U.S. Senate: Be Afraid of State Supreme Courts

President Obama has nominated Merrick Garland, chief judge for the U.S. Court of Appeals for the District of Columbia Circuit, for appointment as a justice of the U.S. Supreme Court. Senators who are at all familiar with the system of dual sovereignty created by the U.S. Constitution will move quickly to act on that nomination, because without a full bench the nation's high court is severely limited in its ability to prevent state supreme court decisions from being the final word. So to all the Federalists in the chamber: fear the state supreme courts. Because unless you act on this nominee, and that quickly, you face the prospect of decisions by the state supreme courts and the federal appellate courts standing final.

Absent a ninth justice, there is a significant risk that close cases will result in a 4-4 vote split. As Tom Goldstein recently wrote on SCOTUSblog , in the event of an evenly-divided court tradition and history permit two equally unhappy possible results: the opinion on review will be affirmed, or the court can order reargument (Tom suspects reargument is more likely). Presently the federal appellate courts are dominated by Democratic appointees, who hold a majority of seats on nine of the thirteen federal circuits. Thus, an affirmance by default more likely than not means that a circuit court decision by Democratic appointees will stand. As for the California Supreme Court, just imagine how badly one might desire high court review of a SCOCA decision on gun control. And if reargument is ordered, the federal appellate opinion or state high court decision at issue will remain in place for up to two years. Nor will this effect be limited to only a few cases. As Slate recently pointed out, in the past twenty years the high court has split 5-4 in ten to thirty percent of its decisions. That translates to between ten and thirty cases each year lacking ultimate resolution, either temporarily or ultimately by default. Consequently, Senators who care about the U.S. Supreme Court having the final word on the great questions should move quickly to consider the President's nominee.

And students of the nation's charter in the Senate chamber should also know that

body's role in the appointment process. It is true that the Senate has the power to reject a nominee by withholding its consent. The President and the Senate share the appointment power for high court justices, with the president nominating, and the senate providing its "advice and consent" under Article II, section 2 of the U.S. Constitution. But there is no basis—in the text, in history, or in practice—for the Senate to withhold its advice entirely. The appointments clause exists to *fill* vacancies, not leave them vacant. Thus, the Senate has a constitutional obligation to at least consider the President's nominee regardless when a vacancy arises. The fact that the recess power exists shows the intent of the drafters to prevent the Senate from frustrating the President's appointment role by simply adjourning without considering the nominee. And when the President announces a nomination, a Senate that refuses to provide its advice is both derelict in its own constitutional duty and risks causing a separation of powers violation by preventing the President from employing one of that office's constitutional powers.

For those who would obstruct the appointment process, history is not on your side. No one doubts that the Senate has sole discretion whether to approve or reject a nominee after hearing. Indeed, the Senate has rejected some nominees. But even past rejections came after a hearing. And there has never been any question that the Senate has a constitutional duty to evaluate presidential nominees. Not once, in the history of this nation, has a Senate failed or refused to consider a nominee while in session. By one count (the New York Times) the Senate has considered U.S. Supreme Court nominees in a president's final year eight times, with six of those being confirmed. By another (the Washington Post), one third of all presidents have appointed a high court justice in an election year. To refuse outright to even consider a nominee has no historical precedent; indeed, the Senate has never taken more than 125 days to vote on a nomination.

Some claim that delay is appropriate because the public should be consulted. That is a weak reed. The public has already weighed in by electing its representatives: specifically, the sitting Senators and the President. All of the political actors are vested with the full authority of their offices for the remainder of their terms. In the nearly-yearlong period between the vacancy occurring and a new presidential administration taking office, the public rightly expects their elected representatives to do their jobs. To rely on a supposed concern for the voters as justification for

waiting will only frustrate the voters' intent and harm their interest. To the extent the concern for public input is valid, the U.S. Constitution already provides a mechanism for measuring public opinion: holding a hearing on the nominee.

Finally, Article II gives the President the power to bypass the Senate and fill a vacancy on the high court on his own, if the Senate recesses without taking action. This has already occurred, when President Eisenhower gave a recess appointment to Justice Brennan. When this year's legislative session ends, and the Senate recesses to permit its members to campaign for reelection before the next Congress assembles, President Obama could well consider using a recess appointment. Is it preferable to vote on a centrist jurist now, or risk the President appointing a true liberal during the recess?

Senators, do as the constitution requires: let the Senate give its advice, and a yea or nay vote. And if you do not, then fear the finality of decisions by the state supreme courts and the federal appellate courts.