Although the Senate calendar *did* prove a problem for the Bradford nomination,<sup>206</sup> the election calendar seems to have as well. The Senate is recorded as having received the nomination (dated August 16) on August 21; it was immediately referred to the Judiciary Committee,<sup>207</sup> which reported it out on August 30.<sup>208</sup> On

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<sup>197</sup> See *Supreme Court Nominations*, *supra* note 92; see also Hughes, *Ex-Chief Justice, Dies*, CHI. TRIBUNE (Aug. 28, 1948), <http://archives.chicagotribune.com/1948/08/28/page/1/article/hughes-ex-chief-justice-dies> (describing the circumstances around Hughes' resignation).

<sup>198</sup> See 138 CONG. REC. 8,862 (1992).

<sup>199</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>200</sup> *Id.*; see U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, at 1555 (Andrew R. Dodge & Betty K. Koed eds., 2005); John A. Farrell, *The Inside Story of Richard Nixon's Ugly, 30-Year Feud with Earl Warren*, SMITHSONIAN (Mar. 21, 2017) <http://www.smithsonianmag.com/history/inside-story-richard-nixons-ugly-30-year-feud-earl-warren-180962614/>.

<sup>201</sup> *Supreme Court Nominations*, *supra* note 92; *Warren-Johnson Letters*, *supra* note 101.

<sup>202</sup> See Act of Jan. 24, 1878, ch. 64, 17 Stat. 419.

<sup>203</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104 (noting the end of the 2nd session of the 90th Congress).

<sup>204</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>205</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104 (noting the end of the first session of the 32nd Congress).

<sup>206</sup> See *id.* (demonstrating that the adjournment of the Senate was only two weeks away); *Supreme Court Nominations*, *supra* note 92.

<sup>207</sup> See 8 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA (1848-1852), at 440, 448 (Wash., Gov't Printing Off. 1887) [hereinafter SENATE EXECUTIVE JOURNAL, vol. 8].

<sup>208</sup> See *id.* at 448.

August 31, just before adjourning its first regular session, the Senate brought up the nomination and adopted a motion to table it, effectively killing it.<sup>209</sup> Not only the short timeframe, but also divided government and the impending presidential election, were apparently factors.<sup>210</sup> Fillmore, a Whig, had been denied his party's nomination and would be out of office by early March.<sup>211</sup> Whatever the chances of the Whig nominee, the Democratic Senate "was in no mood to expedite a Fillmore nomination."<sup>212</sup> Fillmore made two more nominations during the Senate's lame duck second session after the election, but the Democratic Senate blocked them, too.<sup>213</sup> The victor in the presidential election, Democrat Franklin Pierce, would get to fill the McKinley vacancy.<sup>214</sup> Even though the presidential election did play a role in the failure of the Bradford confirmation, the nomination was still reported out of committee and received floor action in the form of a motion to table.<sup>215</sup> The floor action was significant.<sup>216</sup> By 1852, the Senate had changed its rules to provide for the automatic expiration of nominations,<sup>217</sup> so that the Senate no longer had any necessity to act in order to reject a nomination. The Senate could have simply ignored the Bradford nomination, but it did not reject it so cavalierly.

The presidential election likewise played a role in the failure of the Fortas nomination in 1968. Following his June 26 nomination, Fortas testified at his confirmation hearing on July 17,<sup>218</sup> and the hearings ended on July 23.<sup>219</sup> On September 25, Senate opponents of the nomination began a filibuster,<sup>220</sup> and two days later, Fortas lost the crucial support of the Republican minority leader, Everett Dirksen of Illinois.<sup>221</sup> An October 1 cloture vote fell well short of

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<sup>209</sup> See *id.* at 452; see *Supreme Court Nominations*, *supra* note 92.

<sup>210</sup> See, e.g., Whittington, *supra* note 188, at 410–11, 414–15.

<sup>211</sup> See James L. Noles, Jr., *Alabama's Forgotten Justices: John McKinley and John A. Campbell*, 63 ALA. LAW. 236, 238 (2002).

<sup>212</sup> ABRAHAM, *supra* note 139, at 89.

<sup>213</sup> See Noles, Jr., *supra* note 211, at 238.

<sup>214</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>215</sup> See SENATE EXECUTIVE JOURNAL, vol. 8, *supra* note 207, at 452.

<sup>216</sup> See *id.*; *Supreme Court Nominations*, *supra* note 92.

<sup>217</sup> See, e.g., S. JOURNAL, 27th Cong., 3d Sess. 171–72 (1843).

<sup>218</sup> JOHN MASSARO, SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 36 (1990).

<sup>219</sup> *Id.*

<sup>220</sup> See Fred P. Graham, *Critics of Fortas Begin Filibuster, Citing 'Propriety'*, N.Y. TIMES, (Sept. 26, 1968), <http://query.nytimes.com/gst/abstract.html?res=9E02E5DC1E31E034BC4E51DFBF668383679EDE&legacy=true>.

<sup>221</sup> See Fred P. Graham, *Fortas Receives Critical Setback as Dirksen Shifts*, N.Y. TIMES (Sept. 28, 1968), <http://query.nytimes.com/gst/abstract.html?res=9901E2DB1E31E034BC4051DFBF668383679EDE&legacy=true>.

passing and ending the filibuster,<sup>222</sup> so Fortas announced his withdrawal as a nominee the next day.<sup>223</sup> As with Bradford a century earlier, the Senate could have merely ignored the nomination, but it brought it to the floor for debate and at least a cloture vote.

Although a number of factors played a role in the failure of the Fortas nomination,<sup>224</sup> its proximity to the presidential election was certainly one of them. Just as word of Warren's notice began leaking out and well before Johnson nominated Fortas, one of the leading opponents of the nomination,<sup>225</sup> Republican Senator Robert Griffin of Michigan, announced his opposition to any nomination until the next President was inaugurated. His remarks almost perfectly presaged those of McConnell after Scalia's death:

I want to indicate emphatically, as one U.S. Senator, that I shall not vote to confirm an appointment of the next Chief Justice by a "lame duck" President. . . . If a "lame duck" President should seek at this [late] stage to appoint the leadership of the Supreme Court for many years in the future, I believe he would be breaking faith with our system, and that such a move would be an affront to the American people. . . . [S]uch an appointment should be made by the next President—whether he be a Democrat or a Republican—after the people have an opportunity to speak in November. . . . I would hope, and expect, that [President Johnson] would not seek to deny the people and the next President of their appropriate voice in such a crucial decision.<sup>226</sup>

Still, as Griffin himself noted, he was only one Senator. Not every Republican Senator adopted such an absolutist position. In fact, Dirksen, the Republican minority leader, did not automatically oppose any election-year nomination. He had publicly supported the Fortas nomination until late September.<sup>227</sup> Even after the failed cloture vote on October 1, Dirksen said there remained time for

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<sup>222</sup> See Fred P. Graham, *Senate Bars Move to End Filibuster by Fortas Critics*, N.Y. TIMES (Oct. 2, 1968), <http://query.nytimes.com/gst/abstract.html?res=9D02EFDC1530E034BC4A53DFB6678383679EDE&legacy=true>.

<sup>223</sup> See *Fortas Letter and Statement by Johnson*, N.Y. TIMES (Oct. 3, 1968), <http://query.nytimes.com/gst/abstract.html?res=9400E4DF1E38E134BC4B53DFB6678383679EDE&legacy=true>.

<sup>224</sup> See, e.g., ABRAHAM, *supra* note 96, at 80.

<sup>225</sup> See Whittington, *supra* note 188, at 418.

<sup>226</sup> 114 CONG. REC. 18,171 (1968) (statement of Sen. Griffin); see also *id.* at 18,246–47 (statement of Sen. Tower) (echoing Griffin's remarks later in the day).

<sup>227</sup> See Graham, *supra* note 220.



Johnson to submit another nomination and have it confirmed before the Senate's impending adjournment.<sup>228</sup> Senator Griffin and Senator Howard Baker, a Republican of Tennessee, however, "expressed a hope" that Johnson would not submit another nomination.<sup>229</sup> By October 8, the possibility of another nomination was beginning to interfere with the ability of Congress to adjourn.<sup>230</sup> Johnson ultimately did not try another nomination, and President Richard Nixon eventually chose Warren's successor after taking office in 1969.<sup>231</sup>

Even though the impending election was a significant source of Senate opposition to the Fortas nomination, the episode provides only weak support for an inference of a Senate tradition against confirming nominations in presidential election years. Particularly notable was the fact that the Republican minority leader at the time, McConnell's predecessor, had not adopted this position.<sup>232</sup> In any event, though, as with the Bradford nomination, the Fortas nomination was not ignored. The Senate undertook a full confirmation process, and the nomination was even the subject of floor action and at least a cloture vote.<sup>233</sup> To the extent the episode supports an inference of a Senate tradition at all, it does not support McConnell's policy of determined inaction toward the Garland nomination. In addition to the Senate actually acting on these nominations, the instances also arose, as Biden had noted, in the summer of an election year, with the wrangling over the Fortas nomination culminating only a month before the election.

In addition to the Bradford and Fortas nominations, two other failed confirmations also provide limited support for an inference of a unilateral Senate tradition against election-year confirmations, but, significantly, these two instances occurred earlier in the election season. Both involved 1844 nominations made by President John Tyler, and both were before the Senate at the same time. The

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<sup>228</sup> See Graham, *supra* note 221.

<sup>229</sup> Fred P. Graham, *Fortas Abandons Nomination Fight; Name Withdrawn*, N.Y. TIMES (Oct. 3, 1968), <http://query.nytimes.com/gst/abstract.html?res=9905E5DF1E38E134BC4B53DFB6678383679EDE&legacy=true>.

<sup>230</sup> See John W. Finney, *Adjournment of Congress Hinges on Johnson's Decision on Chief Justice*, N.Y. TIMES (Oct. 9, 1968), <http://query.nytimes.com/gst/abstract.html?res=9804E5DE1E38E134BC4153DFB6678383679EDE&legacy=true>.

<sup>231</sup> See *Supreme Court Nominations*, *supra* note 92 (referencing the nomination of Warren Burger).

<sup>232</sup> See Lauren Carroll, *Mitch McConnell Exaggerates 'Tradition' of Not Confirming Election Year Supreme Court Nominees*, POLITIFACT (Mar. 22, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/mar/22/mitch-mcconnell/mitch-mcconnell-exaggerates-tradition-not-confirmit/>.

<sup>233</sup> See Graham, *supra* note 221.

nominations that led to these confirmation failures involved two different Supreme Court seats. The first of these two occasions for nominations arose on January 31, when the Senate rejected Tyler's prior nomination of John Spencer to fill the vacancy created by Justice Thompson's death six weeks earlier.<sup>234</sup> The occasion for a nomination to the other seat arose later, on April 21, when Justice Baldwin died.<sup>235</sup>

In both instances, pre-election nominations were possible but not necessarily urgent. The Senate was in session when these occasions for nominations arose, and it would remain in session until June 17.<sup>236</sup> On the other hand, the Court's January 1844 Term was winding toward an end around March 16,<sup>237</sup> and its next Term would not commence until early December.<sup>238</sup>

Enough time to confirm nominees seemed to remain before the Senate would adjourn in mid-June, so Tyler acted. On the heels of the Senate's rejection of his nomination of Spencer for the Thompson seat, Tyler nominated Reuben Walworth for it on March 13,<sup>239</sup> at almost exactly the same point in the election cycle as Garland was nominated.<sup>240</sup> Then, after the April 24 death of Baldwin, Tyler nominated Edward King for that seat on June 5.<sup>241</sup> Both nominations were immediately referred to the Judiciary Committee when the Senate received them.<sup>242</sup> The King nomination was obviously much closer to the Senate's eventual adjournment on June 17,<sup>243</sup> so timing might have been a factor in that nomination's failure. The delay in submitting that nomination was perhaps caused by Tyler's attempt to convince future President James Buchanan to accept the nomination.<sup>244</sup>

The Senate disposed of both of the nominations in tandem in mid-

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<sup>234</sup> See *Supreme Court Nominations*, *supra* note 92 (referencing the rejection of the nomination of Spencer).

<sup>235</sup> See ABRAHAM, *supra* note 96, at 415.

<sup>236</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>237</sup> See ASHMORE, *supra* note 131, at 46.

<sup>238</sup> See *id.* By law, the timing of the start of the Court's annual Term changed in 1844 from January to December, so instead of starting in January 1845, the next Term commenced in December 1844. See *supra* text accompanying notes 132–36.

<sup>239</sup> See *Supreme Court Nominations*, *supra* note 92 (referencing the first nomination of Walworth).

<sup>240</sup> See 162 CONG. REC. S1,551 (daily ed. Mar. 16, 2016).

<sup>241</sup> See *Supreme Court Nominations*, *supra* note 92 (referencing the first King nomination).

<sup>242</sup> See 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA (1841-1845) 244, 306 (Wash., Gov't Printing Off. 1887) [hereinafter SENATE EXECUTIVE JOURNAL, vol. 6].

<sup>243</sup> See *id.* at 306; *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>244</sup> See Whittington, *supra* note 188, at 430.

June, as the Senate's adjournment approached.<sup>245</sup> Both nominations were reported out of the Judiciary Committee together on June 14.<sup>246</sup> The next day, June 15, the Senate voted to table both of them, effectively killing them both.<sup>247</sup> The Walworth nomination was taken up first and tabled by a recorded vote of 27-20.<sup>248</sup> The Senate then immediately proceeded to the King nomination and tabled it by a recorded vote of 29-18.<sup>249</sup> As with the tabling of the Bradford nomination in 1852, these votes are significant because the Senate had already changed its standing rules to allow nominations to expire at the end of a session without action.<sup>250</sup> The Senate could have left the nominations in committee and allowed them to expire when the Senate adjourned on June 17, but it chose not to dispose of them so casually.<sup>251</sup>

After the votes on June 15, senators probably imagined that they were done with Supreme Court nominations until they reconvened after the upcoming presidential election, but Tyler was not done. On June 17, the final day of the Senate's session, Tyler formally withdrew Walworth's nomination and re-nominated Spencer,<sup>252</sup> whose January rejection by the Senate had created the occasion for nominating Walworth in the first place.<sup>253</sup> In an accompanying communication, Tyler alluded vaguely to a change in the "circumstances" under which the Senate had rejected Spencer, and Tyler also stressed that filling the Supreme Court seat was "essential to the administration of justice" because "a large amount of business has accumulated" in the federal circuit court over which the Justice occupying this seat actively presided as a Circuit Justice.<sup>254</sup> The Senate took no action on the new nomination, so just as the Senate was about to adjourn the day, Tyler sent another communication, which the Senate agreed to receive.<sup>255</sup> In it, Tyler withdrew the re-nomination of Spencer and re-nominated Walworth,<sup>256</sup> in an apparent last-ditch effort to get the Senate to confirm someone. A motion to take up the last-minute Walworth re-

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<sup>245</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>246</sup> *See* SENATE EXECUTIVE JOURNAL, vol. 6, *supra* note 242, at 332.

<sup>247</sup> *See id.* at 344.

<sup>248</sup> *See id.*

<sup>249</sup> *See id.* at 345.

<sup>250</sup> *See id.* at 171-72.

<sup>251</sup> *See id.* at 354.

<sup>252</sup> *See id.* at 353.

<sup>253</sup> *See Supreme Court Nominations*, *supra* note 92.

<sup>254</sup> SENATE EXECUTIVE JOURNAL, vol. 6, *supra* note 242, at 353.

<sup>255</sup> *See id.* at 354.

<sup>256</sup> *See id.*

nomination was blocked on the Senate floor by an objection, and the Senate adjourned, letting the re-nomination expire.<sup>257</sup>

A major factor in the failure of the Walworth and King nominations was, in fact, a desire by Whig senators to keep these vacancies open in hopes that their nominee, Henry Clay, would win the presidency, particularly since they had developed outright contempt for Tyler and his accidental presidency.<sup>258</sup> By the end of the session, “Whig [s]enators, thinking they had victory in their grasp in the forthcoming presidential election,” tabled both the nominations.<sup>259</sup> To the extent that presidential politics did influence the Senate in tabling these nominations, these episodes lend some support to the inference of a unilateral Senate tradition of declining to confirm Supreme Court nominees in a presidential election year, although the acrimonious relationships between Tyler and the Senate cuts significantly against inferring some sort of general principle in favor of suspending confirmations during presidential election years. Still, the Walworth nomination is particularly notable given the close parallel between its timing and the timing of the Garland nomination—March 13 and March 16, respectively.<sup>260</sup>

Even if the episode does lend some support to the idea of a general principle against election-year confirmations, there were other reasons for the Senate’s resistance to the Walworth nomination. Walworth, whose nomination languished for three months before finally being reported out of committee and tabled, was said to be “cordially disliked” by Senate Whigs.<sup>261</sup> The failure of his nomination is said to have “brought to the fore some long-standing complaints” about him in his service as Chancellor of New York—namely, “[h]is obtrusive courtroom manners and his backlog of unfinished legal business.”<sup>262</sup> Prominent New York Whig leader Thurlow Weed remarked that Walworth “is recommended by many distinguished Members of the Bar of the State merely because they are anxious to get rid of a querulous, disagreeable, unpopular Chancellor.”<sup>263</sup> Walworth was also opposed by both of New York’s

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<sup>257</sup> *See id.*

<sup>258</sup> *See* Whittington, *supra* note 188, at 425–26.

<sup>259</sup> HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 79 (1999).

<sup>260</sup> *See Supreme Court Nominations, supra* note 92; *see also* 162 CONG. REC. S1,551 (daily ed. Mar. 16, 2016) (showing the Garland nomination date).

<sup>261</sup> ABRAHAM, *supra* note 139, at 85.

<sup>262</sup> GEOFFREY O’BRIEN, THE FALL OF THE HOUSE OF WALWORTH: A TALE OF MADNESS AND MURDER IN GILDED AGE AMERICA 83 (2010).

<sup>263</sup> *Id.* at 82 (emphasis omitted).

senators.<sup>264</sup> By June, the Senate may have preferred to wait and see who won the presidential election, but there Whig senators already had ample reason to oppose Walworth on the merits, which may better explain why his March nomination had languished until June in the first place. The tabling of his nomination in mid-June provides clearer support for an inference of a unilateral Senate tradition against confirming nominees in the summer of presidential election years than in mid-March, as reasons other than the electoral calendar seem adequate to explain the Senate's earlier resistance to Walworth.

A final piece of evidence reinforces the conclusion that the Senate opposed both Walworth and King for reasons beyond the fact they were nominated in a presidential election year.<sup>265</sup> Whig candidate Henry Clay ultimately did not win the November presidential election; Democrat James K. Polk did.<sup>266</sup> The Whigs had also lost control of the Senate in the election.<sup>267</sup> With the presidency and the Senate about to shift to unified Democratic control in March 1845, Whigs had every incentive to confirm acceptable Supreme Court nominees during their lame duck second session, which convened in December.<sup>268</sup> During that session, they did, in fact, confirm Tyler's nomination of Samuel Nelson for the Thompson seat, which flatly contradicts the inference of any principled position against confirming election-year nominations by an outgoing President.<sup>269</sup> Before turning to Nelson (and to John Read for the Baldwin seat<sup>270</sup>), however, Tyler had re-nominated Walworth and King at the beginning of the lame duck session in December,<sup>271</sup> but the Senate tabled the nominations again, despite its demonstrated willingness to confirm an acceptable Tyler nominee then.<sup>272</sup> Nelson was acceptable and confirmed; Walworth and King were apparently unacceptable on the merits and were not confirmed. Once again, moreover, both nominations were reported out of committee and

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<sup>264</sup> ABRAHAM, *supra* note 139, at 22.

<sup>265</sup> *See id.* at 86.

<sup>266</sup> *See id.*

<sup>267</sup> *Party Division*, *supra* note 178.

<sup>268</sup> *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104 (noting the end of the second session of the 208th Congress).

<sup>269</sup> *Supreme Court Nominations*, *supra* note 92.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> The nominations were referred to the Judiciary Committee on December 10, 1844. *See* SENATE EXECUTIVE JOURNAL, vol. 6, *supra* note 242, at 355. It was then reported and tabled on January 18, 1845. *Id.* at 387.

postponed on the floor without recorded votes.<sup>273</sup> Although the Senate did not have recorded votes, perhaps because it had already had recorded votes to table nominations of these two choices a few months earlier, the reporting of the nominations and their rejection in floor action is not consistent with McConnell's posture of determined inaction.

The final instance of a pre-election nomination that ended in a confirmation failure has little relevance in trying to infer a unilateral Senate tradition against election-year confirmations. This instance was Tyler's nomination of Spencer before Walworth in Tyler's very first attempt to fill the vacancy caused by Justice Thompson's death in December 1843.<sup>274</sup> The Senate received Tyler's nomination of Spencer on January 9, 1844, and immediately referred it to the Judiciary Committee.<sup>275</sup> The nomination was reported out of committee on January 30<sup>276</sup> and rejected by a recorded vote of 21-26.<sup>277</sup> This rejection has been attributed to intraparty opposition to Spencer himself,<sup>278</sup> not to a presidential election that was still ten months away. It adds next-to-nothing to an inference of a principled tradition of suspending confirmations during presidential election years. In any event, the committee action and floor vote contradicts the McConnell posture of determined inaction.

The history of these five instances in which the Senate declined to confirm an election-year nomination provide only weak and limited support for an inference of some kind of principled Senate tradition against election-year confirmations. A desire to avoid confirming nominees until after a presidential election has played a role in four of these five instances. The 1852 Bradford nomination in mid-August seems the clearest example of the factor playing a dominant role in a confirmation failure. It also seems to have played a significant role in the June postponements of Tyler's nominees in 1844, but both of those nominees were demonstrably objectionable on the merits as well. Certainly vocal opponents of the Fortas nomination in 1968 articulated ideas strikingly similar to McConnell's justifications for his posture of determined inaction, but the leader of the Republican caucus, who was accountable to

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<sup>273</sup> See *id.* at 387.

<sup>274</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>275</sup> See SENATE EXECUTIVE JOURNAL, vol. 6, *supra* note 242, at 207-08.

<sup>276</sup> See *id.* at 227.

<sup>277</sup> See *id.* at 229.

<sup>278</sup> ABRAHAM, *supra* note 139, at 31.

Senate Republicans, did not share that aggressive view.<sup>279</sup> The best that may be said is that a desire to hold off on confirming a nominee until after an election is a factor that has played a role in pre-election confirmation failures, but it has not been the only reason or a principled norm. In none of these instances, moreover, did the Senate simply ignore the nominations; rather, each of them was reported out of committee and blocked on the Senate floor, usually with a vote.<sup>280</sup> None of these instances, then, supports an inference that McConnell's posture of determined inaction reflects even a unilateral tradition in the Senate.

*b. The Confirmation Successes*

Although some pre-election nominations have ended in failure, most have been successfully confirmed. Because in these cases a President submitted a pre-election nomination, which the Senate then confirmed, these instances cannot support an inference of any tradition, either via consensus or unilaterally, against the confirmation of a Justice in the vicinity of a presidential election. Rather, these instances contradict an attempt to infer such a tradition.

In the twelve calendar months preceding a November presidential election, there have been eleven instances in which a President made a pre-election nomination that the Senate then confirmed before the election. Focusing only on the summer or fall, Biden had identified five instances of such confirmation successes, but two of those were mistakenly included because they occurred during midterm congressional elections, not presidential elections.<sup>281</sup> The three instances that he correctly identified apparently were the 1888 confirmation of Chief Justice Melville Fuller in place of Chief Justice Morrison Waite, the 1892 confirmation of Justice George Shiras in place of Justice Joseph Bradley, and the 1916 confirmation of Justice Louis Brandeis in place of Justice Joseph Lamar.<sup>282</sup> Inexplicably, he erroneously omitted a fourth instance, that of a successful confirmation in the summer: the 1916 confirmation of Justice John Clarke in place of Justice Charles

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<sup>279</sup> *See id.*

<sup>280</sup> *See Supreme Court Nominations, supra* note 92.

<sup>281</sup> 138 CONG. REC. 8,853 (1992) (Statement of Sen. Biden) (citing the confirmations of Justices Grier and Miller).

<sup>282</sup> Only these three fit his two criteria: confirmation in the summer of a presidential election year to a vacancy that happened before the summer of that year. *See id.*; *Supreme Court Nomination, supra* note 92.

Evans Hughes.<sup>283</sup> Removing the two confirmations before midterm elections and adding the Clarke confirmation to Biden's data brings the total number of successful confirmations during the summer or fall before a presidential election to four.<sup>284</sup> Seven additional confirmation successes also happened before the summer of a presidential election year, in the winter or spring.<sup>285</sup>

Biden's omission of the Clarke confirmation led him to make two claims that were overstatements. When Biden said that every nomination confirmed in the summer of a presidential election year filled a vacancy that has arisen before summer,<sup>286</sup> he omitted the contrary example of Clarke's confirmation for a vacancy that happened on June 10.<sup>287</sup> Likewise, when he said that no vacancy that had arisen during the summer had resulted in a pre-election confirmation,<sup>288</sup> he again omitted the contrary example of Clarke's confirmation on July 14, 1916.<sup>289</sup> When Biden said "all" and "none," he should have added "except one."

In any event, the question is whether any of these confirmation successes undermines an inference of a Senate tradition against election-year confirmations. A review of these instances shows that at least four of them materially conflict with such an inference.

Several of the pre-election confirmations have limited probative value in assessing the Senate's treatment of the Garland nomination. These occasions for nominations arose months earlier than Scalia's death, the presidency and the Senate were under

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<sup>283</sup> See *Supreme Court Nomination*, *supra* note 92.

<sup>284</sup> See *id.*

<sup>285</sup> *Id.* These instances are as follows: the 1796 confirmation of Chief Justice Oliver Ellsworth following the decision of Justice William Cushing to decline his confirmed nomination to be Chief Justice; the 1804 confirmation of Justice William Johnson in place of Justice Alfred Moore; the 1932 confirmation of Justice Benjamin Cardozo in place of Justice Oliver Wendell Holmes; the 1796 declined confirmation of Justice Cushing to serve as Chief Justice in place of Chief Justice Rutledge; the 1940 confirmation of Justice Frank Murphy in place of Justice Pierce Butler; the 1975 confirmation of Justice John Paul Stevens in place of Justice William O. Douglas; and the 1987 confirmation of Justice Anthony Kennedy in place of Justice Powell. See *id.*

<sup>286</sup> See 138 CONG. REC. 8,862 ("Moreover, of the five Justices who were confirmed in the summer of an election year, all five were nominated for vacancies that had arisen before the summer began.").

<sup>287</sup> *Supreme Court Nomination*, *supra* note 92. Yes, since Biden apparently counted Justice Brandeis' June 1 confirmation as a "summer" confirmation, Justice Hughes' June 10 resignation must count as a "summer" resignation. See 138 CONG. REC. 8,862; Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 41 (2004).

<sup>288</sup> See 138 CONG. REC. 8,862 ("[S]ix Supreme Court vacancies have occurred in the summer or fall of a [p]residential election year, and never—not once—has the Senate confirmed a nominee for these vacancies before the November election.").

<sup>289</sup> See *id.* (omitting the Clarke confirmation); see also *Supreme Court Nominations*, *supra* note 92.



unified party control, and the confirmations were speedy. Of these, the instance occurring closest in proximity to its respective election was the March 4 confirmation of Chief Justice Ellsworth in 1796 following the February 2 decision of Justice Cushing to decline his confirmed nomination as Chief Justice.<sup>290</sup> A somewhat more modern example was the February 24 confirmation of Justice Cardozo in 1932 following the January 12 retirement of Justice Holmes.<sup>291</sup>

Also of lesser relevance are the two most recent examples of confirmations in the vicinity of a presidential election. One is the December 17 confirmation of Justice Stevens in 1975, almost eleven months before the election, to replace Justice Douglas following his November 12 retirement.<sup>292</sup> The other of these instances with lesser relevance is the February 3 confirmation of Justice Kennedy in 1988 following the withdrawal of Judge Ginsburg as an announced nominee on November 7, 1987.<sup>293</sup> One is tempted to give weight to these instances because they are the most recent of the entire list of twenty-five occasions for nominations and thus the most analogous in terms of politics and process. Both confirmations succeeded despite occurring under conditions of divided government,<sup>294</sup> which makes them analogous to the Garland instance. Democrats of course made considerable use of the Kennedy confirmation in seeking confirmation hearings for Judge Garland.<sup>295</sup> Indeed, these examples may offer something of a backstop against future efforts to obstruct nominations made even more remotely in time from a presidential election than Judge Garland's March nomination was. Still, the fact that the occasions for these nominations arose about three months earlier than Scalia's death, relative to their respective presidential elections, makes them just too remote from the Garland nomination to provide much guidance in assessing the Senate's treatment of his nomination.

Four other pre-election confirmations, however, do seriously undermine the claim that there is any longstanding tradition against election-year confirmations, especially in relation to the

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<sup>290</sup> See *Supreme Court Nominations*, *supra* note 92.

<sup>291</sup> See *id.*; see also Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 226–27 n.1 (1932) (providing more detail on the retirement of Justice Holmes).

<sup>292</sup> See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1056 (2000); *Supreme Court Nominations*, *supra* note 92.

<sup>293</sup> See Roberts, *supra* note 97; *Supreme Court Nominations*, *supra* note 92.

<sup>294</sup> See Gerald R. Ford, *supra* note 186; *Party Division*, *supra* note 183.

<sup>295</sup> Wheeler, *supra* note 140.

timing of the Garland nomination. Following the January 22 death of Justice Bradley in 1892, President Harrison struggled to satisfy political interests in his search for a nominee<sup>296</sup> and did not nominate his choice, George Shiras, Jr., until mid-July.<sup>297</sup> The Senate nevertheless confirmed the nomination on July 26.<sup>298</sup> An even more striking July confirmation was the July 24 confirmation of John Clarke in 1916. The occasion for the nomination had arisen only on June 10, when Justice Hughes resigned to accept the Republican nomination for President.<sup>299</sup> Although a bit earlier in the cycle, the June 1 confirmation of Justice Brandeis fits a similar pattern. Even though the death that created this occasion for a nomination—the January 1 death of Justice Lamar—occurred six weeks earlier than Scalia’s February 13 death, Brandeis was confirmed, even with a lengthy battle driven by intense opposition to both his radical reputation and his Jewish identity.<sup>300</sup>

The final example of a successful pre-election confirmation was, at least in some respects, perhaps most analogous to the Garland nomination.<sup>301</sup> The death that created the occasion for the nomination of Melville Fuller—the March 23 death of Chief Justice Waite in 1888—occurred more than five weeks later in the cycle than Scalia’s death had, and President Cleveland’s April 30 nomination of Fuller came about six weeks later in the cycle than the Garland nomination.<sup>302</sup> Held up by the Chair of the Judiciary Committee over a “personal senatorial vendetta,” Fuller’s nomination was ultimately confirmed on July 20.<sup>303</sup> Fuller’s confirmation also occurred under the conditions of divided government, but both Cleveland and Fuller were conservative Democrats,<sup>304</sup> which presumably muted partisan objections to the nomination. Fuller was confirmed by a 2-1 margin.<sup>305</sup>

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<sup>296</sup> ABRAHAM, *supra* note 139, at 119.

<sup>297</sup> *See Supreme Court Nominations, supra* note 92.

<sup>298</sup> *See id.*

<sup>299</sup> ABRAHAM, *supra* note 139, at 143–44.

<sup>300</sup> *Id.* at 142.

<sup>301</sup> *See* RICHARD J. REGAN, A CONSTITUTIONAL HISTORY OF THE U.S. SUPREME COURT 61 (2015). The confirmation of Justice Johnson in 1804 is also partly analogous in timing to the Garland nomination. *See id.* at 12. The occasion for the nomination arose on January 26, three weeks earlier in the cycle than Scalia’s death, but the March 22 nomination was submitted about a week later than the Garland nomination. *See id.* A major difference, however, is that the Senate not only acted on the nomination but confirmed it two days after it was submitted. *See id.*

<sup>302</sup> *See id.* at 61.

<sup>303</sup> ABRAHAM, *supra* note 259, at 107.

<sup>304</sup> *See id.*

<sup>305</sup> *See id.*

These four confirmations undercut any suggestion that, if a tradition against confirming Supreme Court nominees in an election year even exists, it has ever extended back to an occasion for a nomination as remote from its respective presidential election as the Garland nomination. The occasion for these four nominations arose between January 2 and June 10; the nominations were submitted between January 28 and July 14; and the confirmations occurred between June 1 and July 26.<sup>306</sup> Although these proceedings date to 1916 at the latest, they undermine the notion of a tradition of withholding confirmations for nominations made during at least the first few months of a presidential election year.<sup>307</sup>

The 1992 Biden remarks, on which McConnell and others placed so much emphasis, are fully consistent with this conclusion. Biden conceded that the nominations of several Supreme Court Justices have been confirmed “in the summer of an election year . . . for vacancies that had arisen before the summer began.”<sup>308</sup> His data set was flawed,<sup>309</sup> but his point was nevertheless accurate. And it points to the disjunction between the Biden speech and McConnell’s use of it. Whereas Scalia died in February and the Garland nomination was submitted in March, Biden was speaking in late June and was explicitly addressing only the prospect of a sitting

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<sup>306</sup> See ABRAHAM, *supra* note 139, at 119, 142–44; Regan, *supra* note 302, at 61; *Supreme Court Nominations*, *supra* note 92.

<sup>307</sup> See Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15, 27 (2016) (“The Senate’s recent history of refusing to consider judicial nominations made within a year of a pending [p]residential election is largely confined to lower court nominees. . . . Prior to Justice Scalia’s death, the opportunity to make a Supreme Court nomination in a presidential election year had only arisen twice since World War II. In neither case, however, was there a confirmation prior to the election.”).

<sup>308</sup> 138 CONG. REC. 8,862 (1992) (statement of Sen. Biden).

<sup>309</sup> Biden claimed that the nominations of only five Justices have ever been confirmed “in the summer or fall” of a presidential election year. *Id.* But the two examples he gave—the confirmations of Justice Grier in 1846 and Justice Miller in 1862—did not occur in presidential election years. See *Supreme Court Nominations*, *supra* note 92. Those were only congressional election years. See *Dates of Sessions of Congress, 1789-Present*, *supra* note 104. His claim that the five vacancies arose “before the summer,” is also barely consistent, if at all, with Justice Clarke’s nomination to fill a vacancy created by Justice Hughes’ resignation on June 10, 1916. See ABRAHAM, *supra* note 139, at 143–44. Biden did not make clear exactly which five confirmations he was describing, but they presumably were the three July confirmations described above (Clarke, Fuller, and Shiras) and the two midterm confirmations that he had mistakenly included. Cf. 138 CONG. REC. 8,862 (statement of Sen. Biden). It cannot be that he meant to expand his analysis to midterm elections or else he would have to have added a half-dozen more summer confirmations to his list, including the September 1986 confirmations of Chief Justice Rehnquist and Justice Scalia. See *Supreme Court Nominations*, *supra* note 92. A researcher scanning a list of confirmation dates must have mistakenly thought that 1846 and 1862 were presidential election years.

Justice retiring from either that point in the election year or later.<sup>310</sup> The supposed “tradition against acting on Supreme Court nominations in a [p]residential year,” he said, “is particularly strong when the vacancy occurs in the summer or fall of that election season.”<sup>311</sup>

Even when using accurate historical data, it is true, as Biden further observed, that there have been no confirmations of Supreme Court nominations in August, September, or October of a presidential election year.<sup>312</sup> Biden emphasized this pattern as a supposed “unbroken string of historical tradition.”<sup>313</sup> One might be tempted to suppose that a total absence of confirmations in those months might imply a firm tradition of preserving summer vacancies for the next President, but the real answer is more mundane. Under the pre-1933 congressional calendar, few Senate sessions ever extended beyond early August in presidential election years, so the Senate was rarely in session either to receive a nomination or to confirm one in those months.<sup>314</sup> Under the post-1933 calendar, Senate sessions typically have extended into at least October in presidential election years, but all but one of the post-1933 nominations made during election years were made very early in the pre-election year.<sup>315</sup> The one exception was the 1968 nomination of Justice Fortas to be Chief Justice.<sup>316</sup> Given the relatively small number of occasions for nominations during presidential election years and the rarity of a Senate session extending into the late summer or early fall before 1933, there is simply a dearth of observations from which to infer much of anything from the absence of successful confirmations during the final three months before a presidential election.

#### 4. Summing Up

The strongest instances from which to infer a tradition against

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<sup>310</sup> 138 CONG. REC. 8,862 (statement of Sen. Biden). Biden was focusing on the prospect of a Supreme Court Justice retiring “tomorrow, or within the next several weeks, or . . . at the end of the summer.” *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> See *id.*; *Supreme Court Nominations*, *supra* note 92.

<sup>313</sup> 38 CONG. REC. 8,862 (statement of Sen. Biden).

<sup>314</sup> See *Dates of Sessions of the Congress, 1789-Present*, *supra* note 104.

<sup>315</sup> See *id.*; see also Amy Howe, *Supreme Court Vacancies in Presidential Election Years*, SCOTUSBLOG (Feb. 13, 2016), <http://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/> (providing the one example of an early nomination in the pre-election year); *Supreme Court Nominations*, *supra* note 92.

<sup>316</sup> Howe, *supra* note 316.

the confirmation of Justices close to a presidential election would be instances in which occasions for nominations arose but no pre-election nomination was made. Those cases would suggest that Presidents as well as senators shared a common understanding against such confirmations. As we have seen, however, none of the instances in which a pre-election nomination was lacking provide any support for an inference that the reason for the absence was some tradition against election-year confirmations.

The alternative source would be instances in which a pre-election nomination was made but was not confirmed by the Senate. Because a nomination was made, these instances cannot support an inference of a consensus tradition in which Presidents have acquiesced, but confirmation failures could still support an inference of a unilateral Senate tradition against election-year confirmations. As we have seen, there have been four instances in which the election-year context played a role in a confirmation failure. In at least three of them, however, significant additional factors also played a role in causing the confirmation failure. Moreover, to the extent that these instances support an inference of a unilateral Senate tradition, the timing of these confirmation failures limits a credible inference to the summer and fall before a presidential election, not March. In addition, post-election behavior undercuts McConnell's strong articulation of the tradition, which would preclude confirmations during the lame duck period after a presidential election as well as during the election campaign. Finally, none of the instances support McConnell's policy of determined inaction, as all of the confirmation failures involved floor action and floor votes.

The third source, confirmation successes, undercuts the inference of any consistent unilateral Senate tradition against election-year confirmations. While the earlier confirmation successes are too remote from the presidential election to have much probative value, four successful confirmations from June 1 to July 26 seriously undercut an inference of any consistent unilateral Senate tradition in those months. A scarcity of evidence makes drawing any firm inferences about August, September, and October challenging. There have been no confirmation successes in those months, but there have been almost no opportunities for them either. The approaching presidential election did play a significant role in the one confirmation failure in late August as well as the ones in late September and early October. But the inference is weak in the latter instance, and neither supports the inference of a broad

tradition against post-election confirmations as well as pre-election ones.

Taken together, the history of nomination absences and confirmation failures, when set against the history of confirmation successes, provides very limited support for an inference of a tradition against election-year confirmations. There is no evidence of a consensus tradition that includes presidential acquiescence, and there is very little net evidence for even a unilateral Senate tradition in connection with occasions for nominations that arise before the summer months. There is mixed evidence for a unilateral tradition during summer or fall. In any event, there is no serious evidence of any tradition against confirmations during the lame duck period after a presidential election and absolutely no evidence of any tradition of a policy of determined inaction, in which nominations are buried in committee and are dismissed without floor action. In several respects—specifically, the timing of the vacancy and nomination, the possibility of lame duck confirmations, and the possibility of floor action—McConnell’s policy of determined inaction in the face of the Garland nomination was decidedly unprecedented.

### *B. Populism*

In addition to precedent, the other major idea animating McConnell’s policy of determined inaction is populism. Refusing to act on Obama’s nomination would have allowed voters to debate judicial philosophy and express a preference for “originalism” or “living constitutionalism” indirectly by way of the vote for President. In at least two ways, however, this idea is incoherent.

#### 1. The Popular Will

The first way in which the idea is incoherent concerns the notion of using the popular will to justify the refusal to consider a Supreme Court nomination during an election year, thus preserving the appointment opportunity for the next President. There are several problems with the idea.

The first is the paradox of public opinion itself. While McConnell was preserving the Scalia vacancy for more than a year purportedly in order to give the people a chance to weigh in on the choice of a new Justice, most people were telling pollsters that they wanted the

Senate to proceed with the confirmation process.<sup>317</sup> To borrow the characteristically no-nonsense words of Justice O'Connor, most Americans seemed to want McConnell and Senate Republicans to just "get on with it."<sup>318</sup> The objection is neither trivial nor facetious. Rather, it was perverse to claim to be serving public opinion while both ignoring it and, indeed, declining to have courtesy meetings or confirmation hearings in order to evade it. As a conservative activist succinctly described the perspective: "Meetings lead to hearings, . . . [i]t's a slippery slope."<sup>319</sup>

A second objection to the notion of using the popular will to justify the refusal to proceed with the nomination is the mismatch between the asserted concern (the will of the people) and the method of measuring it (a presidential election). To suppose that the choice of a President is a simple proxy for a choice of judicial philosophy in prospective Supreme Court nominees grossly overstates the extent to which voters make their presidential choices based on that issue. Some certainly give it weight, but many do not.<sup>320</sup> It is one of a multitude of issues exerting influence on voter choices.<sup>321</sup> Of course, the proxy problem does not even get to the imponderable problem of divining the popular will when one candidate wins the popular vote by a substantial margin but the other candidate takes the presidency by prevailing in the Electoral College. Should the choice of a judicial philosophy by people who encounter the judicial system as individuals not be assessed on a "one person, one vote" basis? The theory is populism, not Electoral College-ism?

A third objection to this use of the concept of the popular will is determining the point in a presidency when further Supreme Court nominations should be suspended in order to re-assess the will of the people. McConnell alluded to the difficulty in his February 23 remarks by characterizing Obama as a "lame duck President"<sup>322</sup>—with nearly a quarter of his term of office remaining to fulfill.<sup>323</sup> If

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<sup>317</sup> See Gardiner Harris, *Obama Says a Garland Rebuff Would Damage Supreme Court*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/19/us/politics/merrick-garland-obama-npr-interview.html>; Amber Phillips, *Americans Say by 2-to-1 that Senate Should Hold Hearings on Obama's Supreme Court Nominee*, WASH. POST (Mar. 10, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/03/10/americans-say-2-to-1-that-senate-should-hold-hearings-on-obamas-supreme-court-nominee/?utm\\_term=.e94de068af79](https://www.washingtonpost.com/news/the-fix/wp/2016/03/10/americans-say-2-to-1-that-senate-should-hold-hearings-on-obamas-supreme-court-nominee/?utm_term=.e94de068af79).

<sup>318</sup> Bradner, *supra* note 86.

<sup>319</sup> See Lipton, *supra* note 29.

<sup>320</sup> See PEW RES. CTR., 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 31 (2016).

<sup>321</sup> See *id.*

<sup>322</sup> 162 CONG. REC. S926 (daily ed. Feb. 23, 2016).

<sup>323</sup> See *GOP's No-Hire Court*, BALT. SUN (Feb. 14, 2016), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-scalia-20160214-story.html>.

the point is to center the popular will, perhaps it is the popular will that should determine when a President has reached the point of losing his previous electoral mandate. Obama may have reached his final year in office, but when he nominated Garland in March 2016, his approval rating hovered just above fifty percent, and it climbed to nearly sixty percent by the time he left office.<sup>324</sup> In contrast, George W. Bush was just coming upon the first anniversary of his re-election when he had the chance to make two Supreme Court nominations.<sup>325</sup> But his approval rating had already dropped to forty-five percent by the time he nominated Chief Justice John Roberts, had fallen to forty percent by the time he nominated Justice Alito, and continued a gradual slide down to around thirty percent by the time he left office.<sup>326</sup> If the Senate were in the business of refusing to process Supreme Court appointments because the nominating President retained too little of his electoral mandate, then the Senate should have refused to consider the nominations of Roberts and Alito, not Garland.

Of course, President Trump was just over a week into his presidency when he nominated Justice Neil Gorsuch for the Scalia vacancy, but Trump's forty-five percent approval rating<sup>327</sup> was already significantly lower than Obama's had been when he had nominated Garland for the same vacancy.<sup>328</sup> How a President who lost the popular vote by a significant margin and had a negative approval rating from the start of his term could be seen to wield "the will of the people" in making a Supreme Court nomination is unclear. Were McConnell serious about a popular mandate, he should have continued the posture of determined inaction until after the 2020 presidential election in hopes that it might be more determinative.

## 2. Originalism

The second way in which McConnell's populism is a paradox is that it seeks public approval of originalism as a judicial philosophy when the very idea of seeking public approval of a judicial

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<sup>324</sup> *Presidential Job Approval Center*, GALLUP, <http://www.gallup.com/interactives/185273/presidential-job-approval-center.aspx> (last visited Mar. 27, 2017).

<sup>325</sup> See *Supreme Court Nominations*, *supra* note 92; *George W. Bush*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/georgewbush> (last visited Mar. 29, 2017).

<sup>326</sup> *Presidential Job Approval Center*, *supra* note 324; *Supreme Court Nominations*, *supra* note 92.

<sup>327</sup> *Presidential Job Approval Center*, *supra* note 324.

<sup>328</sup> *Id.*



philosophy contradicts originalism. In addition to the general suspicion that the framers of the Constitution had for direct democracy, the proceedings at the Philadelphia Convention disclose a repudiation of the idea of involving ordinary laypeople in the selection of Supreme Court Justices.

The delegates to the convention gave specific consideration to the proper method of selecting Supreme Court Justices. The “Virginia Plan,” which served as the basis for the delegates’ work, originally proposed to have Congress choose the Justices.<sup>329</sup> Early in their deliberations, however, the delegates made a choice that bears on the idea of seeking popular approval of judicial philosophies: The delegates stripped the House of Representatives of any role in the selection of Supreme Court Justices.<sup>330</sup> That decision seriously undermines the constitutional propriety of holding open a Supreme Court vacancy in order to give the public a chance to weigh in on judicial philosophy. Why?

By the time of the decision to deprive the House of any role in choosing Supreme Court Justices, the delegates had largely settled on the nature and composition of the House itself. It was to be the most democratic part of the government, representing the will of the people most directly. The House would be apportioned by population,<sup>331</sup> and it would consist of members elected directly by the people<sup>332</sup> to short terms of office.<sup>333</sup> It was to be “our House of Commons.”<sup>334</sup>

That, however, was part of the problem with having the House participate in the selection of Justices. Although James Wilson and John Rutledge previewed a more fundamental disagreement as between legislative or executive appointment,<sup>335</sup> the delegates reached a rather easy consensus that at least House participation in Supreme Court appointments was a bad idea. James Madison offered a blunt rationale:

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<sup>329</sup> James Madison, *Journal* (May 29, 1787), reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 20–21 (Max Farrand ed., 1911) [hereinafter RECORDS].

<sup>330</sup> JAMES A. CURRY ET AL., CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE 61 (5th ed. 1989).

<sup>331</sup> *Journal* (June 11, 1787), reprinted in RECORDS, *supra* note 329, at 190, 192–93 (adopting proportional representation by a vote of 7-3); *id.* at 193 (adopting the infamous three-fifths compromise by a vote of 10-1).

<sup>332</sup> *Journal* (May 31, 1787), reprinted in RECORDS, *supra* note 329, at 46 (approving direct election by a vote of 6-2).

<sup>333</sup> *Journal* (June 12, 1787), reprinted in RECORDS, *supra* note 329, at 209 (approving three-year terms by a vote of 7-4). A little more than a week later, the term was reduced to two years. *Journal* (June 21, 1787), reprinted in RECORDS, *supra* note 329, at 354 (voting 7-3).

<sup>334</sup> James Madison, *Journal* (May 31, 1787), reprinted in RECORDS, *supra* note 329, at 48.

<sup>335</sup> James Madison, *Journal* (June 5, 1787), reprinted in RECORDS, *supra* note 329, at 119.

Many of [the legislators] were incompetent Judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations but possessed of every necessary accomplishment.<sup>336</sup>

No one should ever mistake the framers for small-d democrats. Although no other delegate is reported to have either echoed or challenged this lowly assessment of prospective House members, a motion to retain a role for the House was immediately withdrawn without a vote.<sup>337</sup> Without dissent, the delegates opted at that early point in the convention proceedings to vest the appointment power exclusively in the Senate.<sup>338</sup>

Madison did not speak in such harsh terms about the Senate. Although its nature and composition were less settled, he expected it to be “a less numerous [and] more select body” with members who “would be more competent judges.”<sup>339</sup> Senators were likely to be “sufficiently stable and independent to follow their deliberate judgments.”<sup>340</sup> Madison no doubt understood that there was never much support among delegates for the direct election of senators.<sup>341</sup> The delegates had unanimously approved the election of senators by state legislatures<sup>342</sup> and had set the term of office at seven years.<sup>343</sup> The Senate was not going to be an American House of Lords, but despite initial approval of proportional representation,<sup>344</sup> it was

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<sup>336</sup> James Madison, *Committee Records* (June 13, 1787), reprinted in RECORDS, *supra* note 329, at 232–33.

<sup>337</sup> *See id.* at 233.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> Madison, *supra* note 335, at 120.

<sup>341</sup> *See* Madison, *supra* note 329, at 20 (proposing the Virginia Plan, which contained the election of senators by the House from among candidates nominated by the state legislatures); Madison, *supra* note 334, at 46 (reporting the delegates’ dislike for that particular method of indirect election); *Journal* (June 7, 1787), reprinted in RECORDS, *supra* note 329, at 148–49 (overwhelmingly rejecting the alternative of direct election by the people with a vote of 10-1).

<sup>342</sup> *Journal*, *supra* note 341, at 149.

<sup>343</sup> *Journal*, *supra* note 333, at 211 (voting 8-1).

<sup>344</sup> *Journal*, *supra* note 331, at 193 (narrowly rejecting equal suffrage and adopting proportional representation by votes of 6-5); *see also* James Madison, *Journal* (July 7, 1787), reprinted in RECORDS, *supra* note 329, at 548–49 (substituting the Great Compromise for equal suffrage in the Senate a month later by a preliminary vote of 6-3); *Journal* (July 16,

certainly not going to be a House of Commons. That difference made the Senate an acceptable body for choosing Supreme Court Justices, whereas the House was not.

That difference casts constitutional skepticism on the scheme of holding Supreme Court vacancies open until after an election in order to empower the *vox populi*.<sup>345</sup> If the framers doubted that directly elected representatives of the people would be qualified to choose Supreme Court Justices, much less would they have thought the people themselves qualified to do so. The notion appears never to have occurred to even one delegate that Supreme Court Justices might be chosen based on popular preferences. Indeed, the framers made some effort to insulate Supreme Court Justices from political influence.<sup>346</sup> Of course, none of this alone means that holding a vacancy open until after an election is necessarily unconstitutional, but it does highlight the tension between such a practice and the original design, which may at least indirectly bear on the propriety of the practice, especially for one ironically seeking a popular mandate for originalism.

### III. HARMS TO THE COURT

The policy of determined inaction that McConnell and Senate Republicans adopted in disregarding the Garland nomination risks great harm to the Court and its role in the constitutional system. At least two such harms are probable, one to the Court's stability and one to the Court's legitimacy.

#### A. *Stability*

It is easy to see how McConnell's policy of determined inaction on Supreme Court nominations could recur and expand in ways that seriously undermine the stability of the Court. Throughout most of the Court's history, the public has been able to trust that, however tough a confirmation battle may be, the political branches will ultimately ensure that the Court remains consistently staffed and equipped to perform its function smoothly. That may no longer be the case.

Consider, for example, the National Rifle Association ("NRA").

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1787), reprinted in RECORDS, *supra* note 329, at 13 (adopting the Great Compromise by a final vote of 5-4).

<sup>345</sup> See 162 CONG. REC. S926 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell).

<sup>346</sup> See, e.g., U.S. Const. art. III, § 1 (providing for life tenure and security of compensation).

Nine years ago, a bare majority of the Supreme Court gave the lobby group an extremely valuable tool. In *District of Columbia v. Heller*,<sup>347</sup> the Court re-interpreted the Second Amendment in a way that renders at least some significant efforts at gun control unconstitutional.<sup>348</sup> After that decision, the NRA's top priority during any future Democratic presidency would be to protect *Heller* from being narrowed or overruled.<sup>349</sup> With that as a driving goal, why would the powerful lobby group ever acquiesce in the confirmation of even one Democratic Justice, who might then someday provide a crucial fifth vote to overrule the hallowed precedent and neutralize the Second Amendment?

It would not acquiesce. Rather, the NRA would use every tactic at its considerable disposal to prevent the confirmation of a Democratic nominee. Among other things, it would make it clear to Republican senators that it would be prepared to primary any of them who voted to confirm a Democratic nominee or even allow a Democratic nominee to be considered. Working with other conservative interest groups, the NRA would bring enormous pressure to bear on Republican senators to block any Democratic nominee to the Court.<sup>350</sup> For a conservative interest group like the NRA, having a deadlocked Court would be better than having a liberal majority any day.

In the past, the NRA might not have succeeded. The idea of simply refusing to fill a vacancy on the Supreme Court would once have been unthinkable, but not anymore. The tactic has now been pioneered by McConnell and shown to work. The idea of obstructing a Supreme Court appointment for a year or more purely for ideological control of the Court has now become not only thinkable but actually done. It is possible that the successful blocking of the Garland nomination signaled the demise of timely confirmations of Supreme Court nominees under conditions of divided government.

One can also imagine the tactic cascading further. If the Court were already deadlocked in a 4-4 split when a second vacancy happened, a group like the NRA would gain an instant advantage if

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<sup>347</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>348</sup> *Id.* at 636.

<sup>349</sup> See Chris W. Cox, *NRA: Why We Oppose Merrick Garland's Supreme Court Nomination*, WASH. POST (Mar. 18, 2016), [https://www.washingtonpost.com/opinions/nra-why-we-oppose-merrick-garlands-supreme-court-nomination/2016/03/18/1ea4c9d0-ec5b-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.8b639fc31d50](https://www.washingtonpost.com/opinions/nra-why-we-oppose-merrick-garlands-supreme-court-nomination/2016/03/18/1ea4c9d0-ec5b-11e5-b0fd-073d5930a7b7_story.html?utm_term=.8b639fc31d50).

<sup>350</sup> See, e.g., Ian Millhiser, *McConnell: No New Supreme Court Justice until the NRA Approves of the Nominee*, THINKPROGRESS (Mar. 20, 2016), <https://thinkprogress.org/mcconnell-no-new-supreme-court-justice-until-the-nra-approves-of-the-nominee-76ae0f40e064#.c5lin914o>.

the new vacancy had resulted from a liberal Justice leaving the Court. In that event, the Court would no longer be deadlocked; it would have a 4-3 conservative majority. As long as Democratic nominations remained blocked, a seven-member Court with four conservatives and two vacancies could renew its effort to steer the law to the right.

At that point, it would be rational for a conservative group like the NRA to deal. It could trade confirmation of one liberal Justice for confirmation of one conservative Justice. The result would restore the Court to nine members, but it would still have a one-vote conservative majority. Democrats could take the deal or leave it. Either way, the Court would have a conservative majority, with a split of either five votes to four or four votes three. The Court might well remain understaffed at seven members, as liberals may have little incentive to take such a deal.

A third departure from the Court might put it back at a deadlock, but now a 3-3 deadlock. The Court can continue to operate lawfully with a quorum of only six Justices.<sup>351</sup> The politics of a 3-3 split would largely parallel those of a 4-4 split. As previously described, those politics would impel a group like the NRA toward resistance to any Democratic appointment that would risk creating a liberal majority. The Court might continue to hobble along with only six members until a fourth unfilled vacancy deprived it of a quorum and the ability to operate. Perhaps at that point, liberals and conservatives would accept a deal that merely added a couple Justices so as to maintain the existing ideological division but allow the Court to resume operating short of its full complement of nine members. Each side would have an interest, however, in keeping the Court understaffed in case a period of unified government allowed either of them to appoint their way to a Court majority.

Some partial relief from such persistent vacancies might have been had through the mechanism of recess appointments. A President could have unsettled a dysfunctional political dynamic or even just enabled the Court to operate with a quorum by unilaterally appointing temporary Justices without Senate confirmation using the recess appointment power.<sup>352</sup> If timed correctly, the terms of these temporary Justices could have lasted almost two years before automatically expiring, when perhaps new recess appointments could have been made.<sup>353</sup> By executive action

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<sup>351</sup> See 28 U.S.C. § 1 (2012).

<sup>352</sup> See U.S. CONST. art. II, § 2, cl. 3.

<sup>353</sup> See David Dayen, *Obama Can and Should Put Merrick Garland on the Supreme Court*,

alone, a President even could have given his own ideological camp a temporary majority, but it would have outlasted his own presidency by only months, not decades.<sup>354</sup> In *NLRB v. Canning*,<sup>355</sup> however, the Court greatly limited the recess appointment power by endorsing the Senate's practice of taking breaks while technically avoiding a recess by having a Senator come to the Chamber every three days to convene a pro forma "session" of the Senate.<sup>356</sup> The practice allows the Senate to effectively preclude a recess appointment by never giving the President a recess long enough to trigger the temporary appointment power.<sup>357</sup> In divided government, the Senate is especially likely to exercise this Court-endorsed prerogative. At the very least, the existence of the prerogative would make the option of a recess appointment itself a subject of wrangling and compromise between the President and the Senate. Even with divided government, the Senate might acquiesce in a recess appointment or two in order to keep the Court operating. The opposition party might be willing to tolerate temporary Justices on the theory that they might feel too squeamish to overrule major precedents. The appearance of a fully staffed Court, moreover, might blunt any public pressure to confirm permanent Justices while preserving vacancies for the next President in a less obvious way than McConnell's policy of determined inaction.

If these scenarios of ideological warfare seem preposterous, they are. But they are no longer far-fetched now that McConnell has pioneered President-shopping for ideological advantage in the nomination of Supreme Court Justices. When it appeared that Hillary Clinton might win the 2016 presidential election, a few Republican senators even started talking about refusing to confirm a Supreme Court nominee for her entire four-year term in order to President-shop all the way to 2020 or beyond.<sup>358</sup> That kind of ideological warfare, fluctuating size, and persistent vacancies are exactly how the National Labor Relations Board has been staffed for decades.<sup>359</sup> Just a glance at the NLRB's own chart of its evolving membership over the years reveals its persistent staffing

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NEW REPUBLIC (Nov. 16, 2016), <https://newrepublic.com/article/138787/obama-can-put-merrick-garland-supreme-court>.

<sup>354</sup> *See id.*

<sup>355</sup> *NLRB v. Canning*, 134 S. Ct. 2550 (2014).

<sup>356</sup> *Id.* at 2557.

<sup>357</sup> *Id.* at 2617 (Scalia, J., concurring).

<sup>358</sup> Editorial, *A Coup Against the Supreme Court*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/07/opinion/a-coup-against-the-supreme-court.html>.

<sup>359</sup> *See Members of the NLRB Since 1935*, Nat'l Lab. Rel. Board, <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Mar. 20, 2017).

problems.<sup>360</sup> Especially since the late 1980s, it has been perennially plagued by enduring vacancies and has been forced to limp along with a mixture of confirmed members and recess appointees,<sup>361</sup> the very staffing option that the Court sharply curtailed in *Canning*.<sup>362</sup> The NLRB typically limps along until every few years the President and the Senate strike a bargain to confirm two or three new NLRB members as part of a packaged deal.<sup>363</sup> Since 2000, the NLRB has had a full complement of confirmed members during only two short periods that, together, totaled a span of just two years and eight months.<sup>364</sup> For twenty-six months—January 1, 2008, to March 26, 2010—the five-seat NLRB had only two members.<sup>365</sup> In anticipation of that period, the NLRB tried to retain its ability to achieve a quorum by engaging in successive delegations of its powers from four members to three and then from three members to two.<sup>366</sup> The Court later derided the effort as a “Rube Goldberg-style delegation mechanism” and declared it unlawful.<sup>367</sup> Only the addition of two recess appointments ended that period of “near paralysis.”<sup>368</sup>

This hobbled agency is what the intense ideological clash between management and labor has produced over the course of a few decades. It is also what the intense ideological clash over the Supreme Court could produce if confirmation norms break down further and President-shopping becomes the standard operating procedure. It would leave the Court a greatly diminished institution.

<sup>360</sup> See, e.g., *id.*

<sup>361</sup> See, e.g., *id.*

<sup>362</sup> *Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring).

<sup>363</sup> See, e.g., 143 CONG. REC. 12,209 (1997) (statement of Sen. Kennedy); Burgess Everett & John Bresnahan, *Obama Selects Labor Board Picks*, POLITICO (July 16, 2013), <http://www.politico.com/story/2013/07/white-house-consults-with-afl-cio-head-on-nlrp-picks-094280#ixzz2ZJKIhWik>; Bloomberg News, *After 3 Years, Labor Board Seats Are Full*, N.Y. TIMES (June 22, 2010), [http://www.nytimes.com/2010/06/23/us/23brfs-AFTER3YEARS\\_L\\_BRF.html](http://www.nytimes.com/2010/06/23/us/23brfs-AFTER3YEARS_L_BRF.html); Sam Hananel, *Obama's Labor Board Picks Face Opposition*, WASH. POST (May 16, 2013), [https://www.washingtonpost.com/local/dc-politics/obamas-labor-board-picks-face-opposition/2013/05/16/60d9bc42-be74-11e2-9b09-1638acc3942e\\_story.html?utm\\_term=.6fbd31c41def](https://www.washingtonpost.com/local/dc-politics/obamas-labor-board-picks-face-opposition/2013/05/16/60d9bc42-be74-11e2-9b09-1638acc3942e_story.html?utm_term=.6fbd31c41def); Paul Kane, *Amid Acrimony, Senate Moves Toward Historic Vote to Change its Rules*, WASH. POST (July 11, 2013), [https://www.washingtonpost.com/politics/amid-acrimony-senate-moves-toward-historic-vote-to-change-its-rules/2013/07/11/e3e06e2c-ea45-11e2-a301ea5a8116d211\\_story.html?utm\\_term=.38dbcf6d3d8b](https://www.washingtonpost.com/politics/amid-acrimony-senate-moves-toward-historic-vote-to-change-its-rules/2013/07/11/e3e06e2c-ea45-11e2-a301ea5a8116d211_story.html?utm_term=.38dbcf6d3d8b).

<sup>364</sup> See *Members of the NLRB*, *supra* note 359 (showing that the two periods were December 17, 2002, to August 21, 2003, and August 12, 2013, to August 27, 2015).

<sup>365</sup> See *id.*

<sup>366</sup> *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010); *Aluminum Casting & Eng'g Co.*, 352 N.L.R.B. 1, 1 n.7 (2008).

<sup>367</sup> *New Process Steel*, 560 U.S. at 682.

<sup>368</sup> Steven Greenhouse, *Deadlock is Ending on Labor Board*, N.Y. TIMES (Mar. 31, 2010), <http://www.nytimes.com/2010/04/01/business/01labor.html>.

*B. Legitimacy*

A second harm that McConnell's policy of determined inaction poses to the Court concerns the source of its power: its legitimacy. The President-shopping that the Senate's behavior represents poses a serious threat to the legitimacy of the Court.

Conservatives have historically expressed grave concern for the Court's legitimacy—at least in certain circumstances. When a majority of the Court extended constitutional protection to the right of a grandmother to live with her grandchildren, Justice White dissented, observing that “[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.”<sup>369</sup> He made the same point almost verbatim a few years later when writing for the majority in refusing to extend constitutional protection to the sexual intimacy of same-sex partners.<sup>370</sup> The same language has been quoted as well by Justice Thomas, in an opinion joined by Justice Scalia, when dissenting from the Court's extension of constitutional protection to the right of acquitted defendants to be free from forced commitment to psychiatric hospitals.<sup>371</sup>

Of course, one of the most extensive discussions of the Court's own legitimacy famously came in *Planned Parenthood v. Casey*,<sup>372</sup> in which Justices O'Connor, Kennedy, and Souter relied on the concept in justifying their rejection of calls to overrule *Roe v. Wade*.<sup>373</sup> There, they described the crucial role of legitimacy in sustaining the Court's power:

As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law

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<sup>369</sup> Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).

<sup>370</sup> Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”).

<sup>371</sup> Foucha v. Louisiana, 504 U.S. 71, 125 (1992) (Thomas, J., dissenting) (quoting *Bowers*, 478 U.S. at 194).

<sup>372</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>373</sup> *Id.* at 846 (plurality opinion).



means and to declare what it demands.<sup>374</sup>

The joint authors explained further that the Court's maintenance of its own legitimacy required not only having principled justifications for its decisions, but also:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.<sup>375</sup>

In short, the Court's legitimacy rests on a "need for principled action to be perceived as such."<sup>376</sup>

What these ruminations on the legitimacy of the Court omit is the way in which its legitimacy may be eroded by behavior beyond its control—namely, the process by which its members come to acquire their seats. No matter how principled a Court might imagine its justifications for its decisions to be, it faces a tough challenge in "earn[ing]" public legitimacy "over time"<sup>377</sup> when the public believes that its members are chosen to satisfy strict ideological litmus tests. The use of such tests by Presidents in picking nominees and senators in confirming them has already eroded the legitimacy of the judiciary as a guarantor of the rule of law. The effect is even worse when the public sees a Senate majority so driven by its ideological litmus tests that it was willing to treat a consensus nominee like a pariah and keep a vacancy open for a year (or five) in order to engage in an unprecedented effort at President-shopping in a quest for a more "ideologically correct" nominee.

#### IV. REMEDIAL ACTIONS

McConnell and Senate Republicans achieved their goal. By sticking to their posture of determined inaction, they succeeded in President-shopping in a quest for a more ideologically desirable nominee than Garland. Trump got to fill a Supreme Court vacancy that should not have existed by the time he took office.<sup>378</sup> There may be little way to prevent the scheme from coming to fruition by

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<sup>374</sup> *Id.* at 865.

<sup>375</sup> *Id.* at 865–66.

<sup>376</sup> *Id.* at 866.

<sup>377</sup> *Id.* at 868.

<sup>378</sup> See Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html>.

the time of a swearing-in ceremony. But is there anything constructive that can be done about it now? The following are two modest possibilities.

*A. Containing the Practice*

Although the determined inaction in the face of the Garland nomination was historically unprecedented, history also teaches that election-year politics can intrude on the process of filling existing or impending vacancies on the Supreme Court. Trying to eradicate it entirely is probably a fools' errand. Trying to contain it, however, is a worthy goal. One effort at containing it could involve articulating a limiting principle, a norm of senatorial behavior.

Timing may be a good place to start. Of all the rationales offered by McConnell and Senate Republicans for their determined inaction, insufficient time for the confirmation process was rarely, if ever, one of them. Even if offered, it would not have been credited. The modern history of Supreme Court confirmations shows a remarkable consistency in timing. It makes clear that, in the absence of a fight over a particular nominee, a vacancy that happens in February could be easily filled in time to avoid disrupting the next Term of the Court, which commences in early October. The beginnings of a norm of behavior could focus solely on the objective of proceeding with a confirmation process in a presidential election year whenever there is sufficient time to complete the process before the Court's fall Term begins. What guidance does recent history offer about the timing necessary to achieve that goal?

Since Justice Goldberg resigned in July 1965 to become U.N. Ambassador, twenty vacancies have occurred on the Supreme Court. Of those, eleven arose from routine retirements,<sup>379</sup> four from medically induced retirements,<sup>380</sup> two from deaths,<sup>381</sup> two from

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<sup>379</sup> See R. SAM GARRETT & DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL33118, SPEED OF PRESIDENTIAL AND SENATE ACTIONS ON SUPREME COURT NOMINATIONS, 1900-2010, at 26-29 (2010) (providing: Stevens (2010); Souter (2009); O'Connor (2005); Blackmun (1994); White (1993); Marshall (1991); Powell (1987); Burger (1986); Stewart (1981); Warren (1968); and Clark (1967)).

<sup>380</sup> See, e.g., Linda Greenhouse, *Vacancy on the Court; Brennan, Key Liberal, Quits Supreme Court; Battle for Seat Likely*, N.Y. TIMES (July 21, 1990), <http://www.nytimes.com/1990/07/21/us/vacancy-court-brennan-key-liberal-quits-supreme-court-battle-for-seat-likely.html>; *Justice Black, Champion of Civil Liberties for 34 Years on Court, Dies at 85*, N.Y. TIMES (Sept. 26, 1971) [hereinafter *Justice Black*], <http://www.nytimes.com/1971/09/26/archives/justice-black-champion-of-civil-liberties-for-34-years-on-court.html>; James M. Naughton, *Harlan Retires; Nixon Hints Poff is a Court Choice*, N.Y. TIMES (Sept. 24, 1971), <http://www.nytimes.com/1971/09/24/archives/harlan-retires-nixon-hints-poff-is-a>

resignations to accept another appointment—including one elevation to Chief<sup>382</sup>—and one vacancy arising from a resignation compelled by scandal.<sup>383</sup>

Filling the vacancies resulting from eight of the routine retirements followed a standard pattern. First, the retiring Justice gave notice sometime between late February and late June, either during or at the end of one of the Court's Terms.<sup>384</sup> Then, the President nominated a successor sometime between mid-May and mid-August.<sup>385</sup> Next, the Senate voted to confirm the nominee sometime between late July and mid-October.<sup>386</sup> Finally, the successor was on the bench either by or shortly after the start of the Court's new fall Term on the first Monday in October.<sup>387</sup> Manifestly, the goal of the retiring Justice, the nominating President, and the confirming Senate in these cases has been to appoint the successor in time to avoid seriously disrupting the Court's ensuing Term.

The response to several of the vacancies arising from other causes also happened to conform to the same general timeline. These additional instances were:

- Chief Justice Roberts' confirmation following Chief Justice Rehnquist's death in early September 2005;<sup>388</sup>
- Justice Souter's confirmation following Justice Brennan's medically induced retirement in mid-July 1990;<sup>389</sup>
- Justice Scalia's confirmation to fill the impending vacancy created by Justice Rehnquist's elevation to Chief Justice in September 1986;<sup>390</sup> and

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court-choice-detroit-comments.html; Letter from William O. Douglas, Assoc. Justice, U.S. Supreme Court, to Gerald Ford, U.S. President (Nov. 12, 1975), <http://www.presidency.ucsb.edu/ws/?pid=5375>.

<sup>381</sup> Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES (Sept. 4, 2005), <http://www.nytimes.com/2005/09/04/politics/chief-justice-rehnquist-dies-at-80.html>; Liptak, *supra* note 11.

<sup>382</sup> GARRETT & RUTKUS, *supra* note 379, at 41.

<sup>383</sup> Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1928 (2010).

<sup>384</sup> See, e.g., GARRETT & RUTKUS, *supra* note 379, at 26–29; *The Court and Its Procedures*, SUP. CT. U.S., <https://www.supremecourt.gov/about/procedures.aspx> (last visited May 24, 2017).

<sup>385</sup> See GARRETT & RUTKUS, *supra* note 379, at 26–29.

<sup>386</sup> See *id.*

<sup>387</sup> See 28 U.S.C. § 2 (2012); GARRETT & RUTKUS, *supra* note 379, at 26–29.

<sup>388</sup> GARRETT & RUTKUS, *supra* note 379, at 28.

<sup>389</sup> Richard L. Berke, *Senate Confirms Souter, 90 to 9, As Supreme Court's 105th Justice*, N.Y. TIMES (Oct. 3, 1990), <http://www.nytimes.com/1990/10/03/us/senate-confirms-souter-90-to-9-as-supreme-court-s-105th-justice.html?pagewanted=all>.

<sup>390</sup> Glen Elsasser, *Rehnquist, Scalia Get Senate Confirmation*, CHI. TRIBUNE (Sept. 18,

- Justice Fortas's confirmation following the resignation of Justice Goldberg to become U.N. Ambassador in June 1965.<sup>391</sup>

All told, then, the responses to eleven of the twenty vacancies arising since 1965 have followed a standard pattern, focused on the goal of concluding the process by the start of the Court's ensuing Term in October.

The responses that did not conform to this standard pattern fall into either of two categories. First, conforming to the standard pattern was never possible in three instances because the vacancies were unplanned and unfortunately timed. These three instances (the departures of Justices Harlan, Douglas, and Black) all involved medically induced retirements.<sup>392</sup> The sudden vacancies arose between September and November and unavoidably disrupted the Court's Term.<sup>393</sup> Still, even without advanced notice, the President and Senate managed to complete the confirmation process within two or three months in each instance, which is consistent with the confirmation times of instances conforming to the standard pattern.<sup>394</sup>

The second category comprises confirmation fights. The remaining four vacancies other than the present one each could have conformed to the standard timeline but for confirmation battles that involved the rejection or withdrawal of one or more nominees. These four instances were the confirmations of:

- Justice Alito in early 2006 to replace the retiring Justice O'Connor, following the withdrawn nominations of John Roberts and Harriet Miers;<sup>395</sup>
- Justice Kennedy in early 1988 to replace the retiring Justice Powell, following the rejected nomination of Robert Bork and the withdrawn nomination of Douglas Ginsburg;<sup>396</sup>
- Justice Blackmun in May 1970 to replace the resigning

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1986), [http://articles.chicagotribune.com/1986-09-18/news/8603090746\\_1\\_justice-and-antonin-scalia-tatum-case-supreme-court](http://articles.chicagotribune.com/1986-09-18/news/8603090746_1_justice-and-antonin-scalia-tatum-case-supreme-court).

<sup>391</sup> Andrew Hamm, *Legal History Highlight: Justices Who Left the Court for "Better" Positions*, SCOTUSBLOG (Mar. 25, 2016, 1:54 PM), <http://www.scotusblog.com/2016/03/legal-history-highlight-justices-who-left-the-court-for-better-positions>; see GARRETT & RUTKUS, *supra* note 379, at 26.

<sup>392</sup> See Greenhouse, *supra* note 380; *Justice Black*, *supra* note 380; Naughton, *supra* note 380; Letter from William O. Douglas, *supra* note 380.

<sup>393</sup> GARRETT & RUTKUS, *supra* note 379, at 27, 28.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 28.

<sup>396</sup> *Id.*

- Justice Fortas, following the rejected nominations of Judges Clement Haynsworth and Harrold Carswell;<sup>397</sup> and
- Chief Justice Burger in June 1969 to replace the retiring Chief Justice Warren, following the failed effort to elevate Justice Fortas.<sup>398</sup>

Even in these instances, the timing of the three retirements conformed to the standard timeline. The resignation did as well, although its timing was driven by the happenstance of an unfolding scandal.<sup>399</sup> Either way, the disruption in each instance came from confirmation battles resulting in the failure of first, and sometimes even second, nominations for the vacancy.

What emerges from a look at some of the most recent vacancies before Scalia's death are several norms of behavior. In the case of most voluntary retirements, the Justice has responsibly given notice between late February and late June,<sup>400</sup> and in the two instances of resignations to take other appointments, the respective Presidents offered the new appointments in June or July.<sup>401</sup> In the absence of a confirmation battle or impossibly timed medical retirements, the Senate has managed to confirm a successor by or shortly after the start of the Court's ensuing fall Term, including in the case of an induced retirement in late July and a death in early September.<sup>402</sup> In short, the response to a vacancy since 1965 has conformed to the standard timeline as long as (1) the vacancy arose at least a month before the start of the Court's next Term or (2) the nomination triggered a confirmation battle involving the rejection, filibuster, or forced withdrawal of at least one nominee for the position.

If anyone had any thought that the failure to proceed with the Garland nomination had anything to do with a lack of time for a full confirmation process, the record since 1965 thoroughly refutes the idea. In relation to the start of the Court's ensuing fall Term, Scalia's death in mid-February came earlier than Chief Justice Rehnquist's death in September, Justice Brennan's medically induced retirement in late July, and all notices of voluntary retirement.<sup>403</sup> There is no example in the previous half-century of a vacancy that occurred before early September that was not filled by or shortly after the start of the Court's ensuing fall Term, except for

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<sup>397</sup> *Id.* at 27.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*; see McKoski, *supra* note 383, at 1927–28.

<sup>400</sup> GARRETT & RUTKUS, *supra* note 379, at 26–29.

<sup>401</sup> *Id.* at 26–27.

<sup>402</sup> *Id.* at 28; see Berke, *supra* note 389.

<sup>403</sup> GARRETT & RUTKUS, *supra* note 379, at 26; Liptak, *supra* note 11.

the four instances of major confirmation battles.<sup>404</sup> Timing was absolutely no excuse for those declining to proceed with the Garland nomination. The Senate had more time before the Court's next Term to confirm a successor for Scalia than it had in any instance over the preceding half-century, except for three instances of medically induced retirements occurring after mid-September.<sup>405</sup>

Based on the experience of the past half-century, what is a reasonable expectation of the timing necessary for the Senate to confirm a non-controversial successor in time for the start of the Court's fall Term? The experience with the medically induced retirements of Justices Black and Harlan show that vacancies that arise without notice in mid-September are too late to expect the Senate to meet the October deadline.<sup>406</sup> Chief Justice Rehnquist's death in early September also should not establish the expectation. Even though the Senate was able to confirm Chief Justice Roberts by the start of the Court's October Term, the vetting of Roberts was already underway because he was first nominated in late July to fill a different vacancy.<sup>407</sup> The experience with Roberts does indicate that late July may not be an unreasonable expectation for when the Senate needs to receive the nomination in order to meet the October deadline.

Still, only one of those occasions for a nomination arose during a presidential election year. The latest successful confirmation process in a presidential election year resulted from Justice Hughes' 1916 resignation on June 10.<sup>408</sup> In contrast, the unsuccessful effort in 1968 to elevate Justice Fortas to the position of Chief Justice followed Chief Justice Warren's tender of retirement on June 13.<sup>409</sup> An occasion for a nomination arising in early June, then, perhaps represents the latest point in the election season when one might reasonably expect a nomination to culminate in a successful confirmation before the Court's fall Term. The Scalia vacancy, which arose on February 13,<sup>410</sup> and the nomination opportunity arising from the previous failure of a nomination in 1844—an opportunity that arose on January 31—suggest that the June date may be too aggressive. Still, the political polarization in both of those instances was also unusually high and perhaps should not be

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<sup>404</sup> *Id.* at 26–29 (showing that there were no such examples).

<sup>405</sup> *Id.* at 27.

<sup>406</sup> *Id.* at 27.

<sup>407</sup> *Id.* at 28.

<sup>408</sup> *Id.* at 24.

<sup>409</sup> *Id.* at 27.

<sup>410</sup> *See* Liptak, *supra* note 11.

indulged by using those instances to establish a norm. Choosing a date somewhere in between, it might make sense to establish a norm of proceeding with election-year nominations whenever the occasion for a nomination—whether by vacancy, notice of impending vacancy, or otherwise—happens by, say, May 1.

*B. Containing the Impact*

A second modest possibility for responding to the successful act of President-shopping would be to try to contain the impact of what some have called the “stolen seat.”<sup>411</sup> The person who received a commission to succeed Scalia owes the position to an unprecedented act of President-shopping. He will be a member of the Court, however illegitimate that may seem, and will possess all the powers that come with the office. As a result, the potential to affect the law for many years is great. Pretending that that Justice’s actions are not traceable to McConnell’s posture of determined inaction and the President-shopping that it achieved is to reward and normalize the conduct.

Although there is not much that anyone can do about a sitting Supreme Court Justice confirmed under color of law and wielding a commission, it may be possible to contain at least some of the impact of the appointment. It would be possible to maintain a clear understanding that the presence of that appointee on the Court is the but-for product of the illegitimate behavior of McConnell and Senate Republicans. That original illegitimacy will taint every vote that the appointee will ever cast. There will be decisions, 5-4 decisions, whose outcome is directly traceable to the President-shopping of McConnell and Senate Republicans because the outcome would not have been possible but for the appointee giving four other Justices a fifth, and thus determinative, vote. No one aggrieved by such a decision has any obligation to pretend that their injury is not traceable to McConnell. It would be perfectly appropriate to identify those 5-4 decisions and keep track of them by always noting, parenthetically in a citation or otherwise, that the outcome in each was only so because of a “McConnell Majority.”

Although people must obviously comply with those decisions, the legal community need not internalize them as legitimate additions to the law. Instead, they should be regarded as merely provisional, akin to dicta in lacking precedential force. They may be regarded as

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<sup>411</sup> See *The Stolen Supreme Court Seat*, supra note 378.

subject to overruling without any stare decisis constraint. Commentators should carefully identify and quarantine them. At the very least, the signaling can stand as a refusal to normalize the President-shopping. To the extent that the labeling can diminish the reputation of such decisions as precedents, it can begin to have some substantive bite. A strong enough reaction could eventually render the decisions dubious authority. If certain critics can seek to focus attention on a “Lost Constitution,” there is no reason why other critics cannot seek to focus attention on the illegitimate basis of any decision rendered by a “McConnell Majority.”

## V. CONCLUSION

The idea of resisting the normalization of the abnormal has pervaded dismayed reactions to the election and inauguration of President Trump, but he is neither the target nor the culprit here. To be clear, Trump is not the source of the indelible illegitimacy that will attach to any 5-4 decision rendered by the Supreme Court if the majority depends on the vote of Justice Scalia’s successor. Trump is not the reason for the need to identify, highlight, and quarantine those decisions as precedents, and the peculiar taint that de-legitimizes the vote of Scalia’s successor will not affect the votes of any future Trump nominees to fill vacancies that may arise in any other seats on the Court. The illegitimate bare majorities are not “Trump Majorities;” they are “McConnell Majorities.” They bear McConnell’s name because it was his orchestration of the President-shopping by determined inaction that has unfortunately tainted Justice Gorsuch, who owes his commission to unprecedented ideological manipulation of the appointments process. That original illegitimacy permanently marks Justice Gorsuch as an ideological trespasser in a stolen seat. Neither “gay friends”<sup>412</sup> nor saccharine fawning<sup>413</sup> will change it. To borrow a phrase from McConnell, the illegitimacy is “about a principle, not a person.”<sup>414</sup>

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<sup>412</sup> Sheryl Gay Stolberg, *Gorsuch Not Easy to Pigeonhole on Gay Rights, Friends Say*, N.Y. TIMES (Feb. 11, 2017), [https://www.nytimes.com/2017/02/11/us/politics/gorsuch-gay-rights.html?\\_r=0](https://www.nytimes.com/2017/02/11/us/politics/gorsuch-gay-rights.html?_r=0).

<sup>413</sup> See, e.g., Neal K. Katyal, *Why Liberals Should Back Neil Gorsuch*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/why-liberals-should-back-neil-gorsuch.html> (providing an example of liberals praising Neil Gorsuch).

<sup>414</sup> Amita Kelly, *McConnell: Blocking Supreme Court Nomination ‘About a Principle, Not a Person’*, NPR (Mar. 16, 2016), <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>.