Congress' Obstruction Addiction and the Garland Nomination

by Peter M. Shane

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Now that Congress is back from its summer recess, our federal legislative branch needs an intervention. Its leaders are addicted to obstruction. They won't fund the anti-Zika campaign. They won't fix our crumbling infrastructure. They can't agree on a resolution to authorize the fight against ISIS. Of the twelve regular appropriations bills that should be enacted by September 30, the end of the fiscal year, they have enacted—none.

Perhaps most remarkably, the Senate is now in its sixth month of obstructing the nomination of Judge Merrick Garland to the United States Supreme Court. They are stonewalling even though Republican

Senators find virtually nothing about Judge Garland to criticize. Senator Rob Portman (R-OH) credits Judge Garland with "an impressive record." Senator Orrin Hatch (R. – UT) has said: "The president told me several times he's going to name a moderate, but I don't believe him. [Obama] could easily name Merrick Garland, who is a fine man."

The Senate's action is triply irresponsible. First, it ignores a history of reliable vote-taking on Supreme Court nominees and sets a potentially disastrous institutional precedent. A recent University of Illinois study found 103 prior cases in which the Senate voted after "an elected President . . . faced an actual vacancy on the Supreme Court and began an appointment process prior to the election of a successor." These include eight cases "where the nomination process began during an election year." In contrast, there have been only six instances since the country began where the Senate has held a Supreme Court vacancy open for a new president – three times when the appointing president had not been elected (Tyler, Fillmore, and Andrew Johnson) and three times when the nomination was made after a new president had already been elected – most recently in 1881. There is no recent precedent whatever for

the Garland obstruction and no case ever in which the Senate denied its constitutional responsibility for reviewing a Supreme Court nominee on the merits when the nominating President was popularly elected and the nomination preceded an upcoming presidential election.

Second, the Senators who won't do their jobs on the Garland nomination have little reason for confidence in the Republican nominee for whom they are hypothetically keeping the seat vacant. In May, Donald Trump released a list of names provided for him by the Heritage Foundation of conservative judges he said he would consider nominating to replace the late Justice Antonin Scalia. But in the words of Richard Epstein, a Hoover Institution Fellow, professor at both the New York University School of Law and the University of Chicago Law School, and a leading legal conservative, the list is comforting only on "the questionable assumption that a man of [Trump's] mercurial temperament and intellectual ignorance will keep to his word."

Constitutional conservatives now have to ask themselves whether a nominee who jokes about Mormons and fans the flames of hatred against Muslims can be trusted to select Justices protective of religious freedom. Can a nominee who throws protestors and reporters out of his rallies and who believes the Constitution should protect public figures from press criticism be trusted to select Justices vigilant about free speech? Can a nominee who would subject American citizens to trial by military commission and who so famously admires authoritarian rulers be trusted to select Justices who will stand up for due process and against executive overreach?

Finally, the Senate's intransigence is keeping the Supreme Court from playing its constitutionally assigned role. This is most obvious with regard to *United States v. Texas*, the case challenging a Department of Homeland Security program to provide undocumented immigrant parents of U.S. citizen children temporary protection against involuntary removal. Without a ninth Justice, the Court split 4-4, leaving in place a lower court injunction that prevents the program from moving forward, but without any authoritative resolution of the applicable law.

As a result of the injunction, millions of families that include citizen-children are left without any clear path to maintain the security of their family units. Fifteen states and the District of Columbia have joined with the federal government to advocate for the program, recognizing that "[r]emoving an undocumented parent can subject . . . children to housing instability, food insecurity, and other harms." As the amicus brief filed by the states argues, getting undocumented persons out of the shadows improves public safety, and "when immigrants are able to work legally – even for a limited time – their wages increase, they seek work compatible with their skill level, and they enhance their skills to obtain higher wages, all of which benefit state economies by increasing income and growing the tax base."

But even if the injunction were proper, it would be important for the government to know why. Do the four Justices who voted to uphold the injunction believe that the Secretary of Homeland Security overreached his statutory authority in issuing the program at all? Or is the problem only procedural, namely, that the Secretary should have provided for a formal period of public comment on the proposed program before it became final? Because the answers to these questions matter critically to the government in moving forward, the Obama Administration has taken the extraordinary step of asking the Supreme Court to rehear the case once a ninth Justice is appointed.

What does Senate leadership have to say about the stonewalling that abdicates the Senate's historical role, sets a corrosive institutional precedent, keeps open a vacancy in the name of a presidential candidate with no apparent understanding of the Constitution or the role of courts, and leaves millions of families, as well as federal and state authorities, in limbo? Majority Leader Mitch McConnell (R.-KY) has boasted: "One of my proudest moments was when I looked Barack Obama in the eye and I said, 'Mr. President, you will not fill the Supreme Court vacancy.'"

So there we have it: The Senate Majority Leader is proud of his addiction to obstruction. Senators who privately recognize the merits of the nomination, but who voice the lame election-year excuse for inaction enable the addiction. Americans who make excuses for Senators who won't do their jobs are enabling the enablers.

It is time for Senators who know better to stage an intervention and take a vote on Merrick Garland. If they won't intervene, the voters should.

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