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Senators Can't Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers

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SENATORS CAN'T BE CHOOSERS: MORATORIUMS ON SUPREME COURT NOMINATIONS AND THE SEPARATION OF POWERS

*J. Stephen Clark*¹

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INTRODUCTION

By the time Republican Richard M. Nixon took office as the 37th President of the United States on January 20, 1969, Chief Justice Earl Warren had already publicly committed to retiring at the end of the court's term in June.² Engulfed in scandal, Justice Abe Fortas then announced his resignation on May 15, 1969.³ Facing the prospect of two Republican appointments to the liberal Warren Court,⁴ Senator Mike Mansfield, the Democratic Majority Leader of the Democratic-controlled Senate, did not commit the Senate to a moratorium on even entertaining nominations to the Supreme Court until a new President, perhaps a Democrat, was elected.⁵ But what if Mansfield had?

If Mansfield had imposed a moratorium on Supreme Court nominations until a Democratic President took office—eight years later, it would turn out⁶—the membership of the Court would have withered. The nine-member Court of May 1969⁷ would have dropped to seven members after Warren and Fortas departed. Had the moratorium continued, the membership of the Court would have declined to five Justices by September 1971, when declining health forced Justices Hugo L. Black⁸ and, a week later, John M. Harlan⁹ to retire. At that point, the rump Court of Five would have been forced to cease operations because a quorum of six is required by law to do business.¹⁰ Had the moratorium continued through the succession of Republican Gerald Ford to the Presidency following Nixon's

² See 115 CONG. REC. 1289–90 (1969); See, e.g., R.W. Apple, Jr., *Warren Consents to Nixon Request to Stay Till June*, N.Y. TIMES, Dec. 5, 1968, at 1; Anthony Lewis, *Warren Firm on Retiring; Leaves Date up to Nixon*, N.Y. TIMES, Nov. 15, 1968, at 1; Editorial, *The Warren Decision*, N.Y. TIMES, Dec. 5, 1968, at 46.

³ Fred P. Graham, *Fortas Quits the Supreme Court, Defends Dealings with Wolfson; Liberal Majority May Be Curbed: Fee Is Explained—Justice Concedes He Made Arrangement on a Life Stipend*, N.Y. TIMES, May 16, 1969, at 1; *The Texts of Letters and Statements Involving the Resignation of Justice Fortas*, N.Y. TIMES, May 16, 1969, at 20.

⁴ Robert B. Semple, Jr., *Fortas Quits the Supreme Court, Defends Dealings with Wolfson; Liberal Majority May Be Curbed: 2 Positions Open—Nixon's Choices Can Alter the Direction Taken by Court*, N.Y. TIMES, May 16, 1969, at 1.

⁵ Fred P. Graham, *A Wolfson-Fortas Parley on S.E.C. Case Reported*, N.Y. TIMES, May 19, 1969, at 1 (“The Senate majority leader, Mike Mansfield, said today that the Senate would make a searching investigation of future Supreme Court nominees, but that Senate Democrats would not oppose President Nixon’s nominees simply on partisan grounds, if they were Republicans.”).

⁶ See 123 CONG. REC. 1862 (1977) (documenting Jimmy Carter’s inauguration).

⁷ Front Matter, 394 U.S. III (1969) (listing Warren, C.J., and Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, and Marshall, JJ.).

⁸ Robert B. Semple, Jr., *Justice Black, 85, Quits High Court, Citing His Health*, N.Y. TIMES, Sept. 18, 1971, at 1.

⁹ James M. Naughton, *Harlan Retires; Nixon Hints Poff Is a Court Choice*, N.Y. TIMES, Sept. 24, 1971, at 1. Like the two in 1969, these vacancies gave liberal Democrats in the Senate a strong incentive to hold these seats open, particularly given that the next presidential election was just over a year away. See Fred P. Graham, *Toward a ‘Nixon Court’*, N.Y. TIMES, Sept. 18, 1971, at 12.

¹⁰ 28 U.S.C. § 1 (2012); see also *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 679–82 (2010) (limiting ability of federal agencies to manipulate around a statutory quorum requirement).

resignation,¹¹ the membership of the Court would have fallen to just four Justices in November 1975, when declining health also induced Justice William O. Douglas to retire.¹² As the nation celebrated the 1976 Bicentennial of its independence,¹³ the four-member Supreme Court would have been left in an indefinite state of suspended animation.

Only after Jimmy Carter took office as President on January 20, 1977,¹⁴ with a filibuster-proof Democratic majority in the Senate¹⁵ might the Supreme Court have been resuscitated by the addition of five new Democratic Justices. Instead of Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell, Jr., William H. Rehnquist, and John Paul Stevens,¹⁶ all Nixon or Ford appointees,¹⁷ the 1977 Court might have consisted of five new Democratic appointees, including a new Democratic Chief Justice, alongside Justices William J. Brennan, Jr., Potter Stewart, Byron R. White, and Thurgood Marshall.¹⁸ The Court might have had a seven-member supermajority of liberals for the foreseeable future. Conservative Republicans would have conceded defeat and said, “Well played!” Right?¹⁹

Of course, Mansfield did not impose a political moratorium on Supreme Court nominations from 1969 to 1977,²⁰ but, constitutionally speaking, he could have, or so say defenders of the constitutionality of the shorter moratorium announced by Senator Mitch McConnell, Republican Majority Leader, on February 13, 2016, the day of Justice Antonin Scalia’s death.²¹ Professor Noah Feldman, for example, shrugged, “The Senate has essentially complete control over its own rules and practices.”²² When Democratic nominee Hillary Clinton appeared poised to win

¹¹ See, e.g., Resignation of President Nixon, 10 WEEKLY COMP. PRES. DOC. 1021 (Aug. 12, 1974); Administration of Gerald R. Ford: Presidential Documents, 10 WEEKLY COMP. PRES. DOCS. 1023–25 (Aug. 12, 1974).

¹² Lesley Oelsner, *Douglas Quits Supreme Court; Ford Hails 36½-Year Service: Poor Health Cited—Woman Successor Reported Studied*, N.Y. TIMES, Nov. 13, 1975, at 1; *Texts on Retirement of Justice Douglas*, N.Y. TIMES, Nov. 13, 1975, at 60 (letter of Justice William O. Douglas).

¹³ See James T. Wooten, *President Talks: Philadelphia Throngs Told U.S. Is Leader—Liberty Bell Rings*, N.Y. TIMES, July 5, 1976, at 1.

¹⁴ See 123 CONG. REC. 1862 (1977).

¹⁵ *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/K8LN-R8KQ>] (last visited Feb. 8, 2018).

¹⁶ *Front Matter*, 429 U.S. III (1978).

¹⁷ *About the Court: Justices 1789 to Present*, U.S. SUP. CT., <https://www.supremecourt.gov/about/memberstext.aspx> [<https://perma.cc/8439-MMYC>] (last visited Feb. 8, 2018).

¹⁸ *Front Matter*, 429 U.S. at III.

¹⁹ Future Senate Majority Leader Mitch McConnell would not have been pleased at the time. See A. Mitchell McConnell, Jr., *Haynesworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 43 (1970–71) (criticizing the covert influence of ideological considerations in the Senate confirmation of Supreme Court Justices).

²⁰ See Graham, *supra* note 5.

²¹ Senator Mitch McConnell, FACEBOOK (Feb. 13, 2016), <https://www.facebook.com/mitchmccconnell/posts/1021148581257166> [<https://perma.cc/8XRG-USC9>]. For the full details of this moratorium, see *infra* Section IV.G.

²² Noah Feldman, Opinion, *Obama and Republicans Are Both Wrong About Constitution*, BLOOMBERG VIEW (Feb. 17, 2016, 12:21 PM), <https://www.bloomberg.com/view/articles/2016-02->

the 2016 presidential election, libertarian commentator Ilya Shapiro did more than shrug. He echoed several Republican Senators in urging McConnell and the Republican-controlled Senate to do exactly what Mansfield did not do: refuse to confirm any Supreme Court nominee over the ensuing four or eight years, if not longer, until a President of their own party took office.²³ “As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally,” he argued; “it’s definitely constitutional.”²⁴

With all due respect to Shapiro, who made a strong argument, a preemptive moratorium on Supreme Court nominations is not definitely constitutional. At best, it is arguably constitutional, but it is also quite arguably unconstitutional. A large group of law professors certainly said so in a letter organized by the liberal-leaning, Alliance for Justice, at the outset of the McConnell moratorium.²⁵ But neither their arguments nor those of the defenders of the moratorium’s constitutionality framed the issue clearly or properly. A Senate-imposed moratorium on Supreme Court nominations, depending on the precise circumstances, may well violate the Constitution because it may breach the separation of powers.²⁶

Those who have defended the constitutionality of such a moratorium have not adequately addressed the separation of powers, one of the Constitution’s essential structural features. Focusing excessively on the specific text, they have too hastily supposed that the absence of any *explicit* limitation on the Senate’s confirmation prerogative means that the Senate has the discretion to exercise that prerogative in any way it sees fit,²⁷ regardless of any potential impact on the powers of the President or the Supreme Court. But if the Constitution were interpreted with such absolute dependence on explicit limitations, the Senate could also disregard executive privilege in compelling testimony from presidential advisors,²⁸ as the

17/obama-and-senate-are-both-wrong-about-the-constitution [https://perma.cc/J8D9-Y5YS]; see also Vikram David Amar, *The Grave Risks of the Senate Republicans’ Stated Refusal to Process Any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016), https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them [https://perma.cc/V4VY-HLYV].

²³ Ilya Shapiro, *The Senate Should Refuse to Confirm All of Hillary Clinton’s Judicial Nominees*, FEDERALIST (Oct. 26, 2016), http://thefederalist.com/2016/10/26/senate-refuse-confirm-hillary-clintons-judicial-nominees/ [https://perma.cc/26DT-N3WL].

²⁴ *Id.*

²⁵ Letter from Law Professors of Various Institutions to Mitch McConnell and Various Members of the Senate, https://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf [https://perma.cc/WY7Y-8JJ4] (last visited Feb. 10, 2018).

²⁶ See *Clinton v. Jones*, 520 U.S. 681, 699–702 (1997) (summarizing the doctrine); see also *Loving v. United States*, 517 U.S. 748, 756–58 (1996).

²⁷ See *supra* notes 22–23 and accompanying text.

²⁸ See *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974); *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 12 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008); see also *Watkins v. United States*, 354 U.S. 178, 187 (1957) (noting that houses of Congress have an implied power to conduct investigations and subpoena

Constitution nowhere explicitly mentions executive privilege or any limit on the Senate's interrogation of presidential advisors.²⁹ To be sure, the Senate has no obligation to confirm a Supreme Court nominee, nor may it have any obligation even to give a nominee a confirmation vote.³⁰ The Senate does, indeed, have sweeping discretion in exercising its "Advice and Consent" function.³¹ Still, announcing that it will henceforth entertain no Supreme Court nominations from the sitting President may well violate the separation of powers.

There are at least three ways in which a preemptive Senate moratorium may violate the separation of powers. First, such a moratorium may impermissibly intrude upon the President's exclusive power to nominate persons to serve as Supreme Court Justices.³² It may intrude upon that power either by failing to give meaningful effect to the constitutional act of making a nomination or by attempting to exercise partial agency over the choice of nominees by "President-shopping"³³ for a new nominator. Second, a preemptive Senate moratorium may unduly impair the ability of the President to fulfill his constitutional obligation to assure the faithful execution of the laws in using his appointment power to keep the Supreme Court staffed with the number of Justices mandated by federal law³⁴—a federal law the Senate has no power to amend or repeal unilaterally.³⁵ Third, a preemptive Senate moratorium may unduly impair the ability of the Supreme Court to perform its constitutional duties. The impairments may range from burdening the practical management of its caseload to diminishing the primary source of its authority: its legitimacy as an impartial, non-partisan arbiter of the law. The Senate may not have to do much in response to a Supreme Court nomination, but it may have to do more than pretend that the nomination does not exist, particularly for months or years on end and particularly as vacancies mount.³⁶

This Article has four major parts. Part I describes the constitutional standards applicable to separation of powers questions and rejects two general arguments

witnesses as incidental to the power to legislate); *McGrain v. Daugherty*, 273 U.S. 135, 160–61, 173–74 (1927).

²⁹ Mark Rozell, *The Constitution and Executive Privilege*, LAW & LIBERTY (July 12, 2012), <http://www.libertylawsite.org/2012/07/12/the-constitution-and-executive-privilege/> [<https://perma.cc/USQ9-SPWU>].

³⁰ Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15, 17–18 (2016).

³¹ U.S. CONST. art. II, § 2, cl. 2; *see also* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

³² U.S. CONST. art. II, § 2, cl. 2.

³³ J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making*, 80 ALB. L. REV. 743, 744 (2016–2017).

³⁴ 28 U.S.C. § 1 (2012); *see also* U.S. CONST. art. II, § 3.

³⁵ *See INS v. Chadha*, 462 U.S. 919, 954–59 (1983) (invalidating one-house legislative vetoes as an impermissible attempt by one house of Congress to amend a law unilaterally).

³⁶ The present inquiry is not whether the Supreme Court would adjudicate this question. It very well might not deem the question justiciable. The fact that a question may not be justiciable, however, does not mean that it necessarily fails to present any substantial issues of constitutional moment. The President and every United States Senator are duty bound to conform their acts to the mandates of the Constitution itself, even if the Court is not watching.

against their applicability to the Senate confirmation process. Part II examines the potential encroachments of a Senate moratorium on the President's exclusive power to nominate Supreme Court Justices. Part III examines the potential impairments that a Senate moratorium inflicts on the ability of the President and the Court to perform their constitutional functions. Part IV surveys the history of unsuccessful nominations to the Supreme Court and determines that a Senate moratorium on even entertaining any nominations cannot find a constitutional safe harbor in tradition.

I. SEPARATION OF POWERS

The separation of powers is a constitutional feature, not a formality. Certain purposes are served by disaggregating federal powers and distributing them among three branches of government. This separation seeks to prevent the tyranny that might arise from the consolidation of power in one officer or institution and makes the effective exercise of power dependent upon the cooperation of more than one branch of government.³⁷ In addition, its division of labor allows each branch to be specially designed for exercise of its particular power.³⁸ Clear distinctions in authority also facilitate accountability.³⁹ The separation of powers is a significant constitutional protection and one that may constrain the Senate's most aggressive exercises of the confirmation power.

A. *The Appointment of Justices*

The appointment of Supreme Court Justices implicates a complex allocation of powers and prerogatives. It involves three branches of government in the exercise of two great powers.⁴⁰ Specifically, the President and the Senate exercise the executive power to appoint federal officials,⁴¹ and the officials whom they appoint in this instance wield the judicial power "to say what the law is."⁴² The potential for clashes over the proper allocation of power is apparent.

By design, the President has the preeminent role in the appointment of federal officers, including Supreme Court Justices.⁴³ Article II of the Constitution not only vests "[t]he executive Power" in the President,⁴⁴ but also imposes upon the chief executive the duty to "take Care that the Laws be faithfully executed."⁴⁵ This general grant of authority, James Madison thought, might have been sufficient

³⁷ *Loving v. United States*, 517 U.S. 748, 756–58 (1996).

³⁸ *Id.* at 757–58.

³⁹ *Id.*

⁴⁰ See U.S. CONST. art. II, § 2, cl. 2.

⁴¹ *Id.*

⁴² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴³ See U.S. CONST. art. II, § 2, cl. 2.

⁴⁴ U.S. CONST. art. II, § 1, cl. 1.

⁴⁵ U.S. CONST. art. II, § 3.

alone to empower the President to appoint federal officers,⁴⁶ but at least “to prevent doubts and misconstructions,”⁴⁷ Article II addresses the appointment power specifically.⁴⁸ Although the task of appointing “inferior Officers” may be delegated by law to other actors, Article II directs that the President “shall appoint” all the principal “Officers of the United States,” including “Judges of the supreme Court.”⁴⁹ Appointing these officers is a basic executive power, which the mandatory language would seem to render obligatory. Indeed, the President’s duty to appoint principal officers may be understood as just a specific instance of his general duty to ensure the faithful execution of the laws, including the law establishing a Supreme Court with nine members.⁵⁰

The executive power to appoint principal officers is not, however, a unilateral one. It is true that appointing inferior officers may be delegated to “the President alone,”⁵¹ but for the appointment of principal officers, the Constitution allocates the Senate a crucial role in the exercise of this executive power. Article II directs that the President “shall nominate”⁵² persons to serve as principal officers, but unless making merely temporary appointments “during the Recess of the Senate,”⁵³ the President may not actually appoint principal officers at will. Rather, the President “shall appoint” them only “by and with the Advice and Consent of the Senate.”⁵⁴ Only then is the President charged to “Commission” appointees as “Officers of the United States.”⁵⁵

The Constitution thus interposes a kind of veto between the nomination of candidates for principal offices, including Supreme Court Justices, and the actual appointment and commissioning of them by the President. This veto is assigned to the Senate exclusively.⁵⁶ The Constitution does not provide any formal mechanism for the President to appeal from the Senate to the House of Representatives, to the Supreme Court, to a privy council, to the States, or to any other body. Unlike the President’s conditional veto of a bill, which may be overridden by Congress,⁵⁷ the Senate’s veto of a nomination is absolute.⁵⁸ It is a potent check on the President’s exercise of the appointment power.

⁴⁶ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66–67 (Max Farrand ed., Yale Univ. Press 1911) (June 1, 1787).

⁴⁷ *Id.* at 67.

⁴⁸ See U.S. CONST. art. II, § 2, cl. 2.

⁴⁹ *Id.*

⁵⁰ See 28 U.S.C. § 1 (2012) (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices . . .”).

⁵¹ U.S. CONST. art. II, § 2, cl. 2.

⁵² *Id.*

⁵³ U.S. CONST. art. II, § 2, cl. 3.

⁵⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵⁵ U.S. CONST. art. II, § 3.

⁵⁶ U.S. CONST. art. II, § 2, cl. 2.

⁵⁷ U.S. CONST. art. I, § 7, cl. 2.

⁵⁸ See Michael D. Ramsey, Why the Senate Doesn’t Have to Act on Merrick Garland’s Nomination, ATLANTIC (May 15, 2016),

Although this division of the appointment power between two branches of government is loosely characterized as part of the separation of powers, it might be described with greater precision as an element of the system of checks and balances. The allocation of distinct roles in the appointment process to the President and the Senate does not actually separate any of the three great powers from each other: legislative, executive, and judicial. Rather, granting the Senate a veto over presidential appointments amounts to a division of one power—the executive power—between two branches of government (or at least a branch and a half). When the Senate advises and consents to presidential appointments, it is not exercising legislative power; it is partaking in the exercise of the appointment power, a quintessentially executive power. The Senate itself has always distinguished between its “executive sessions,” during which it considers nominations, and its “legislative sessions,” during which it considers legislation.⁵⁹ The Senate even documents its executive proceedings in a separate journal.⁶⁰ While the Senate’s prerogative to veto presidential appointments serves as a check on the power of the President, it is not technically a separation of the great powers. Still, it does entail an important separation of specific powers within the exercise of the executive power of appointment.

Although disputes centered on the respective interests of the President and the Senate in defining the boundary between their roles in the appointment process raise interbranch separation of powers questions wholly within one of the great powers, these boundary disputes can nevertheless give rise to their own separation of powers questions. Similar boundary disputes as to the respective powers of Congress and the President in exercising the legislative power certainly have. If the President does not sign a bill within the constitutionally prescribed ten-day period after it is presented to him, does the bill become a law without his signature if Congress has adjourned for an intersession recess when the signing period expires? No.⁶¹ May the President exercise a line-item veto over specific appropriations in one bill? No.⁶² May Congress exercise a legislative veto over the actions of administrative agencies without presenting its reversal of the administrative decision to the President in a bill for approval or veto? No.⁶³ Must a proposed constitutional amendment approved by the requisite supermajorities in Congress be presented to the President for approval or veto before submission to the states for

<https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/> [<https://perma.cc/X8M2-A97C>].

⁵⁹ *The Senate in Executive Session*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ExecutiveSessions.htm [<https://perma.cc/PTN5-BD3H>] (last visited Feb. 14, 2018).

⁶⁰ *Senate Executive Journal*, LIBR. CONGRESS, <https://memory.loc.gov/ammem/amlaw/lwej.html> [<https://perma.cc/ZQM2-MRUQ>] (last visited Feb. 14, 2018).

⁶¹ See U.S. CONST. art. I, § 7, cl. 2.; *Pocket Veto Case*, 279 U.S. 655, 672, 692 (1929) (holding that Congress’s adjournment prevented the President from returning the bill within the ten-day period and therefore that the bill did not become law).

⁶² See *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

⁶³ See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

ratification? No.⁶⁴ Interbranch disputes over the allocation of distinct roles in the exercise of the executive power of appointment are similar.⁶⁵ They too are subject to separation of powers analysis, even though only the executive power is at issue.

In addition, however, when the subject of the appointment power is the Supreme Court, the interbranch dispute concerns more than the interbranch sharing of the executive power. Rather, when appointments to the Supreme Court are at issue, the exercise of the executive power of appointment by the President and the Senate has potentially serious ramifications for the Supreme Court's exercise of one of the other three great powers: the judicial power. While the power to appoint Supreme Court Justices may lie within the executive power, it is situated just inside the frontier between the executive power and the judicial power.⁶⁶ Like the fabled defendant whose actions on one side of a state line cause injuries on the other, the exercise of the executive power of appointment can have significant impacts on the judicial side of the boundary separating the executive power from the judicial. The exercise of the power to appoint Supreme Court Justices, even if purely executive, is obviously relevant to the exercise of the judicial power.

In contrast to disputes between the President and the Senate over the division of authority within the executive power of appointment, disputes centered on the interests of the judicial branch in how the President and Senate exercise the appointment power represent the more standard type of separation of powers question. These interbranch disputes involve managing the boundary between two great powers: executive and judicial. The question is whether the separation of powers may impose limits on the exercise of the executive power of appointing Supreme Court Justices to avoid negative impacts on the Court's exercise of the judicial power.

These different allocations of power surrounding the appointment of Supreme Court Justices can raise serious separation of powers questions. Although separation of powers law exhibits some well-known methodological incoherence,⁶⁷ two general principles have nevertheless emerged from it. First, one branch of government may not *encroach* upon a constitutional power that belongs exclusively to another branch.⁶⁸ Second, even when exercising its own power, one branch of government may not unduly *impair* the ability of another branch to perform its own essential functions.⁶⁹ The first of these principles requires each branch to stay

⁶⁴ See *Hollingsworth v. Virginia*, 3 U.S. (1 Dall.) 378, 379 (1798).

⁶⁵ See generally *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (challenging the President's appointment power under the Recess Appointments Clause).

⁶⁶ See Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1522–23 (2015).

⁶⁷ See, e.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Krotoszynski, *supra* note 66; M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

⁶⁸ See *infra* notes 70–75 and accompanying text.

⁶⁹ See *infra* notes 76–81 and accompanying text.

in its own lane on the governance highway, while the second principle adds that each branch must avoid obstructing those in the neighboring lanes. A workable system requires both principles.

The anti-encroachment principle enforces the constitutional allocation of a specific power exclusively to one branch of government.⁷⁰ Its resolution typically turns on a formalist characterization of the specific power as legislative, executive, or judicial and thus as belonging to that respective branch.⁷¹ For example, the power to seize the nation's steel mills in order to prevent a work stoppage from impeding war production has been characterized as a legislative power and thus may not be exercised by the President without congressional authorization.⁷² The power to extend official recognition to a foreign country, in contrast, has been characterized as an executive power, so the President must be allowed to exercise that power without congressional intrusion.⁷³ As the Court has put it in another context, "The 'judicial [p]ower' . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."⁷⁴ When the Constitution definitively allocates certain powers to each of the branches, that allocation is binding.⁷⁵

The second type of separation of powers dispute is different, as is its associated functionalist methodology.⁷⁶ Even when one branch of government is otherwise acting within the scope of its allocated powers, it may not exercise those powers in a way that unduly "impair[s] another [branch] in the performance of its constitutional duties."⁷⁷ Resolving this type of dispute has required a two-step balancing test: whether the behavior of one branch has sufficiently impaired the operation of another branch to raise a genuine constitutional question and, if so, whether the impairing branch has a constitutionally sufficient justification for the burden it has imposed on the other.⁷⁸ In the normal course of trying a criminal case, for example, a federal court seeking to subpoena tape recordings of private conversations between the President and his aides usually may proceed because the Judiciary's duty to provide a criminal defendant with compulsory process to obtain exculpatory evidence typically justifies the possible chilling of candor in executive conversations.⁷⁹ But the court must carefully avoid unnecessary disclosures of

⁷⁰ See Krotoszynski, *supra* note 66, at 1527–28.

⁷¹ See *id.*

⁷² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952).

⁷³ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

⁷⁴ *United States v. Nixon*, 418 U.S. 683, 704 (1974).

⁷⁵ See *id.*

⁷⁶ Krotoszynski, *supra* note 66, at 1528–29 (discussing functionalism).

⁷⁷ *Loving v. United States*, 517 U.S. 748, 757 (1996); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010); *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 382 (2004); *Clinton v. Jones*, 520 U.S. 681, 701 (1997); *Morrison v. Olson*, 487 U.S. 654, 690–91 (1988); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

⁷⁸ *Free Enter. Fund*, 561 U.S. at 531–35.

⁷⁹ *Nixon*, 418 U.S. at 702–07.

sensitive national security matters.⁸⁰ The ultimate question is whether one branch has gone so far in the exercise of its own power as to *unduly* impair another branch in the exercise of its power.⁸¹

The complex allocations of power surrounding the appointment of Supreme Court Justices might produce either type of separation of powers dispute—or at least the disputes might be conceptualized in either way. The first form of dispute would center on a claim that the President or the Senate has *encroached* on power that definitively belongs solely to the other or that either has encroached on power that definitively belongs to the Supreme Court. The second form of dispute would center on a claim that the President or the Senate has unduly impaired the other in the exercise of its respective powers or that either of them has unduly impaired the ability of the Court to exercise its powers. The first type of dispute would typically trigger a formalist categorization of the competing powers and a policing of the boundary between them, while the second type of dispute would typically trigger a functionalist analysis of the magnitude of any interbranch impairment and the weightiness of the justifications for it.

The boundary between the power of the President to appoint principal officers and the prerogative of the Senate to veto their nominations is not clearly marked.⁸² A Supreme Court nomination, moreover, adds an important additional dimension to the question. Supreme Court nominations involve the selection of the highest officers of a third branch of the government, a branch whose independence Article III of the Constitution endeavors to shield from the other two branches.⁸³ Perhaps for good reason, Article II explicitly identifies “Judges of the supreme Court” as a distinct category of appointees,⁸⁴ whose proper method of appointment the Framers debated specifically.⁸⁵ However aggressively the Senate may deal with the President in the case of an executive branch nomination, there may be legitimate questions about the scope of its discretion when considering Supreme Court nominations. May the Senate, for instance, withhold consent to a Supreme Court nominee as leverage to secure the President’s capitulation in a dispute over some wholly unrelated matter, such as cutting taxes or raising the debt ceiling? May the Senate select its own candidate for a Supreme Court vacancy and refuse even to consider anyone else whom the President might nominate? May the Senate adopt rules that summarily dispose of any Supreme Court nomination that fails to meet certain criteria? May the Senate impose a moratorium on even considering any Supreme Court nomination made by a particular sitting President? These questions are hardly answered by the bare constitutional phrase, “by and with the Advice and Consent of the Senate,”⁸⁶ even if read in conjunction with the Article I provision

⁸⁰ See *id.* at 712–16.

⁸¹ See *Free Enter. Fund*, 561 U.S. at 532–33.

⁸² See *supra* notes 20–33 and accompanying text.

⁸³ U.S. CONST. art. III, § 1.

⁸⁴ U.S. CONST. art. II, § 2, cl. 2.

⁸⁵ See *infra* Section II.A.

⁸⁶ U.S. CONST. art. II, § 2, cl. 2.

authorizing the Senate to “determine the Rules of its Proceedings.”⁸⁷ Such questions implicate serious separation of powers considerations.

Answering such questions, however, requires considering not only the abstract principles of encroachment and impairment, but also history. Even if a practice appears to meet the test for an impermissible encroachment or impairment and thus may constitute a *prima facie* violation of the separation of powers, a crucial factor in determining the constitutionality of a practice is historical precedent.⁸⁸ An affected branch's acquiescence in a past practice stands as a tradition that provides a validating safe harbor for what might otherwise be deemed a violation of the separation of powers. A key final inquiry thus must be whether a tradition of Senate moratoriums on Supreme Court nominations exists such that the contemporary imposition of one may be saved by tradition from constitutional invalidity under separation of powers principles.⁸⁹

B. Availability

A Senate moratorium on Supreme Court nominations cannot violate the separation of powers if it is not subject to a separation of powers analysis in the first place. Commentators have offered two reasons why a Senate moratorium cannot trigger any significant separation of powers question, but neither rationale is persuasive.

i. The Senate's Confirmation Discretion Is Absolute

Perhaps the principal defense of the Senate's power to impose a moratorium on Supreme Court nominations by the incumbent President rests on the notion that the Senate has absolute discretion in exercising its prerogative to advise and consent to the nominations.⁹⁰ While the argument merits serious consideration, it ultimately overstates the scope of the Senate's discretion. The Senate's prerogative to confirm or reject Supreme Court nominations is not absolute and immune to all constitutional constraint.

To be sure, no one should minimize the sweeping discretion that the Constitution gives the Senate in exercising its confirmation power to promote its own preferences in an interbranch dispute over a nomination. Opposing a nominee should be seen as a broadly legitimate assertion of senatorial power, and resistance to that power is left mostly to the counter-assertion of presidential power. As with the President's ability to wave the veto pen to influence legislation, outcomes in the

⁸⁷ U.S. CONST. art. I, § 5, cl. 2.

⁸⁸ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (collecting cases); see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

⁸⁹ See *infra* Part IV.

⁹⁰ See *supra* note 21–24 and accompanying text.

appointment process have and will reflect the dynamic balance of power between the branches with few, if any, rules and, at best, only glancing judicial review.

It is not extremist to suppose that there is no constitutional limit to the Senate's ability to obstruct the process of filling vacancies on the Supreme Court if that is its will. The confirmation power is clearly broad. No obvious limitation appears in its grant, which stipulates merely that the President shall appoint new Justices "by and with the Advice and Consent of the Senate."⁹¹ Still, a basic structural feature of the Constitution is the separation of powers, and it does place implicit constitutional limits on the exercise of power by each branch of the federal government. If there is any limit to the Senate's ability to obstruct the process of filling vacancies on the Supreme Court, the separation of powers seems one of the likelier sources of it.

True, the Constitution explicitly authorizes the Senate to "determine the Rules of its Proceedings."⁹² This delegation of authority gives the Senate broad discretion "to determine how and when to conduct its business,"⁹³ and this discretion extends to the Senate's performance of its confirmation function.⁹⁴ If this discretion were so broad as to be immune from all constitutional constraints, it would not be theoretically possible for the separation of powers to limit the Senate's discretion in dealing with Supreme Court nominations. But the Senate's discretion is not absolute; it is subject to constitutional constraints.

Some of these constitutional constraints are so obvious that they go almost unnoticed. The Constitution stipulates, for instance, that a majority of the Senate is necessary for a quorum⁹⁵ and that the Senate must keep a journal.⁹⁶ In addition, each Senator gets a vote,⁹⁷ the Vice President may cast a tie-breaking vote,⁹⁸ and a sufficient number of Senators may demand a recorded vote.⁹⁹ There is no credible argument that the Senate's discretion to set its own rules authorizes it to change these constitutionally established quorum, voting, and documentation requirements¹⁰⁰ or that the phrase "by and with the Advice and Consent of the Senate" preempts their application to the confirmation process.¹⁰¹

⁹¹ U.S. CONST. art. II, § 2, cl. 2.

⁹² U.S. CONST. art. I, § 5, cl. 2.

⁹³ *Noel Canning*, 134 S. Ct. at 2555 (citing U.S. CONST. art. I, § 5, cl. 2).

⁹⁴ See *United States v. Smith*, 286 U.S. 6, 27–29, 33 (1932).

⁹⁵ U.S. CONST. art. I, § 5, cl. 1.

⁹⁶ U.S. CONST. art. I, § 5, cl. 3; see, e.g., 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 29–30 (Duff Green 1828) (Sept. 26, 1789) (recording the confirmation of the first nominees to the Supreme Court).

⁹⁷ U.S. CONST. art. I, § 3, cl. 1.

⁹⁸ U.S. CONST. art. I, § 3, cl. 4.

⁹⁹ U.S. CONST. art. I, § 5, cl. 3.

¹⁰⁰ See, e.g., *Thomas Confirmation Vote*, C-SPAN (Oct. 15, 1991), <https://www.c-span.org/video/?22041-1/thomas-confirmation-vote> [<https://perma.cc/RC74-FASY>] (showing Vice President Dan Quayle presiding over the close vote to confirm Justice Thomas, Majority Leader requesting recorded vote, and individual Senators casting votes); 137 CONG. REC. 26,354 (1991) (noting that Vice President Dan Quayle presided over the close confirmation vote for Justice Thomas).

¹⁰¹ See U.S. CONST. art. II, § 2, cl. 2.

Other constitutional limitations may be less obvious. Article VI of the Constitution expressly stipulates that “no religious Test shall ever be required as a Qualification to any Office . . . under the United States.”¹⁰² The precise scope of this protection may be debatable,¹⁰³ but if the concept of a forbidden “religious Test” is broad enough to include compelling a nominee to make a pre-confirmation declaration of religious belief,¹⁰⁴ probing a nominee’s religious beliefs during a confirmation hearing,¹⁰⁵ or withholding confirmation because of a nominee’s religious identity,¹⁰⁶ then Article VI would necessarily constrain the Senate’s discretion to regulate its own proceedings during the confirmation process. The anti-Semitic hostility toward the confirmation of Justice Louis D. Brandeis¹⁰⁷ illustrates the danger of interpreting the Senate’s confirmation discretion so absolutely as to immunize even religious discrimination from constitutional condemnation. Would it really be constitutional for the Senate to ignore Article VI and refuse to acknowledge a Supreme Court nominee because she is Muslim?¹⁰⁸

The Court itself has recognized that the Senate’s rulemaking discretion is subject to constitutional constraints. In *United States v. Ballin*, the Court upheld a federal statute against the claim that it had supposedly passed the House of Representatives without either a quorum or a sufficient majority.¹⁰⁹ Although the Court reasoned that either house could adopt any method of polling reasonably

¹⁰² U.S. CONST. art. VI, cl. 3.

¹⁰³ Attached to the clause requiring state and federal officials to swear an oath of fidelity to the Constitution, the protection against religious tests most obviously makes it unconstitutional to condition the receipt of a commission on a declaration of religious belief. See *Torcaso v. Watkins*, 367 U.S. 488, 493–95 (1961); see also, e.g., Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987); Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261 (1996). Less clear is whether the Article VI protection against religious tests extends a step further to exclusions from office that are based on a person’s religious status but that do not involve any compulsory declaration of belief. See generally *McDaniel v. Paty*, 435 U.S. 618 (1978).

¹⁰⁴ It would seem immaterial whether such a declaration is exacted as a condition for being confirmed or, as in *Torcaso*, as a condition for being commissioned. 367 U.S. at 489. The effect would appear to be the same. If the purpose of the protection is to prevent the exclusion of people from office on the basis of religion, the exclusion is the same in either case, and even if the purpose of the protection is merely to avoid inducing a false declaration, the false declaration is induced in either case.

¹⁰⁵ See, e.g., Emma Green, *Bernie Sanders’s Religious Test for Christians in Public Office*, THE ATLANTIC (June 8, 2017), <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-christian-hollen-russell-vought/529614/> [https://perma.cc/DZ3C-29ND]; Jonathan A. Greenblatt, *Feinstein, Durbin Dangerously Close to Pushing Religious Test on Judge*, THE HILL (Sept. 15, 2017, 4:05 PM), <http://thehill.com/opinion/civil-rights/350930-feinstein-durbin-dangerously-close-to-pushing-religious-test-on-judge> [https://perma.cc/UP78-NTRJ].

¹⁰⁶ See THOMAS KARFUNKEL & THOMAS W. RYLEY, *THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT* 37–58 (1978).

¹⁰⁷ See *id.*

¹⁰⁸ Cf. *Davis v. Passman*, 442 U.S. 228 *passim* (1979) (holding that a congressional staffer who was discharged because of her sex had a private right of action under the equal protection component of the Due Process Clause against the Member of Congress who fired her).

¹⁰⁹ See *United States v. Ballin*, 144 U.S. 1, 3–4, 6, 9 (1892).

calculated to ascertain the presence of a quorum, the rulemaking discretion was not boundless.¹¹⁰ As Justice Brewer explained for a unanimous Court, neither house may “by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”¹¹¹ In fact, when the text of the Constitution contains a lacuna, the Court sometimes asserts its power as ultimate interpreter of the Constitution to resolve the ambiguity in a way that binds the respective house, rather than leave the question to the discretion of that chamber.¹¹² Drawing on a variety of sources, for example, the Court further held in *Ballin* that the majority requisite for passing a bill was a majority of the quorum present, even if less than a majority of the whole membership of the particular house.¹¹³ The absence of any express specification, the Court reasoned, meant that the Constitution embodied what the Court called “the general rule of all parliamentary bodies”¹¹⁴

Though broad, the Senate’s discretion in performing its confirmation function is qualified, not absolute. It remains subject to constitutional constraints. It is constrained by procedural requirements specified in Article I.¹¹⁵ It surely is constrained by substantive protection against religious tests for public office.¹¹⁶ According to *Ballin*, the Senate’s internal rules also must meet some minimum test of basic rationality.¹¹⁷ It seems doubtful that, despite these constitutional limitations, the Senate’s prerogative to confirm Supreme Court nominations nevertheless transcends all potential separation of powers constraints.

ii. The Power to Reduce the Size of the Court

A second general defense of the Senate’s power to impose a moratorium on Supreme Court nominations is that the size of the Court’s membership is not constitutionally fixed.¹¹⁸ Congress has the power to increase¹¹⁹ or, at least by

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.*

¹¹² *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 547–50 (1969) (discussing the Court’s authority to “interpret the Constitution in a manner at variance with the construction given the document by another branch”).

¹¹³ *Ballin*, 144 U.S. at 6.

¹¹⁴ *Id.*

¹¹⁵ *See generally* U.S. CONST. art. I.

¹¹⁶ *See* U.S. CONST. art. VI, cl. 3.

¹¹⁷ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

¹¹⁸ *See* U.S. CONST. art. III, § 1 (anticipating that the Court will consist of “Judges” but omitting to specify how many); *see also* U.S. CONST. art. I, § 3, cl. 6 (presupposing that there would be a Chief Justice and thus a multi-member Court).

¹¹⁹ *Compare* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73, (“[T]he supreme court . . . shall consist of a chief justice and five associate justices.”), *with* Seventh Circuit Act of 1807, ch. 16, § 5, 2 Stat. 420, 421 (increasing the number of seats from six to seven).

attrition,¹²⁰ to decrease¹²¹ the number of seats on the Court.¹²² A moratorium on entertaining a nomination to fill a vacancy, the argument goes, is merely an instance of the Senate effectively exercising this discretion to reduce the size of the Court for a time.¹²³

This argument misconceives the nature of that discretion. The number of seats on the Court has been set by statute since 1789¹²⁴ and remains so today.¹²⁵ The number of seats may be changed, but it may not be changed by the Senate acting unilaterally. If the Senate wishes to amend the Court's organic statute to either increase or decrease the size of the Court's membership, the Senate must pass a bill, get the House of Representatives to concur, and either get the President to assent to the bill or else enact it (along with a supermajority of the House) over his veto.¹²⁶ Circumvention of these requirements of bicameralism and presentment, circumvention which the Framers took pains to forestall,¹²⁷ violates the separation of powers.¹²⁸

In the case of increasing the size of the Court, the Senate's inability to make the change alone is evident because an increase would require affirmative lawmaking. No one imagines that the Senate could unilaterally add a tenth seat to the current Court by passing a one-house resolution declaring a new seat to exist and then inviting the President to submit a nomination to fill the new "vacancy."¹²⁹ When the Court was first established and its original statutory

¹²⁰ See U.S. CONST. art. III, § 1 (providing that Supreme Court Justices "shall hold their Offices during good Behaviour" and that their salaries "shall not be diminished during their Continuance in Office").

¹²¹ Compare Tenth Circuit Act of 1863, ch. 100, § 1, 12 Stat. 794, 794 (setting the size of the Court at one Chief Justices and nine Associate Justices), with Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209, 209 ("[N]o vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six.").

¹²² See U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power to enact laws that are "necessary and proper" for implementing the powers vested in any other "Department or Officer" of the federal government).

¹²³ See Jeff Shesol, *Will Republicans Fight to Shrink the Supreme Court?*, NEW YORKER (Oct. 31, 2016), <https://www.newyorker.com/news/news-desk/will-republicans-fight-to-shrink-the-supreme-court> [https://perma.cc/NJX4-4F37].

¹²⁴ Judiciary Act of 1789 § 1 (fixing the number of seats at six).

¹²⁵ 28 U.S.C. § 1 (2012) (fixing the number of seats at nine).

¹²⁶ U.S. CONST. art. I, § 7, cl. 2.

¹²⁷ U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States."). *But see* Hollingsworth v. Virginia, 3 U.S. (1 Dall.) 378, 381–82 (1798) (holding that constitutional amendments approved by Congress under Article V were not subject to the presentment requirement).

¹²⁸ See *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998); *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

¹²⁹ *Cf.* U.S. CONST. art. I, § 7, cl. 3; *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (disfavoring interpretations of the Constitution that would permit the marginalization of a constitutional institution that was given a role in the appointment process).

membership set at six,¹³⁰ the Senate complied with the requirements of bicameralism and presentment.¹³¹ Each subsequent increase in the membership of the Court has similarly been accomplished by passage of a bill by both houses of Congress and approval by the President.¹³² Even President Franklin Roosevelt never imagined that his Court-packing plan, which would have increased the total number of Justices, could have been adopted by unilateral Senate action.¹³³ He deliberately began the lawmaking process in the Senate, but only because the plan was opposed by key leaders in the House.¹³⁴

The proposition that the Senate may not unilaterally reduce the size of the Court is just as certain, even if it is less obvious because a moratorium on nominations would seem to allow the Senate to achieve the goal as a de facto matter by passively undercutting the number of statutorily prescribed seats through confirmation inaction. Purporting to reduce the size of the Court by inaction, however, would deprive the House of Representatives as well as the President of their constitutional prerogatives to approve or reject the proposed reduction. The statutorily prescribed size of the Court has been reduced twice in history and in both instances the Senate complied with the requirements of bicameralism and presentment.¹³⁵

The first instance came in 1801, when President John Adams and his defeated Federalist Party used their final, lame duck session of Congress to enact a law reducing the membership of the Court by attrition from six seats to five.¹³⁶ That effort to preserve a Federalist majority on the Court may have been unseemly, but at least they complied with the prescribed lawmaking process. Indeed, the Senate was not even the dominant chamber. The bill originated in the House,¹³⁷ and the

¹³⁰ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

¹³¹ See 1 JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 43 (Washington, Gales & Seaton 1820) (July 20, 1789) (sending the bill to the House for concurrence); *id.* at 82–83 (Sept. 19, 1789) (concurring with most House amendments to the bill); 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 119–20 (Washington, Gales & Seaton 1826) (Sept. 23, 1789) (presenting the bill to the President for approval); 1 JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 87 (Washington, Gales & Seaton 1820) (Sept. 24, 1789) (receiving notice of President's approval of bill).

¹³² Circuit Judges Act of 1869, ch. 22, § 1, 16 Stat. 44, 44; Tenth Circuit Act of 1863, ch. 100, § 1, 12 Stat. 794, 794; Eighth and Ninth Circuits Act of 1837, ch. 34, § 1, 5 Stat. 176, 176; Seventh Circuit Act of 1807, ch. 16, § 5, 2 Stat. 420, 421.

¹³³ See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132–35 (1995).

¹³⁴ *Id.* at 135.

¹³⁵ Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89 (reducing the number of seats from six to five upon the next vacancy); Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209, 209 (reducing the number of seats from seven to six upon the next vacancy).

¹³⁶ Judiciary Act of 1801 § 3; Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 543–44, 547 (2012).

¹³⁷ 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 743 (Washington, Gales & Seaton 1826) (Dec. 19, 1800).

Senate merely concurred without amendment.¹³⁸ The bill was presented to the President,¹³⁹ and he signed it into law.¹⁴⁰

The second instance came in 1866, when the Republican Congress enacted a law reducing the authorized membership of the Court by attrition from ten seats to seven.¹⁴¹ This effort also may have been an unseemly tactic in the Congress's intense conflict with President Andrew Johnson, but at least they complied with the prescribed lawmaking process. Again, the bill did not even originate in the Senate,¹⁴² but the Senate did substantially amend this one. Although the House-approved version would have reduced the Court only from ten members to nine,¹⁴³ the Senate went further and amended the bill to reduce the Court from ten members to seven,¹⁴⁴ a change in which the House acquiesced.¹⁴⁵ Notably, despite the intense interbranch conflict, the bill was presented to the President,¹⁴⁶ and he signed it into law.¹⁴⁷ Crucially, the Senate did not simply impose a unilateral moratorium on Supreme Court nominations, even though a vacancy in the membership of the Court existed at the time¹⁴⁸ and the President had submitted a nomination to fill it.¹⁴⁹ Rather, the Senate worked with the House to reduce the statutory membership of the Court and presented the bill to the President.¹⁵⁰

On still another occasion, House involvement in the process was crucial in protecting the Court, as the House prevented the Senate from manipulating the Court's seats as a way to dispense with an unwelcome nomination. In 1835, the Senate's anti-Jacksonian majority delayed consideration of Jackson's nomination of Roger B. Taney of Maryland to fill the Associate Justice vacancy caused by the resignation of Justice Gabriel Duvall, a Marylander who had presided over the federal circuit for Maryland and Delaware.¹⁵¹ During the delay, the Senate drafted and passed a bill to merge Maryland and Delaware's circuit into the neighboring

¹³⁸ 3 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 123 (Washington, Gales & Seaton 1821) (Feb. 7, 1801).

¹³⁹ 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 800 (Washington, Gales & Seaton 1826) (Feb. 12, 1801).

¹⁴⁰ *Id.* (Feb. 13, 1801).

¹⁴¹ Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209.

¹⁴² CONG. GLOBE, 39th Cong., 1st Sess. 3697 (1866); H.R. JOURNAL, 39th Cong., 1st Sess. 335 (1866) (recording introduction of H.R. 334).

¹⁴³ CONG. GLOBE, 39th Cong., 1st Sess. 1259 (1866).

¹⁴⁴ CONG. GLOBE, 39th Cong., 1st Sess. 3697–99 (1866).

¹⁴⁵ CONG. GLOBE, 39th Cong., 1st Sess. 3909 (1866).

¹⁴⁶ H.R. JOURNAL, 39th Cong., 1st Sess. 1065 (July 20, 1866).

¹⁴⁷ *Id.* at 1087–88 (July 23, 1866).

¹⁴⁸ Justice John Catron had died on May 30, 1865. *Judges: Catron, John*, FED. JUD. CTR., *Catron, John*, <https://www.fjc.gov/history/judges/catron-john> [<https://perma.cc/J66K-NE4K>] (last visited Feb. 16, 2018).

¹⁴⁹ 14 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 994 (Washington, Gov't Printing Office 1887) (Apr. 16, 1866) (receiving nomination of Henry Stanberry).

¹⁵⁰ See *supra* notes 143–147 and accompanying text.

¹⁵¹ Justin Crowe, *Westward Expansion, Preappointment Politics, and the Making of the Southern Slaveholding Supreme Court*, 24 STUD. AM. POL. DEV. 90, 108 (2010).

one, comprising Pennsylvania and New Jersey. That circuit already had a sitting Justice to preside over it, Henry Baldwin of Pennsylvania.¹⁵² The Senate bill would also create two new Mississippi Valley circuits, which would need new Justices from those places to preside over those circuits.¹⁵³ Although creating “western” circuits had been a legitimate need for years, and even though the bill would have resulted in a net increase in the size of the Court from seven to eight members to accommodate the expansion, it also would have had the convenient side-effect of obviating the need for a Maryland-based Justice—namely, pending nominee Taney.¹⁵⁴ The House debated the bill, understood its implications, considered a version that preserved the Maryland circuit, and ultimately declined to pass any version at all.¹⁵⁵ Only when the bill had clearly failed in the House did the Senate resume its consideration of the Taney nomination, which it affirmatively voted to postpone on the last day of the 23rd Congress.¹⁵⁶ The incoming Senate of the 24th Congress would be significantly less anti-Jacksonian than the expiring one,¹⁵⁷ and it would confirm Jackson’s second nomination of Taney—this time to replace the recently deceased John Marshall as Chief Justice.¹⁵⁸

Bicameralism and presentment are not optional steps when the Senate wishes to change a considered policy that has been enacted into law. Neither the House nor the President may be denied a role in approving the change of policy, and that proposition is true whether the Senate wishes to increase or reduce the size of the Court. Although the Senate’s prerogative to advise and consent to Supreme Court nominations may be broad enough to support a unilateral moratorium, it is decidedly not because the Senate has a unilateral power to change the statutorily fixed size of the Court.¹⁵⁹ The fact that the size of the Court is not constitutionally prescribed means that it may be increased or reduced. It does not mean that the

¹⁵² *Id.* at 108 & n.146 (discussing consolidation of the two Eastern circuits); *id.* at 110–11 (discussing the Senate’s passage of the circuit reform).

¹⁵³ *Id.* at 110.

¹⁵⁴ *Id.* at 110–11.

¹⁵⁵ *Id.* at 111.

¹⁵⁶ 4 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 484 (Washington, Gov’t Printing Office 1887) (Mar. 3, 1835) (voting 24-21 to postpone the nomination indefinitely).

¹⁵⁷ *See* Crowe, *supra* note 151, at 113–14 (discussing the Whig party’s loss of control).

¹⁵⁸ 4 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 520–21 (Washington, Gov’t Printing Office 1887) (Mar. 15, 1836); *Nominations, Chapter 5: Andrew Jackson, U.S. SENATE*, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm#5> [<https://perma.cc/H9UZ-5DLX>] (last visited Feb. 17, 2018).

¹⁵⁹ A moratorium linked to the duration of a particular President’s term or to one party’s control of the presidency is not grounded in any neutral policy concerning the proper size of the membership of the Court. Still, the Constitution generally does not forbid the exercise of its granted powers with the ulterior motive of advancing a purely partisan objective. The discretion to set the size of the Court and the prerogative to advise and consent to nominations may not be any exception. Exploiting either power for partisan ends may be unseemly but may not be unconstitutional. Still, it requires some suspension of disbelief to imagine that a moratorium on nominations from a particular President or party represents a bona fide policy choice about the appropriate size of the Court.

Senate may disregard the statutorily entrenched judgment of the House and President as to the proper size and change it unilaterally.

II. ENCROACHMENT

The action of one branch of government may violate the separation of powers either by encroaching upon the power of another or by impairing another in the exercise of its power.¹⁶⁰ A Senate moratorium on Supreme Court nominations may implicate the first of these principles. It may impermissibly encroach upon the power of the President to make Supreme Court nominations.

The anti-encroachment principle recognizes that one branch's exclusive power may not be shared with another branch.¹⁶¹ The judicial power of federal courts, for example, "can no more be shared" with the Executive Branch "than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'"¹⁶² While the examples easily could be multiplied, the point is simple—the Constitution allocates power for a reason, and its allocations are binding. Power that it allocates exclusively to one branch may not be re-allocated to another, whether by power-sharing agreements or by the unilateral negation, usurpation, dispossession, repudiation, or abdication of power.¹⁶³

This anti-encroachment principle applies to the President's power to make Supreme Court nominations. A Senate moratorium on such nominations for as long as the incumbent President remains in office may constitute an impermissible attempt by the Senate to re-allocate the President's exclusive power to make those nominations. This encroachment may be conceptualized in two ways. First, such a moratorium may impermissibly deny effect to the constitutional act of making a nomination, and, thus encroach upon the President's power by repudiation. Second, a Senate moratorium may impermissibly superintend or transfer the nomination power by "President-shopping" for a preferred nominator to exercise the power in a preferred way.¹⁶⁴ On this latter view, a moratorium may encroach upon the President's nomination power by usurpation.

A. Repudiation

At a minimum, a Senate moratorium on Supreme Court nominations by the incumbent President may constitute a repudiation of his power in violation of the separation of powers. Like Congress enacting a law or a court entering a final judgment in a case, the President submitting a Supreme Court nomination to the

¹⁶⁰ See *supra* notes 66–81 and accompanying text.

¹⁶¹ See *supra* notes 70–75 and accompanying text.

¹⁶² See *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)).

¹⁶³ See *Buckley v. Valeo*, 424 U.S. 1, 120–24 (1976).

¹⁶⁴ See *Clark*, *supra* note 33, at 744 (defining "President-shopping").

Senate is a constitutional act within the scope of his exclusive power. As in the other examples, the separation of powers requires the other branches to recognize the act and give it full effect.¹⁶⁵ To borrow a phrase, each branch must, at least as a general principle, give full faith and credit¹⁶⁶ to the constitutional acts of the other branches when done within the scope of their exclusive power. A Senate moratorium on Supreme Court nominations denies that recognition and effect to any nomination the President submits. In that way, the moratorium may impermissibly repudiate his exclusive power to make Supreme Court nominations.

This principle is not novel. It is settled law, for example, that the separation of powers forbids Congress to deny effect to final judgments rendered by a federal court.¹⁶⁷ Although Congress may amend the substantive law regulating a dispute while the case remains pending, it may not retroactively re-open a judgment that has become final.¹⁶⁸ Congress is obliged to give effect to the Judiciary's exclusive constitutional act of rendering final judgment in adjudicating a case or controversy over which a federal court has jurisdiction.¹⁶⁹ By the same token, the Judiciary has a reciprocal obligation toward Congress when adjudicating a particular case or controversy. If Congress retroactively amends the substantive law governing the dispute, the Judiciary is obliged to give effect to the law, if valid, and apply it to any pending case that has not yet culminated in a final judgment.¹⁷⁰ The Judiciary must give effect to the constitutional acts of Congress and vice versa. Neither may repudiate the acts of the other as if they do not exist or have no force.

This principle also applies to the exclusive constitutional acts of the President. It is now settled law that a President's issuance of a pardon to a person guilty of a federal crime is final and binding on the other branches.¹⁷¹ They must recognize it and give it full effect. The Judiciary must comply with the terms of the pardon in an attempted prosecution of the recipient or in any proceeding seeking his release from custody.¹⁷² Congress must also recognize a presidential pardon and give it full

¹⁶⁵ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–84, 2095 (2015) (citing and discussing “Justice Jackson’s . . . tripartite framework” in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)).

¹⁶⁶ Cf. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (“Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”).

¹⁶⁷ See Jennifer Mason McAward, *Congress’s Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1342–49 (2008).

¹⁶⁸ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19, 225–26 (1995).

¹⁶⁹ *Id.* at 218–19.

¹⁷⁰ See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440–41 (1992); *Plaut*, 514 U.S. at 226–27; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273–80 (1994); *United States v. Peggy*, 5 U.S. (1 Cranch) 103, 108–10 (1801).

¹⁷¹ See *Ex parte Grossman*, 267 U.S. 87, 119–22 (1925); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867).

¹⁷² See *Grossman*, 267 U.S. at 113, 119–22; *Garland*, 71 U.S. (4 Wall.) at 380.

effect.¹⁷³ In fact, Congress is even obliged to enact legislation, “if necessary,” to effectuate a pardon.¹⁷⁴ Passively doing nothing when doing something is necessary to give a pardon effect amounts to an impermissible repudiation of the President’s exclusive power to issue pardons. As Justice Jackson has observed with respect to the three branches of the federal government, the Constitution “contemplates that practice will integrate the dispersed powers into a workable government” and “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹⁷⁵

Like a presidential pardon, a presidential nomination is a formal constitutional act of the President.¹⁷⁶ It is not a simple message delivered to the Senate. It is a legal act with constitutional consequences. As a formal constitutional act, moreover, it is entitled to as much recognition and effect as a presidential pardon. The difficult question is what effect a presidential nomination—particularly a Supreme Court nomination—must be given. A nomination is not constitutionally entitled to Senate approval, for the Senate has the discretion to reject any nomination it wishes.¹⁷⁷ Short of approval, the most obvious effect that a nomination—particularly a Supreme Court nomination—might be constitutionally entitled to receive from the Senate is a confirmation vote.¹⁷⁸ Perhaps the President is constitutionally entitled to an up-or-down vote on Supreme Court nominations, with a chance for supporters to demand a recorded vote¹⁷⁹ in order to hold Senators accountable for rejecting a good nomination. Although the tradition of Senate behavior in handling Supreme Court nominations may fall short of supporting the proposition that such a nomination is entitled to a formal confirmation vote, the Senate still may have affirmative obligations, as with a pardon, to do more than ignore it and pretend that it does not exist. To refuse to even to entertain it, to commence no vetting, and to have no formal committee proceedings, may fail to afford a nomination, particularly of a candidate for appointment to the Supreme Court, the degree of recognition and effect that the separation of powers requires. Unless the Senate’s confirmation power is broad enough to include sharing in the President’s power to nominate Supreme Court Justices, a moratorium on nominations may unconstitutionally fail to give requisite effect to such a nomination.

The essential question is the extent to which the President’s nomination power is truly exclusive and thus protected from Senate encroachment by repudiation. As the Supreme Court recently observed, “The Constitution vests the power of

¹⁷³ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141–42 (1872); *Garland*, 71 U.S. (4 Wall.) at 380.

¹⁷⁴ *Klein*, 80 U.S. (13 Wall.) at 142.

¹⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

¹⁷⁶ U.S. CONST. art. II, § 2, cl. 2.

¹⁷⁷ *See id.*

¹⁷⁸ *Cf.* U.S. CONST. amend. XXV, § 2.

¹⁷⁹ *See* U.S. CONST. art. I, § 5, cl. 3.

nomination in the President alone. . . .¹⁸⁰ As the Appointments Clause prescribes, the President “shall nominate” federal officers, including “Judges of the supreme Court.”¹⁸¹ It is only the President’s power to appoint them to office that must be done “by and with the Advice and Consent of the Senate.”¹⁸² The Senate may reject his nominees, but it has no explicitly articulated role in selecting them.

This language was no accident. The Framers of the Constitution intended the President to have the exclusive power to choose nominees without Senate interference. Throughout the Convention, the primary dispute concerning the selection of Supreme Court Justices was whether to vest the power to appoint them in the President or in the Senate.¹⁸³ The Framers ultimately wanted accountability for the choice focused squarely on the President, with the Senate providing security against a poor presidential choice.¹⁸⁴

The issue was not necessarily that the Framers imagined the Senate would be unfit to select Supreme Court Justices. Throughout much of the Constitutional Convention, in fact, senatorial appointment was the prevailing choice of the delegates. The Virginia Plan, from which the delegates worked, called for congressional appointment of Supreme Court Justices.¹⁸⁵ The delegates soon modified that proposal to eliminate any role for the House of Representatives and vest the appointment of Supreme Court Justices in the Senate exclusively.¹⁸⁶ This method of judicial appointment by a legislative chamber was familiar to the delegates. In the early 1780s, the judges of the first national high court, the Court of Appeals in Cases of Capture,¹⁸⁷ had been nominated, chosen by ballot, and commissioned by the Continental Congress¹⁸⁸ and later by the Confederation

¹⁸⁰ NLRB v. Noel Canning, 134 S. Ct. 2550, 2558–59 (2014) (emphasis in original).

¹⁸¹ U.S. CONST. art. II, § 2, cl. 2.

¹⁸² *Id.*

¹⁸³ See *Nominations, Chapter 2: Constitutional Convention*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm#2> [<https://perma.cc/E3VN-HY25>] (last visited Feb. 17, 2018).

¹⁸⁴ *Id.*

¹⁸⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., Yale Univ. Press 1911) (May 29, 1787).

¹⁸⁶ *Id.* at 116, 119–21 (June 5, 1787) (striking appointment by “the national Legislature”); *id.* at 230, 232–33 (June 13, 1787) (adopting appointment by the Senate).

¹⁸⁷ ARTICLES OF CONFEDERATION of 1781, art. IX, ¶¶ 1–2 (authorizing creation of courts); 28 U.S.C. § 6 (2012) (regulating records of this former court); *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 55–56 (1795).

¹⁸⁸ 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 61, 64 (Gaillard Hunt ed., Gov’t. Printing Office 1910) (Jan. 15, 1780) (seeking nominations for first set of judges); *id.* at 77 (Jan. 20, 1780) (reporting list of nominees); *id.* at 79 (Jan. 22, 1780) (electing first set of judges); *id.* at 121 (Feb. 2, 1780) (adopting form of commission); *id.* at 254 (Mar. 13, 1780) (receiving letter from one designee declining appointment); *id.* at 322 (Apr. 1, 1780) (resolving to choose alternative judge); *id.* at 397 (Apr. 28, 1780) (electing alternative judge in lieu of designee who declined to serve); 17 *id.* at 779 (Aug. 25, 1780) (resolving to elect new judge to fill vacancy); Letter from Samuel Huntington to Titus Hosmer, William Paca, & George Wythe (Feb. 2, 1780), in 14 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 386 (Paul H. Smith et al. eds., Library of Congress 1987) (letter delivering commissions to judge-designees).

Congress.¹⁸⁹ Senatorial appointment of Supreme Court Justices remained the approved choice of the delegates until nearly the end of the 1787 Convention.¹⁹⁰

The primary alternative, presidential appointment of Supreme Court Justices, had some support from the outset of the deliberations,¹⁹¹ but the choice between the two methods of appointment eventually became a site of polarized conflict between large states and small states.¹⁹² Delegates sparred over whether the Senate or President would be more susceptible to making corrupt appointments, more inclined to make geographically diverse appointments, or more accountable in the event of bad appointments.¹⁹³ But, once the Convention adopted the Great Compromise, which rejected proportional representation in the Senate in favor of equal suffrage for small and large states;¹⁹⁴ senatorial appointment of Supreme Court Justices became more appealing to delegates from small states and less appealing to delegates from large states. As Edmund Randolph candidly put it, “[W]hen the [appointment] of the Judges was vested in the [Senate] . . . an equality of votes had not been given to it.”¹⁹⁵ Once that decision was made, the

Big Three—Virginia, Massachusetts, and Pennsylvania—could no longer expect to wield the same outsize influence in the Senate as they could anticipate in the House.¹⁹⁶ The delegates also suspected—correctly, it turned out¹⁹⁷—that the population advantage gave the large states a good chance of routinely holding the presidency.¹⁹⁸ Virginia delegate, James Madison, who had previously supported

¹⁸⁹ 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 749 (Gaillard Hunt ed., Gov't. Printing Office 1914) (Nov. 22, 1782) (resolving to elect new judges to fill vacancies); *id.* at 765 (Dec. 5, 1782) (filling vacancies on court by nomination and ballot).

¹⁹⁰ *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., Yale Univ. Press 1911) (Sept. 7, 1787) (adopting presidential appointment with Senate confirmation).

¹⁹¹ 1 *id.* at 119 (June 5, 1787) (noting the argument of James Wilson of Pennsylvania for the appointment of Supreme Court Justices by a single, accountable executive).

¹⁹² *See, e.g.,* 2 *id.* at 1–2, 41–44, 80–83.

¹⁹³ *Id.* at 41–44, 80–83.

¹⁹⁴ MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91–105 (1913).

¹⁹⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 43 (Max Farrand ed., Yale Univ. Press 1911) (July 18, 1787). Edmund Randolph was a Virginia delegate. FARRAND, *supra* note 194, at 8.

¹⁹⁶ Under the initial apportionment established in the Constitution itself, these three states together would command approximately forty percent of the House seats. *See* U.S. CONST. art. I, § 2, cl. 3. The Big Three held twenty-six out of the sixty-five House seats. *See id.* In the reapportionment following the first census, the proportion rose to nearly forty-four percent. *See Apportionment of the U.S. House of Representatives*, CENSUS.GOV 3–4 tbl.3 (Mar. 1998), <https://www.census.gov/prod/3/98pubs/CPH-2-US.PDF> [<https://perma.cc/TZN2-97T3>].

¹⁹⁷ The first six Presidents would hail from either Virginia or Massachusetts. *Timeline Guide to the U.S. Presidents*, SCHOLASTIC, <https://www.scholastic.com/teachers/articles/teaching-content/timeline-guide-us-presidents/> [<https://perma.cc/C2DP-9DSP>] (last visited Feb. 17, 2018).

¹⁹⁸ While the delegates were considering alternatives to senatorial appointment of Supreme Court Justices, they were almost simultaneously grappling with the method of electing the president. But either of the competing options—election by Congress or by electors apportioned at least in part based on population—would give a large state significantly greater influence than a small state. *See* 2 THE

senatorial appointment of Supreme Court Justices,¹⁹⁹ became a convert to presidential appointment.²⁰⁰ Conversely, delegates from small states, whose New Jersey Plan had called for executive appointment,²⁰¹ became fans of senatorial appointment. Three different proposals to shift the appointment of Supreme Court Justices from the Senate to the President failed in votes that tracked the division between small states and large states.²⁰² Senatorial appointment was reaffirmed over the objections of the Big Three,²⁰³ and the Committee of Detail incorporated it into the draft Constitution.²⁰⁴

What finally induced the delegates to shift the power of appointing Supreme Court Justices from the Senate to the President was a desire to avoid conflicts of interest. The issue arose from the allocation of the power to try impeachments.²⁰⁵ The delegates had initially opted to empower the Supreme Court to try all impeachments,²⁰⁶ but they soon realized that having the Court try impeachments would be problematic in any instance in which one of its own members was the subject of an impeachment trial.²⁰⁷ The solution that emerged was to transfer the impeachment trials of Supreme Court Justices to the Senate.²⁰⁸ The avoidance of that potential conflict of interest, however, created another one. If the Senate had the power to appoint Supreme Court Justices, its deliberations in impeachment trials of Supreme Court Justices might be tainted by the prospect that conviction and removal would create a vacancy that the Senate itself would get to fill.²⁰⁹ The delegates took this kind of potential conflict of interest seriously. A similar concern about the Senate's impartiality during an impeachment trial of the President prompted the delegates to shift the power to break presidential ties in the Electoral College from the Senate to the House.²¹⁰ Thus, the Senate could not enable itself

RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., Yale Univ. Press 1911) (July 17, 1787) (rejecting direct popular election by a 9-to-1 margin; rejecting state-appointed electors by a 2-to-8 margin; and adopting congressional election unanimously); *id.* at 50 (July 19, 1787) (reconsidering method of presidential election and adopting election by state-appointed electors); *id.* at 97-99 (July 24, 1787) (reconsidering method of presidential election and returning to congressional election).

¹⁹⁹ 1 *id.* at 120 (June 5, 1787).

²⁰⁰ 2 *id.* at 42-43 (July 18, 1787) (proposing presidential appointment with the consent of only one-third of the Senate).

²⁰¹ 1 *id.* at 243-44 (June 15, 1787).

²⁰² 2 *id.* at 41, 44 (July 18, 1787) (recording rejection of James Wilson's proposal by all states but Massachusetts and Pennsylvania); *id.* at 44 (recording rejection of Nathaniel Ghorum's proposal by all states but Virginia, Massachusetts, Pennsylvania, and the fourth largest state, Maryland); *id.* at 82-83 (July 21, 1787) (recording rejection of James Madison's proposal by all states but Virginia, Massachusetts, and Pennsylvania).

²⁰³ *Id.* at 83 (July 21, 1787).

²⁰⁴ *Id.* at 183 (Aug. 6, 1787) ("The Senate of the United States shall have power...to appoint ...Judges of the supreme Court.").

²⁰⁵ *See id.* at 551-52 (Sept. 8, 1787).

²⁰⁶ *See id.* at 172-73 (reprinting the Committee of Detail's draft of the Constitution).

²⁰⁷ *Id.* at 551-52 (Sept. 8, 1787).

²⁰⁸ *Id.*

²⁰⁹ *See id.* at 41-44 (July 18, 1787).

²¹⁰ *Id.* at 573.

to choose a new President by convicting and removing a sitting President. To avoid a similar self-interested incentive to convict a Supreme Court Justice in an impeachment trial, the delegates shifted the power to choose Supreme Court Justices from the Senate to the President.²¹¹ To ensure that the Senate did not benefit from convicting and removing a sitting Justice by getting to fill the resulting vacancy, the delegates stripped the Senate of the power to appoint Justices of its own choosing.

This point is crucial to understanding the distinction between the President's power to nominate Supreme Court Justices and the Senate's prerogative to consent to them before appointment. The Senate was to have no role in choosing Justices. Placing the power to remove Justices in the same hands as the power choose Justices posed risks that the Framers were unwilling to take. At the very least, the power to choose a successor might bias senators in their impeachment trials of Supreme Court Justices. Perhaps worse, the ability to remove and replace Justices might undermine the judicial independence that the Framers clearly sought to assure. One might scoff at the prospect today, since there has been no serious effort at removing Justices through impeachment since the Senate acquittal of Justice Samuel Chase in 1805.²¹² Part of the reason for that tradition against removals, however, may be the Framers' choice to deprive the Senate of the power to replace Supreme Court Justices. It is far from unrealistic to imagine the prospect of an increase in the willingness of Congress to impeach and remove Supreme Court Justices if congressional leaders understood that the Senate Majority Leader would be able to choose the replacement Justice. In any event, the Framers clearly made the policy decision to minimize improper impeachment temptations by depriving the Senate of the power to choose Supreme Court Justices.

A final episode at the Convention further clarified the distinction between the roles of the President and the Senate in nominating and confirming Supreme Court Justices. Several delegates made a final effort to strip the Senate of the prerogative even to consent to presidential nominations of executive branch officials as well as judges.²¹³ The proposal was to transfer the confirmation function to a congressionally or senatorially appointed privy council that would be structured like a mini-Senate inside the Executive Branch.²¹⁴ In addition to separation of powers and efficiency concerns,²¹⁵ a principal criticism of Senate confirmation of nominees was that it blurred the line of accountability for bad appointments.²¹⁶ The prevailing rebuttal, however, was delivered most clearly by

²¹¹ *Id.* at 41–44 (July 18, 1787).

²¹² Valerie Strauss, *Can a Supreme Court Justice Be Forcibly Removed from the Bench? A Quick Civics Lesson*, N.Y. TIMES (Dec. 12, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/12/can-a-supreme-court-justice-be-forcibly-removed-from-the-bench-a-quick-civics-lesson/?utm_term=.f8ae931420ee [<https://perma.cc/6EAD-TPQP>].

²¹³ *See, e.g., id.* at 328–29 (Aug. 18, 1787); *id.* at 538–39 (Sept. 7, 1787).

²¹⁴ *Id.* at 329.

²¹⁵ *Id.* at 537–38 (Sept. 7, 1787).

²¹⁶ *Id.* at 538–39.

Governor Morris, who had previously advocated for a privy council²¹⁷ but who had changed his mind. He reported that a privy council had been debated in committee and rejected as giving the President a way to shift blame and avoid accountability for bad appointments.²¹⁸ Presidential nomination and then appointment following Senate confirmation, he explained, preserved accountability without giving the President unchecked appointment power:

“[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”²¹⁹ He added that with the Confederation Congress’s then existing practice of appointing executive and judicial officers by nomination and election, “there [was] no responsibility.”²²⁰

This episode reinforces the inference that the Senate was to have no role in choosing the candidates for appointment to the Supreme Court. Neither the proponents nor the opponents of the privy council alternative denied the value of presidential accountability for bad appointments.²²¹ The prevailing view, however, was that Senate confirmation would not undermine presidential accountability because, in Morris’s words, “the President was to nominate” and the Senate was merely to “concur” (or not).²²² Clear presidential accountability for bad appointments depended crucially on the president bearing exclusive responsibility in the selection of appointees. The participation of a privy council in choosing appointees would give the President a ready scapegoat for bad choices, but so too would a Senate role in the selection of nominees. The most the Framers were willing to authorize the Senate to do was give “Advice,” and even that function was textually attached to the appointment power and textually separated from the nomination power.²²³

The actions and deliberations at the Constitutional Convention indicate that the Framers sought to preclude the Senate from choosing Supreme Court Justices. Senate involvement in the actual selection of nominees would improperly taint Senate deliberations in impeachment trials of Supreme Court Justices and thereby potentially undermine the independence of the Court. Such involvement would also blur responsibility for bad selections and make it harder to hold the President accountable. For these reasons, the Framers set out to make the presidential power to nominate Supreme Court Justices exclusive, and they understood that it would be exclusive.

²¹⁷ *Id.* at 329, 342–44, 427.

²¹⁸ *Id.* at 541–542 (Sept. 7, 1787).

²¹⁹ *Id.* at 539.

²²⁰ *Id.*

²²¹ *Id.* at 538–39, 541–42. *But see id.* at 539 (Elbridge Gerry expressing doubt as to whether accountability was achievable).

²²² *Id.* at 539; *see also supra* text accompanying note 219.

²²³ *See* U.S. CONST. art. II, § 2, cl. 2.

In the *Federalist Papers*, Alexander Hamilton addressed the appointment power in general and emphasized this same point. In response to critics who argued that Senate confirmation would undermine presidential accountability for appointments, Hamilton stressed the exclusive nature of the President's power to choose nominees:

“In the act of nomination, *his judgment alone* would be exercised; and as it would be *his sole duty* to point out the man, who with the approbation of the [S]enate should fill an office, his responsibility [for choosing a bad nominee] would be as complete as if he were to make the final appointment[.]”

without any requirement of Senate confirmation.²²⁴ Hamilton added that “the power of nomination is unequivocally vested in the [E]xecutive.”²²⁵ Because of the clear distinction between the President's power to nominate and the Senate's prerogative to confirm, “[t]he blame of a bad nomination would fall upon the [P]resident singly and absolutely[,]” while the Senate would only face either the prospective “censure of rejecting a good [nomination]” or reproach “for approving” a poor one.²²⁶ Senate rejection of a President's nomination “[c]ould] only be to make place for another nomination by [the President],” for “[t]he person ultimately appointed must be the object of his preference, though perhaps not in the first degree.”²²⁷ Hamilton dismissed the notion that the Senate could have any incentive to reject presidential nominations “by the preference they might feel to another” potential nominee “because they could not assure themselves, that the person they might wish [to confirm] would be brought forward by a second or by any subsequent nomination.”²²⁸ Indeed, he wrote further that the Senate “could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them”²²⁹ Hamilton therefore contemplated that the President alone would choose nominees, and that the Senate's role was limited to either approving or rejecting them, which it had to do with the understanding it had no role in choosing nominees.

Expressions in ratification conventions were also consistent with this understanding. In response to criticism that the Senate's role in appointments would give it too much power, the consistent response was that the Senate had no meaningful role in choosing nominees. In North Carolina, James Iredell explained that “the Senate has no other influence but a restraint on improper appointments. The President proposes such a man for such an office. The Senate has to consider

²²⁴ THE FEDERALIST NO. 76, at 393 (Alexander Hamilton) (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001) (emphasis added).

²²⁵ *Id.* NO. 77, at 397 (Alexander Hamilton).

²²⁶ *Id.* at 397–98.

²²⁷ *Id.* NO. 76, at 394 (Alexander Hamilton).

²²⁸ *Id.*

²²⁹ *Id.*

upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate."²³⁰ Underscoring the Senate's lack of agency in choosing nominees, Iredell further explained that it would do a Senator no good to reject one nominee in an effort to save the position for a friend, for "[w]ere an office to be vacant, for which a hundred men on the continent were equally well qualified, there would be a hundred chances to one whether his friend would be nominated to it."²³¹ In Pennsylvania, James Wilson rejected the idea that a senator could bribe a member of the House of Representatives with a federal appointment because "the President must nominate before [federal officers] can be chosen"²³² In New York, Chancellor Robert Livingston made the same point by resisting the argument that the Senate's role in appointments justified a proposal to limit senators to nonconsecutive terms; "the Senate," he said, "had but a negative upon the President; they had only an advisory power."²³³ Each of these statements by supporters of the Constitution rested on an assumption that the President's power to nominate was exclusive and that the Senate had no role in choosing nominees.

A review of originalist sources confirms what the text of the Constitution makes apparent: that the President's power to nominate Supreme Court Justices is exclusive and specifically excludes the Senate.²³⁴ The power, moreover, is not limited to the mere formal submission of a candidate; rather, the reasons for vesting the power in the President presuppose that the choice of nominee will be entirely his.²³⁵ For reasons of presidential accountability as well as prevention of a Senate conflict of interests, the Senate was not to participate in the actual selection of candidates for appointment to the Supreme Court. Any effort to encroach upon the President's exclusive power to select the individual nominees breaches the separation of powers unless validated by past practice. Repudiation of a President's Supreme Court nominations by way of a Senate moratorium quite arguably constitutes such an encroachment without more. But there is more. There is usurpation of the nomination power.

B. Usurpation

In addition to repudiating presidential power, a Senate moratorium may constitute a usurpation of the President's nomination power in violation of the separation of powers. When the Senate imposes a moratorium on Supreme Court

²³⁰ 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 134 (Philadelphia, J.B. Lippincott Co. 2d ed. 1891) (1788).

²³¹ *Id.*

²³² 2 *id.* at 476–77 (1787).

²³³ *Id.* at 323 (1788).

²³⁴ See U.S. CONST. art. II, § 2, cl. 2; *supra* notes 230–233 and accompanying text.

²³⁵ See John O. McGinnis, Essay, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 635–36 (1993) (finding that the nomination power rests solely with the President and carries political weight).

nominations until the incumbent President leaves office, the Senate is engaged in “President-shopping.”²³⁶ The Senate deliberately postpones its consideration of nominees so as to hold a Supreme Court vacancy open until the exclusive power to make a nomination to fill the vacancy has passed to a new President.²³⁷ There are at least two ways in which this practice of “President-shopping” may constitute a Senate usurpation of the nomination power. First, the Senate superintends the selection of Supreme Court nominees by determining which President gets to make the selection, aggrandizing to itself a major role in the exercise of the nomination power. Second, a moratorium may usurp the President’s exclusive power to make Supreme court nominations by effectively transferring the nomination power from the President to someone who is not the President, at least not yet.

i. Superintending

A Senate moratorium on Supreme Court nominations until a different President takes office amounts to “President-shopping” for a preferred nominator so as to materially alter the exercise of the nomination power. This effort to participate in the exercise of that power may impermissibly intrude upon the President’s exclusive nomination power and thus violate the separation of powers.

The idea of an extended moratorium on Supreme Court nominations is so unusual that identifying analogies among established separation of powers principles is difficult. There has been nothing quite like it in the preceding two centuries.²³⁸ The superintending of another branch’s exercise of an exclusive power nevertheless does have some rough analogies. The Constitution protects the Judicial Branch from efforts by the other two branches to superintend its exercise of the judicial power.²³⁹ It is settled law, for example, that the separation of powers precludes an arrangement in which judicial determinations are made subject to review and approval by the Executive Branch.²⁴⁰ Congress also may not require federal courts to find certain facts or reach certain judgments in particular cases.²⁴¹ Rather, “those who apply a rule to particular cases, must of necessity expound and

²³⁶ See *supra* notes 33, 164 and accompanying text.

²³⁷ See *supra* notes 33, 164 and accompanying text.

²³⁸ Of course, the very unusualness of a practice raises serious questions about its constitutional conformity to the separation of powers; see *infra* notes 415–423 and accompanying text.

²³⁹ See, e.g., Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 707–12 (1995) (outlining the general constitutional and policy frameworks protecting the judiciary’s independence).

²⁴⁰ See, e.g., *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); see also *Morrison v. Olson*, 487 U.S. 654, 677 n.15 (1988) (discussing these precedents).

²⁴¹ See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326 (2016); *Robertson v. Seattle Audobon Soc’y*, 503 U.S. 429, 438 (1992).

interpret that rule[.]”²⁴² The other branches may not superintend the Judiciary in the exercise of its exclusive power to interpret and apply the law to the particular cases or controversies before it.

The Constitution similarly protects Executive officials from congressional efforts to superintend their exercise of executive power.²⁴³ Congress may not establish a scheme of “legislative vetoes,” whereby it attempts to grant itself the unilateral power to oversee and reverse regulatory actions taken by the Executive Branch’s departments and agencies.²⁴⁴ Neither may Congress grant itself the power to supervise and remove federal officials in the exercise of executive powers,²⁴⁵ nor require the President to obtain the advice and consent of the Senate before removing Executive Branch appointees.²⁴⁶ As the Court observed in *Bowsher v. Synar*, “The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”²⁴⁷

This principle against superintending raises general doubts about the constitutionality of efforts by the Senate to superintend the President’s exercise of his exclusive power to make Supreme Court nominations. The Senate’s current Standing Rule XXXI provides for the automatic referral of a Supreme Court nomination to the Judiciary Committee.²⁴⁸ If the Senate amended its rule to provide for the summary rejection of any Supreme Court nominee not drawn from a list of names supplied to the President by the Majority Leader, that rule would likely represent an impermissible attempt by the Senate to superintend and usurp the President’s exclusive power to make Supreme Court nominations.

Although such a Senate rule might appear merely to regulate Senate procedure, it would in fact usurp presidential power: the history of the issue in the debates at the Constitutional Convention explains why. In vesting the nomination power in the President, the Framers deliberately rejected an allocation of powers that would have vested the Senate with the power both to appoint and to remove Justices of the Supreme Court. Specifically, the Framers sought to avoid an allocation of powers in which the Senate’s trial of impeachments of sitting Justices could be influenced by the Senate’s recognition that conviction and removal of a Justice would give the Senate itself the opportunity to fill the vacancy with a new Justice of

²⁴² *Bank Markazi*, 136 S. Ct. at 1323 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²⁴³ See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599–602 (1984) (outlining the general constitutional and policy safeguards of the Executive’s independence).

²⁴⁴ See, e.g., *INS v. Chadha*, 462 U.S. 919, 921–22 (1983).

²⁴⁵ See *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986).

²⁴⁶ *Myers v. United States*, 272 U.S. 52, 176 (1926).

²⁴⁷ *Bowsher*, 478 U.S. at 722.

²⁴⁸ S. DOC. NO. 113–18, at 43–44 (2013), <https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf> [<https://perma.cc/NTY5-4GTC>]; DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO THE PRESENT: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 5 (2012), <https://fas.org/sgp/crs/misc/RL33225.pdf> [<https://perma.cc/4AJM-8Z2H>].

its own choosing.²⁴⁹ The Framers' solution to that potential conflict of interest was to remove the Senate's power to choose Supreme Court Justices. This decision makes clear that the exclusive power of the President to make Supreme Court nominations is not limited to the mere formal act of submitting a name to the Senate for confirmation; that formality itself is constitutionally insignificant. What matters, for constitutional purposes, is that the President, not the Senate, identify and select individual candidates for appointment to the Supreme Court. Any serious effort by the Senate to superintend the selection of nominees encroaches upon a power meant to be vested solely in the President, with the specific objective of denying the Senate any meaningful role in the actual identification and selection of the individuals to fill vacancies on the Supreme Court.

In terms of the reason for denying the Senate any meaningful role in the selection of Supreme Court nominees, there is, constitutionally, no material difference between requiring the President to choose a nominee from a short list of candidates selected by the Senate and imposing a moratorium on Supreme Court nominations until a new President of a different party takes office. A President of one party will typically select a Supreme Court nominee from a relatively small universe of lower court judges and other highly qualified lawyers with legal views compatible with his own party.²⁵⁰ "President-shopping" for a nominator of the other party will typically result in the selection of a Supreme Court nominee from an equally small but completely different universe of lower court judges and other highly qualified lawyers with legal views compatible with the other party.²⁵¹ If the Senate imposes a moratorium on one President to shop for a nominator from the other party, it enables the Senate to choose for itself which of the two small universes of highly qualified lawyers from which it will receive Supreme Court nominations. The only real difference between this scheme and one requiring the President to draw his nominee from a short list of Senate-provided names is the size of the pool. Even that difference is not likely to be particularly material, as a short list of the President would likely bear an uncanny resemblance to the short list compiled by a Senate majority of the same party. In either case, what really matters in terms of the effect on senatorial incentives and presidential prerogatives is that the nominee will be drawn from one party's universe of qualified individuals and not from the other party's universe of qualified individuals. For the typical liberal or conservative Senator, any circuit judge or prominent practitioner drawn from their own side of the ideological spectrum will be mostly fungible with any

²⁴⁹ See *supra* notes 205–208 and accompanying text; see also Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1061–64 (1987) (reviewing the Framers' debates on the appointments clause and executive power).

²⁵⁰ See Robert Barnes, *Justices Tend to Agree with the President That Picks Them—but Stray Later*, WASH. POST (Dec. 20, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-are-loyal-to-their-presidents--they-stray-later/2015/12/20/0016886a-a5a1-11e5-9c4e-bc37f66848bb_story.html?https://perma.cc/P4DB-MP22.

²⁵¹ See Clark, *supra* note 33, at 744–49.

other. It is the ideological divide that is crucial, and that ideological divide may be serviced about as well by “President-shopping” for a preferred nominator as by compelling the President to choose a nominee from a Senate-compiled short list.

In either case, the Senate would be arrogating to itself a highly meaningful role in the exercise of the nomination power. “President-shopping” would give it less control over the individuals selected than restricting the President to a Senate-compiled short list, but it would still allow the Senate to select one of the two ideological universes of nominees as opposed to the other. Either scheme, moreover, would have roughly the same effect on the incentive of a Senator in deciding whether to convict and remove a sitting Supreme Court Justice in order to see a more ideologically compatible replacement appointed to the bench. Because “President-shopping” for a nominator presents a version of the very evil that prompted the Framers to deny the Senate any meaningful role in selecting Supreme Court nominees, the conclusion follows that “President-shopping” for a preferred nominator exceeds the Senate’s authority and encroaches upon power allocated exclusively to the President. It would violate the separation of powers unless saved by a validating tradition.

ii. Conveyancing

In addition to superintending the nomination power, a Senate moratorium on Supreme Court nominations may also usurp the President’s nomination power in a second way. By “President-shopping” for a more preferred nominator, the Senate is effectively dispossessing the incumbent President of his exclusive power to make Supreme Court nominations and transferring it to someone else, known or unknown, who is not yet the President and lacks the present authority to exercise the power. For convenience, this tactic may be called “conveyancing,” and it represents a *different* way to conceptualize the Senate’s potential usurpation of the nomination power through “President-shopping.”

The central premise is that the Constitution (as well as American political tradition) provides for “only one [P]resident at a time;”²⁵² the President, Article II clearly states, “shall hold his Office during the Term of four Years”²⁵³ A former President retains some residual authority to protect his own interests,²⁵⁴ and to a limited extent even those of future Presidents,²⁵⁵ but he is no longer the President and therefore not authorized to command the executive power. Likewise,

²⁵² Ruth Marcus, Opinion, *Memo to Trump: There Can Be Only One President at a Time*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/opinions/memo-to-trump-there-can-be-only-one-president-at-a-time/2016/12/28/753b1406-cd39-11e6-a747-d03044780a02_story.html?utm_term=.5efd1dcfd42 [<https://perma.cc/6T63-ZYFW>].

²⁵³ U.S. CONST. art. II, § 1, cl. 1.

²⁵⁴ See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that a former President cannot be held civilly liable for damages stemming from his official acts).

²⁵⁵ See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (holding that confidentiality between the President and his advisors extends past the end of the President’s term).

a President-Elect gains some statutory protections,²⁵⁶ but he is not yet the President and is not yet authorized to command the executive power—even less so is a mere presidential hopeful or an unknown future President. The simple fact is that “only the incumbent is charged with performance of the executive duty under the Constitution,”²⁵⁷ and “it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch”²⁵⁸

The constitutional power of the President does not become subservient to the indulgence of the Senate merely because a President's term approaches its end. That end, which previously happened by indirect constitutional mandate on every fourth March 4,²⁵⁹ has arrived quadrennially since 1940 at exactly noon on January 20 by force of the 20th Amendment.²⁶⁰ An outgoing President may veto a bill or submit a nomination until his last day in office,²⁶¹ and an outgoing Vice President, elected for the same term as the President,²⁶² may break a tie in the Senate on the last day of the term.²⁶³ Indeed, the outgoing Vice President presides over Congress during the counting of electoral votes in choosing the next President and Vice President.²⁶⁴ The powers of the President are not constitutionally throttled even during the final seventeen days of his term from January 3 to January 20, when the next Congress has already taken office but the next President, elected at the same time as the incoming Congress, has not.²⁶⁵ Not only does the President retain his powers to the final day of office, but he also remains bound by the duty to take care that the laws be faithfully executed until the final day of his term.²⁶⁶

There are only two constitutional ways to deprive a sitting President of his powers before the end of his term: conviction by the Senate following impeachment by the House²⁶⁷ or determination of his inability to discharge the powers and duties of the office.²⁶⁸ In neither instance does the Senate possess the

²⁵⁶ *E.g.* 18 U.S.C. § 871(a) (2012) (establishing that threatening the President is a federal crime).

²⁵⁷ *Nixon v. Adm't of Gen. Servs.*, 433 U.S. at 448.

²⁵⁸ *Id.* at 449.

²⁵⁹ 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 523 (Roscoe R. Hill ed., Gov't. Printing Office 1937) (Sept. 13, 1788) (setting “the first Wednesday in March” of 1789 as the date “for commencing proceedings” under the Constitution); *see* U.S. CONST. amend. XII, *amended by* U.S. CONST. amend. XX, § 3 (identifying, prior to amendment, March 4 as the start date of presidential terms).

²⁶⁰ U.S. CONST. amend. XX, § 1.

²⁶¹ *See* U.S. CONST. art. I, § 7, cl. 2.

²⁶² U.S. CONST. art. II, § 1, cl. 1.

²⁶³ U.S. CONST. art. I, § 3, cl. 4.

²⁶⁴ U.S. CONST. amend. XII.

²⁶⁵ *See* U.S. CONST. amend. XX, § 1.

²⁶⁶ *See* U.S. CONST. art. II, § 3.

²⁶⁷ U.S. CONST. art. I, § 2, cl. 5 (giving the House the “sole Power of Impeachment”); U.S. CONST. art. I, § 3, cl. 6 (giving the Senate the “sole Power to try all Impeachments”); U.S. CONST. art. II, § 4 (listing actions warranting impeachment). The same applies to a person who succeeded to the presidency or acted as president. U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. XX, §§ 1,3; U.S. CONST. amend. XXV, §§ 1, 3–4.

²⁶⁸ U.S. CONST. amend. XXV, §§ 3–4.

unilateral power to deprive the President of his powers. The House must initiate the impeachment process,²⁶⁹ and the Vice President, cabinet, and House must all participate in the declaration of a President as incapable of exercising his powers.²⁷⁰ Nor does the Senate ever acquire presidential powers or unilaterally choose who exercises them when the sitting President is removed or deemed incapable of discharging his powers. In either instance, the powers devolve upon the Vice President, who serves as either a new President²⁷¹ or as the Acting President,²⁷² or in the absence of a Vice President, the powers devolve upon whichever official Congress, including at least the House as well as the Senate, has designated by law.²⁷³ The only unilateral role of the Senate in presidential succession is in choosing its own President *pro tempore*, who, by statute,²⁷⁴ is third in line for the presidency after the Vice President and Speaker of the House.²⁷⁵ In the absence of removal by way of impeachment or suspension of the exercise of powers by incapacitation, Article II mandates that a sitting President “shall hold his Office during the Term of four Years”²⁷⁶

Were the objective of a Senate moratorium to dispossess the incumbent President of an exclusive executive power, such as the power to make Supreme Court nominations, in order to transfer it to the Senate or to Congress generally, the attempted conveyancing would violate the separation of powers. Congress may not appropriate executive power and vest it in the Legislative Branch or one of its officers,²⁷⁷ and there is no reason to suppose that the Senate may do alone what it is forbidden to do with the agreement of the House and the signature of the President. In a similar vein, Congress may not withdraw core judicial functions from the Judicial Branch and transfer them to non-Article III courts.²⁷⁸ Such attempts at conveyancing usurp the power of the dispossessed branch of government and violate the separation of powers as a result.

Although a Senate moratorium on Supreme Court nominations until a new President takes office is obviously different from those examples of impermissible interbranch conveyancing, a moratorium presents functionally analogous problems. In the case of a moratorium, the attempted conveyancing is not interbranch, but

²⁶⁹ U.S. CONST. art. I, § 2, cl. 5.

²⁷⁰ U.S. CONST. amend. XXV, §§ 3–4.

²⁷¹ U.S. CONST. amend. XX, § 3; U.S. CONST. amend. XXV, § 1.

²⁷² U.S. CONST. amend. XX, § 3; U.S. CONST. amend. XXV, §§ 3–4.

²⁷³ U.S. CONST. amend. XX, § 4.

²⁷⁴ 3 U.S.C. § 19(b) (2012).

²⁷⁵ U.S. CONST. art. I, § 3, cl. 5; U.S. CONST. amend. XX, §§ 3–4; U.S. CONST. amend. XXV, § 1, 3–4; 3 U.S.C. § 19(a)–(b).

²⁷⁶ U.S. CONST. art. II, § 1, cl. 1.

²⁷⁷ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274–76 (1991); *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976).

²⁷⁸ *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72–74 (1982). *But see* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854–55 (1986) (vesting of quasi-judicial power in a non-Article III court does not violate the separation of powers).

intrabranched, from one President to another. But it is nevertheless an attempt at an *intertemporal* conveyancing of a power from the incumbent President, who is exclusively authorized to exercise it, to a future President, who, until a future inauguration, has no greater constitutional authorization to exercise the exclusive power of the incumbent President than the Congress or the Judiciary do. Indeed, he may have less. At least the incumbent members of Congress and the sitting federal Judiciary have taken oaths to support the Constitution.²⁷⁹ The President-Elect may never have. In that sense, the notion that the Senate may appropriate the power to make Supreme Court nominations and hold it in trust for a future President is less defensible than the notion that it can transfer the power to the Majority Leader of the Senate immediately.

The different theories of impermissible encroachment provide significant support for the proposition that a Senate moratorium on Supreme Court nominations is a *prima facie* violation of the separation of powers. The key determination of its constitutionality may be whether it is saved from invalidity by a historical tradition that legitimizes it.²⁸⁰

III. IMPAIRMENT

Even if a moratorium on Supreme Court nominations does not exceed the scope of the Senate's confirmation power and thereby encroach upon the Executive Branch, it still may violate the separation of powers in the second general way. In addition to the anti-encroachment principle, the separation of powers also imposes an anti-impairment principle on the three branches of government.²⁸¹ Even when acting within the scope of its allocated powers, one branch may not unduly "impair another in the performance of its constitutional duties."²⁸² A Senate moratorium on Supreme Court nominations may violate the separation of powers by impermissibly impairing the functioning of another branch of government.

The anti-impairment principle regulates the separation of powers in areas where the allocated powers of two branches overlap and thus may conflict with each other.²⁸³ If one branch's exercise of its power sufficiently impairs the other branch in the exercise of its powers, the anti-impairment principle sometimes mandates a balancing of interests in order to resolve the conflict of powers, rather than always leaving resolution to an interbranch political confrontation.²⁸⁴ On one side of the balance is the degree to which the challenged action of one branch impairs an interest that the other branch has in its own functioning.²⁸⁵ On the other side is the impairing branch's justification for the impairment or, in other

²⁷⁹ U.S. CONST. art. VI, cl. 3.

²⁸⁰ See *infra* Part IV.

²⁸¹ See *supra* notes 69, 76–81 and accompanying text.

²⁸² *Loving v. United States*, 517 U.S. 748, 757 (1996).

²⁸³ See *Mistretta v. United States*, 488 U.S. 361, 380–83 (1989).

²⁸⁴ See *id.*

²⁸⁵ See *id.* at 382–83; see also *supra* notes 78, 81 and accompanying text.

words, its interest in carrying out the challenged action.²⁸⁶ Accommodation of the competing interests depends on the relative extent to which a branch's interests are impaired, taking account of mitigation options that either branch could use to minimize or avoid the impairment.²⁸⁷

This anti-impairment principle applies to the Senate's imposition of a moratorium on Supreme Court nominations until the sitting President leaves office. Such a moratorium may produce two different types of interbranch impairments. First, it may impermissibly impair the ability of the President to fulfill his constitutional duty to *appoint* Supreme Court Justices²⁸⁸ and his related duty to "take Care that the Laws be faithfully executed"²⁸⁹ Second, a Senate moratorium on Supreme Court nominations may impermissibly impair the ability of the Supreme Court itself to exercise "[t]he judicial Power of the United States," which is vested first and foremost in that institution.²⁹⁰ A Senate moratorium violates the separation of powers in either of these ways if the interest of the other branch outweighs the Senate's interest in the moratorium, so a crucial consideration is the Senate's interest in imposing a moratorium.

A. Executive Impairment

Existing authority identifies two major areas in which the Constitution places limits on the power of another branch to act in ways that impermissibly impair the functioning of the Executive Branch. The first area consists of attempts by Congress to impose limits on the ability of the President to remove subordinate federal officers.²⁹¹ The second area consists of the attempts by federal courts to subject the President to judicial process.²⁹²

In the removal conflicts, the patterns are fairly similar, even if the outcomes are not always the same. Congress seeks to promote an interest in securing the independence of a particular executive officer, such as an independent counsel, by protecting the officer from removal by the President without cause.²⁹³ The impairment thus results from the limitation on the President's removal power.²⁹⁴ The President resists the limitation by asserting an interest in holding subordinate executive officers accountable in order to assure the faithful execution of the laws.²⁹⁵ Where the limitations on removal protect the independence of a federal officer who exercises quasi-legislative or quasi-judicial power, the congressional interest

²⁸⁶ *See id.*; *see also supra* notes 78 and accompanying text.

²⁸⁷ *See id.* at 380–84; *see also supra* notes 78–81 and accompanying text.

²⁸⁸ U.S. CONST. art. II, § 2, cl. 2 (“[H]e . . . shall appoint . . . Judges of the supreme Court . . .”).

²⁸⁹ U.S. CONST. art. II, § 3.

²⁹⁰ U.S. CONST. art. III, § 1.

²⁹¹ *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988).

²⁹² *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

²⁹³ *See, e.g., Morrison*, 487 U.S. at 660–64, 689–93.

²⁹⁴ *Id.* at 685, 689–90.

²⁹⁵ *See id.* at 689–90; *see also* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010).

generally prevails.²⁹⁶ Where the limitations protect the independence of a federal officer who exercises purely executive power, the presidential interest prevails and the limitation is invalid if it leaves the President with no effective means of controlling the officer,²⁹⁷ but the congressional interest prevails if the limitation leaves the President with some effective alternative means of controlling the officer, even if indirectly.²⁹⁸

In the judicial process conflicts, the patterns are also fairly consistent. The Judiciary seeks to do justice by adjudicating a controversy in which the President is a defendant or at least by subjecting him to compulsory process in order to obtain material evidence for an adjudication.²⁹⁹ The impairment results from the subjection of the President to some form of legal process, which he resists on the ground either that participating in litigation as a defendant will intrude upon his scarce time or that disclosing the evidence will chill his subordinates from providing him with candid advice.³⁰⁰ Where the litigation, if properly managed by the trial court, would not pose a risk of serious distraction, the judicial interest prevails.³⁰¹ In the attempts to obtain evidence, the result of the assertion of executive privilege depends on a fact-specific weighing of the magnitude of the need, the severity of the intrusion, and the viability of mitigation.³⁰²

In a conflict over a Senate moratorium on Supreme Court nominations, the impairment may seem obvious, but it is a bit more complicated than it appears. Certainly, the President has a constitutional duty both to appoint Supreme Court Justices when vacancies happen³⁰³ and also to assure the faithful execution of the laws,³⁰⁴ including the execution of the statute fixing the membership of the Supreme Court at nine seats.³⁰⁵ But the President's appointment power is explicitly constrained by the requirement of Senate consent to any appointment.³⁰⁶ In general, the Senate's discretion to confirm or reject a nominee is as unfettered as the President's discretion to sign or veto a bill, which is a somewhat analogous condition on Congress's exercise of its legislative power. Because the Senate has the prerogative to thoroughly vet a nominee and reject an unsuitable one or even a succession of unsuitable ones,³⁰⁷ identifying the impairment that results from a

²⁹⁶ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629–30 (1935).

²⁹⁷ *See Free Enter. Fund*, 561 U.S. at 495–97, 513–14.

²⁹⁸ *Morrison v. Olson*, 487 U.S. 654, 694–96 (1988).

²⁹⁹ *See Clinton v. Jones*, 520 U.S. 681, 704–06 (1997).

³⁰⁰ *Nixon v. Fitzgerald*, 457 U.S. 731, 753–57 (1982).

³⁰¹ *Clinton*, 520 U.S. at 703–06; *Nixon v. Fitzgerald*, 457 U.S. at 753–58.

³⁰² *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 389–90 (2004); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 444 (1977); *United States v. Nixon*, 418 U.S. 683, 705–13 (1974).

³⁰³ U.S. CONST. art. II, § 2, cl. 2.

³⁰⁴ U.S. CONST. art. II, § 3.

³⁰⁵ 28 U.S.C. § 1 (2012).

³⁰⁶ U.S. CONST. art. II, § 2, cl. 2.

³⁰⁷ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II*, at 9–18 (Rowman & Littlefield Publishers, Inc. 5th ed. 2008) (1921) (chronicling the successive rejections of two Nixon nominations).

moratorium is not necessarily as simple as pointing to the unfilled vacancy on the Court and concluding that the Senate has forced the President to violate his appointment and faithful-execution duties. Still, part of the identification of the impairment surely must start with a recognition that the President has a duty to make appointments when vacancies happen so as to assure the faithful execution of the judicial statute and that the Senate moratorium precludes his fulfilling these duties.

Perhaps the best way to account for the Senate's unfettered discretion to vet and reject nominees is to recognize that, in the specific case of a moratorium, the Senate is not exercising its discretion at all; it is forsaking it. A Senate moratorium on Supreme Court nominations until a different President takes office is not preventing the appointment of new Justices because the Senate is thoroughly vetting nominees and rejecting unsuitable ones. Rather, the Senate is refusing to do anything at all. The law acknowledges a difference between hard bargaining and a refusal to bargain at all.³⁰⁸ A true moratorium is the latter. In that case, the existence and continuation of the vacancy assumes greater weight in identifying the impairment of the President's power than might be true in the case of vigorous opposition to particular nominees. The extension of the vacancy in the case of a moratorium is a product of calculated disengagement by the Senate. The difference ought to have constitutional significance in the identification of an impairment, as the conflict exists because of one branch's boycott of a constitutional process in which it has an essential role.

In that situation, it would not be unfair to the Senate to identify the impairment of the President's power as commencing at the moment the moratorium is imposed. The impact on his ability to fulfill his constitutional obligations begins almost immediately. Every week of a continuing moratorium threatens to delay any potential confirmation process by another week and postpones by a week the time when the President will be able to discharge his constitutional duties by appointing a confirmed nominee to the Supreme Court.

The Senate's moratorium during the Scalia vacancy does not represent the outer limit of possibilities if the imposition of a moratorium is accepted as constitutional. When analyzing a separation of powers question, one may consider the expansion of a practice, "if allowed to stand."³⁰⁹ If the Senate may impose a moratorium on Supreme Court nominations during the final year of a presidency, there would be no apparent reason why it could not impose one during the final two years, for an entire term, or until some future time when an acceptable President is elected. Likewise, if the Senate may impose a moratorium while one Supreme Court vacancy exists, there would be no apparent reason why it could not continue the moratorium even when a second or third vacancy occurs. If the Senate still continued its moratorium, the Court would eventually lose its quorum³¹⁰ and

³⁰⁸ *CF* 29 U.S.C. § 158(a)(5) (2012) (making it an unfair labor practice for an employer to refuse to bargain with its employees' chosen representative).

³⁰⁹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

³¹⁰ 28 U.S.C. § 1 (2012).

thus the authority to act³¹¹ when a fourth vacancy occurred.³¹² The practice could effectively abolish the Court by way of an extended moratorium on nominations. Even with a second or third vacancy, the Court would likely face a significant reduction in either its productivity or the quality of its work.³¹³ The President could face something of a judicial emergency with a vacancy-riddled Supreme Court.

Still, a constitutionally material impairment of another branch's ability to perform its constitutional duties does not exist if the affected branch has an alternative way to carry out its duties. In the case of a Senate moratorium, however, the President will likely have few, if any, mitigating options.

The most obvious alternative that the Constitution provides would be for the President to make unilateral recess appointments to the Court,³¹⁴ but this alternative has two major limitations. First, it is unlikely even to be available to the President. A Senate that has imposed a moratorium on Supreme Court nominations by the incumbent President will almost certainly exploit the Court-approved option of holding brief *pro forma* sessions every few days in order to avoid recessing for a long enough time to trigger the President's recess appointment power.³¹⁵ The Senate exercised that option during the Scalia moratorium.³¹⁶

³¹¹ The Court itself has sharply limited the ability of agencies to evade statutory quorum requirements. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687–88 (2010) (holding that the statute required that quorum be met before the board could act). So, the Court may face the same constraints itself. Indeed, the text of the Court's quorum statute is less flexible than the one at issue there.

³¹² Cf. *Free Enter. Fund*, 561 U.S. at 497 (hypothesizing "a Matryoshka doll" of multiple layers of good-cause tenure protection).

³¹³ Whether these or other impacts on the practical operation of the Court would violate separation of powers by impairing the ability of the Court to perform its constitutional role is a question addressed below. See *infra* Section III.B.

³¹⁴ See U.S. CONST. art. II, § 2, cl. 3.

³¹⁵ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014); *id.* at 2568–70 (conceding that *pro forma* sessions may have undesirable consequences preventing the president from making any recess appointments).

³¹⁶ The Senate met in *pro forma* sessions every three days during the three breaks that otherwise were long enough to trigger the President's recess appointment power: (1) The traditional, month-long August recess, see *The August Recess*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/News_August_Recess.htm [<https://perma.cc/XH36-738X>] (last visited Feb. 19, 2018); see also 162 CONG. REC. S5205 (daily ed. July 29, 2016); *id.* at S5207 (daily ed. Aug. 2, 2016); *id.* at S5209 (daily ed. Aug. 5, 2016); *id.* at S5211 (daily ed. Aug. 9, 2016); *id.* at S5213 (daily ed. Aug. 12, 2016); *id.* at S5215 (daily ed. Aug. 16, 2016); *id.* at S5217 (daily ed. Aug. 19, 2016); *id.* at S5219 (daily ed. Aug. 23, 2016); *id.* at S5221 (daily ed. Aug. 26, 2016); *id.* at S5223 (daily ed. Aug. 30, 2016); *id.* at S5225 (daily ed. Sept. 2, 2016); (2) The recess around the fall election, see, e.g., *2017 Congressional Calendar: 115th Congress, First Session*, HILL, http://thehill.com/sites/default/files/2017_the_hill_congressional_calendar.pdf [<https://perma.cc/RT4Z-JVQY>] (last visited Feb. 19, 2018); see also 162 CONG. REC. S6295 (daily ed. Oct. 11, 2016); *id.* at S6297 (daily ed. Oct. 13, 2016); *id.* at S6299 (daily ed. Oct. 17, 2016); *id.* at S6301 (daily ed. Oct. 20, 2016); *id.* at S6303 (daily ed. Oct. 24, 2016); *id.* at S6307 (daily ed. Oct. 31, 2016); *id.* at S6309 (daily ed. Nov. 3, 2016); *id.* at S6311 (daily ed. Nov. 7, 2016); *id.* at S6313 (daily ed. Nov. 10, 2016); *id.* at S6315 (daily ed. Nov. 14, 2016); *id.* at S6499 (daily ed. Nov. 18, 2016); *id.* at S6501 (daily ed. Nov. 22, 2016); *id.* at S6503 (daily ed. Nov. 25, 2016); *id.* at S6505–20 (daily ed. Nov. 28, 2016); and (3) The recess over the year-end holidays, see *2017 Congressional Calendar: 115th*

Second, the recess appointment option is not an adequate substitute for permanent appointments to the Supreme Court. While temporary appointments may suffice in the operation of the Executive Branch, judicial recess appointments raise serious concerns—perhaps even constitutional ones—because of their potential to impair judicial independence by leaving a judge's long-term continuance in office dependent on further action by the President and Senate.³¹⁷ If a Senate moratorium on Supreme Court nominations impairs the President's ability to exercise the appointment power and fulfill his duty to assure the faithful execution of the laws, the theoretical availability of recess appointments does not sufficiently mitigate the impairment in order to conclude that no separation of powers analysis is necessary.

Another alternative would be to exercise the nomination power differently. The President could withdraw a controversial nominee and submit a less-controversial nominee in hopes of securing Senate action. That response, however, works only if the Senate objects to the particular nominee. In the case of a Senate moratorium on *any* Supreme Court nomination by the incumbent President, it is not the nominee, but the President to whom the Senate objects. The Scalia moratorium was imposed before the President selected any nominee at all,³¹⁸ and when word surfaced that the President might nominate a popular, moderately conservative Republican governor for the vacancy, the Senate made clear that the moratorium applied irrespective of the identity of the nominee.³¹⁹ When President Obama eventually defied his own political base and nominated Judge Garland, a non-diverse choice widely viewed as a moderate Democrat but one of exceptional qualification, the Senate went out of its way to disclaim any negative assessment of Garland himself.³²⁰ When the President faces a true moratorium on any Supreme Court nomination he makes, his option to withdraw one nominee and submit another makes little difference.

Of course, the President might try just giving the Senate what it wants. While the Senate disclaimed a specific objection to Garland, the Republican majority was widely viewed as imposing the moratorium in hopes of securing a principled conservative nominee if a Republican won the upcoming presidential election. The

Congress, First Session, supra, see also 162 CONG. REC. S7169 (daily ed. Dec. 13, 2016); *id.* at S7171 (daily ed. Dec. 16, 2016); *id.* at S7173 (daily ed. Dec. 20, 2016); *id.* at S7175 (daily ed. Dec. 23, 2016); *id.* at S7177 (daily ed. Dec. 27, 2016); *id.* at S7179 (Dec. 30, 2016).

³¹⁷ See, e.g., *Recess Appointments to the Supreme Court—Constitutional but Unwise?*, 10 STAN. L. REV. 124 (1957) (suggesting that judicial recess appointments may impair judicial independence).

³¹⁸ See Chris Wilson, *Antonin Scalia's Open Supreme Court Seat Could Set Record for Vacancy*, TIME (Feb. 14, 2016), <http://time.com/4224348/scalia-vacancy-supreme-court/> [https://perma.cc/R6BV-8SNQ].

³¹⁹ See Mark Sherman & Mary Clare Jalonick, *Garland Submits Questionnaire as Judiciary Committee Stonewalls*, PBS NEWSHOUR (May 10, 2016, 1:16 PM), <http://www.pbs.org/newshour/rundown/garland-submits-questionnaire-as-judiciary-committee-stonewalls/> [https://perma.cc/EZW6-PGTG].

³²⁰ See Emmarie Huetteman, *Merrick Garland Completes Nominee Questionnaire for the Senate*, N.Y. TIMES (May 10, 2016, 5:47 PM), https://www.nytimes.com/politics/first-draft/2016/05/10/merrick-garland-completes-nominee-questionnaire-for-the-senate/?mcubz=1&_r=0 [https://perma.cc/43EE-WTC4].

political realities suggest that the President might have persuaded the Senate to end its moratorium by capitulating to their ideological preference and nominating a principled conservative.³²¹ If the President faced a true judicial emergency, he could choose that alternative, however personally repellent or politically damaging it might be.

Still, there are at least three problems with the President choosing a Supreme Court nominee to appease the Senate's ideological interests. First, for reasons described earlier,³²² it arguably just mitigates an impairment of the President's appointment power by impermissibly misallocating the nomination power. The Constitution presupposes that the choice of nominees belongs exclusively to the President, not to the Senate.³²³ Substituting one violation of the separation of powers for another is hardly a solution. Second, even if the Senate is covertly motivated by ideology, taking action on even an ideologically acceptable nominee may be politically impossible once the Senate has offered some politically neutral pretext for the moratorium. In the Garland episode, the popular mandate rationale for the moratorium logically precluded any alternative that involved considering *any* nominee submitted by the outgoing President.³²⁴ The need to maintain the public rationale for the moratorium compelled the Majority Leader to reject calls from within his own party for confirming Garland in the lame duck period after the election if the Democratic candidate won the presidency.³²⁵ Now, there is certainly no rule against a Senate leader changing his mind and appearing inconsistent or even hypocritical, but firmly grounding a moratorium in some neutral public rationale, such as the desire to allow voters to choose the President who will fill the vacancy, may make it politically quite difficult to relent later merely because the incumbent President submits a new nominee who meets with ideological approval. A moratorium imposes political obstacles that the mere objection to a particular nominee does not. A final problem with this alternative is simply that the answer to a separation of powers question, such as the constitutionality of a Senate moratorium on Supreme Court nominations by an incumbent President, should not turn on whether the President is on good or bad terms with the Senate and does or does not acquiesce in its potential violation of the separation of powers.³²⁶

³²¹ See Sherman & Jalonick, *supra* note 319.

³²² See *supra* Part II.

³²³ See U.S. CONST. art. II, § 2, cl. 2.

³²⁴ See Sherman & Jalonick, *supra* note 319.

³²⁵ See Ted Barrett, *GOP Leaders Ignore Trump-Inspired Calls to Confirm Garland Now*, CNN POL. (May 5, 2016, 4:04 PM), <http://www.cnn.com/2016/05/05/politics/merrick-garland-supreme-court-donald-trump/index.html> [https://perma.cc/P3DU-L2EX].

³²⁶ Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010) (“[T]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress.” (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986))).

B. *Judicial Impairment*

In addition to potentially impairing the President's ability to fulfill his constitutional obligations, a Senate moratorium on Supreme Court nominations may also impair the Supreme Court's ability to perform its constitutional functions. In applying the anti-impairment principle to impacts on the Judiciary, the central question is whether the action of one branch "threatens the institutional integrity of the Judicial Branch."³²⁷ Impermissible threats can be tangible, such as disrupting the actual operation of the Judicial Branch, or intangible, particularly by "undermin[ing] public confidence in the disinterestedness of the Judicial Branch."³²⁸ A Senate attempt to pack the Court by "President-shopping" potentially poses both sorts of dangers, although the threat to public confidence is the more serious one.

i. Tangible Effects

A Senate moratorium on Supreme Court nominations arguably might disrupt the operation of the Court in several tangible ways. In the situation most likely to violate the separation of powers, a lengthy, multi-year moratorium leaving several unfilled vacancies could severely impair the operation of the Court by depriving it of the requisite quorum to operate lawfully.³²⁹ Less extreme moratoriums could still impermissibly impair the Court's tangible operation in less obvious ways by saddling it with an even number of Justices, which leaves them vulnerable to deadlock, or by materially diminishing the Court's overall productivity because it is statutorily short-handed.³³⁰ Whether the latter situations would violate the separation of powers is a tougher question.

1. Denial of a Quorum

Notwithstanding the view of one defender of a Senate moratorium that "the Senate is fully within its powers to let the Supreme Court die out, literally,"³³¹ allowing the membership of the Court to decline to the point where it lost its statutory quorum and thus its ability to operate would impose a severe impairment on the Court and trigger a grave separation of powers question. By statute, six Justices are necessary to give the Supreme Court a quorum to operate.³³² If the Senate vowed to ignore any Supreme Court nomination made by an incoming President, the fourth vacancy to arise during that President's tenure would deprive

³²⁷ *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

³²⁸ *See id.* at 406–07.

³²⁹ *See* 28 U.S.C. § 1 (2012).

³³⁰ *See id.*

³³¹ *See* Shapiro, *supra* note 23.

³³² 28 U.S.C. § 1.

the Court of a quorum to operate at all. While four vacancies during a presidency seems like an unusually large number, it has not been uncommon until the past few decades. President Nixon filled four vacancies during his time as President and would have had a chance to fill a fifth one had his Watergate crimes not forced his resignation before Justice Douglas's retirement in 1975.³³³ Five vacancies arose during Eisenhower's two terms and four during Truman's two terms.³³⁴ Likewise, five vacancies arose during Franklin Roosevelt's second term alone³³⁵ and six during Taft's one term.³³⁶ There were thus five instances during the 20th century when a Senate vow to ignore any nomination made by the incumbent President during his time in office could have eventually left the Court without a quorum to operate. That course of behavior is exactly what some advocated if Hillary Clinton had won the 2016 presidential election.³³⁷

Ensuring the existence of a functioning Supreme Court appears to be a matter of constitutional obligation, not congressional discretion. While the creation of lower federal courts may be discretionary, Article III does not provide that the federal judicial power *may* be vested in the Supreme Court.³³⁸ It provides that “[t]he judicial Power of the United States, *shall* be vested in one supreme Court”³³⁹ As Justice Story observed in *Martin v. Hunter's Lessee*, “It is manifest that a supreme court must be established” by Congress.³⁴⁰ He explained:

[T]he object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution.³⁴¹

The Supreme Court of the United States is a uniquely vulnerable part of the system of government established by the Constitution. Unlike Congress or the President, the Court is wholly dependent on the other branches for its existence.³⁴² The Constitution presupposes a Chief Justice and presumably at least one associate

³³³ See RUTKUS & BEARDEN, *supra* note 248, at 36–37.

³³⁴ See *id.* at 34–35.

³³⁵ See *id.* at 33.

³³⁶ See *id.* at 30.

³³⁷ See Shapiro, *supra* note 23.

³³⁸ See U.S. CONST. art. III, § 1.

³³⁹ *Id.* (emphasis added).

³⁴⁰ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330 (1816).

³⁴¹ *Id.* at 329.

³⁴² See, e.g., U.S. CONST. art. II, § 2, cl. 2 (providing for presidential authority to nominate Justices by “[a]dvice and [c]onsent of the Senate”); U.S. CONST. art. III, § 1 (“[V]est[ing] [judicial power] in one supreme Court, and . . . such inferior Courts as the Congress may . . . ordain and establish.”); U.S. CONST. art. III, § 2, cl. 2 (granting the Supreme Court appellate jurisdiction subject to congressional regulation).

justice,³⁴³ but the Constitution does not even prescribe the number of justices that the Supreme Court should have.³⁴⁴ By lawmaking, Congress and the President have had to fix the size of the Court and also prescribe the time for its convening.³⁴⁵ Nowhere does the Constitution literally require Congress and the President to establish the Supreme Court, but if the Court is a mandatory element of the constitutional system, the actions necessary to establish it must be constitutional obligations. By extension, the actions necessary to maintain the Court in operation must be constitutional obligations as well. As the Court lacks any mechanism for perpetuating itself, as in choosing its own new members, these obligations of creation and maintenance necessarily lie with the President and the Senate.

2. Risk of Deadlock

By law, a fully-staffed Supreme Court consists of nine Justices.³⁴⁶ The benefit of an odd number such as nine is that it significantly reduces the risk of deadlock. Isolated recusals may still result in an inability to act because of an equal division of participating Justices, but the prospects are much lower from isolated recusals on a Court with an odd number of Justices than from the ordinary participation of all Justices on a court with an even number of members. It did not escape notice that the Court's ability to perform its constitutional function was somewhat impaired by deadlocks during the 14-month Scalia vacancy.³⁴⁷ The burdens resulting from an even number of Justices over a longer period could materially diminish the role of the Court within the Judicial Branch and in the broader federal system. Concluding that any impairment from this cause would violate the separation of powers remains difficult, however, because of historical precedent.

It is difficult to conclude that a moratorium that leaves the Court with an even number of Justices violates the separation of powers because it requires accepting the proposition that the First Congress and President acted unconstitutionally when they established the Supreme Court in 1789.³⁴⁸ It may be hard today to conceive of a Court with any number of seats other than the nine it has had since 1869,³⁴⁹ but nothing in the text of the Constitution sets the size of the Court at nine members, and nine is not the number that the First Congress and President chose when they adopted the Judiciary Act of 1789. They created a Supreme Court

³⁴³ See U.S. CONST. art. I, § 3, cl. 6 (providing the only instance where the Chief Justice is mentioned in the Constitution); U.S. CONST. art. II, § 2, cl. 2 (providing the procedure for nominating justices).

³⁴⁴ See U.S. CONST. art. III.

³⁴⁵ See, e.g., *supra* Section I.B.ii.

³⁴⁶ 28 U.S.C. § 1 (2012).

³⁴⁷ See Ariane de Vogue, *Scalia to Gorsuch: What a Long Strange Trip It's Been*, CNN POL. (Apr. 7, 2017, 12:20 PM), <http://www.cnn.com/2017/04/07/politics/scalia-gorsuch-long-strange-trip/index.html> [<https://perma.cc/4FXR-VPKZ>].

³⁴⁸ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (creating a six-Justice Supreme Court).

³⁴⁹ Circuit Judges Act of 1869, ch. 22, § 1, 16 Stat. 44, 44.

with *six* seats, an even number,³⁵⁰ and but for a repudiated effort to reduce the number to five in 1801,³⁵¹ the Court remained at six members until 1807, when Congress added a seventh seat and finally gave the Court an odd number of members.³⁵² When Congress added two more seats in 1837 the size of the Court grew to nine but remained an odd number.³⁵³

The only departure from the nine-member standard after 1837 came during the 1860s and was short-lived. In 1863, Congress added a tenth judicial circuit for California and Oregon and a tenth Supreme Court Justice to go with it.³⁵⁴ The addition once again returned the Court to an even number of seats, but Congress reduced the Court to seven members by attrition in 1866.³⁵⁵ In 1869, after the Court had dropped by attrition to eight members,³⁵⁶ Congress then fixed the Court at nine members, where it has remained.³⁵⁷ President Franklin Roosevelt's infamous Court-packing plan of 1937 would also have allowed the President to increase the membership of the Court by adding up to six new members, a power which he could have exercised, had the scheme been enacted, to give the Court an even number of seats.³⁵⁸

Even though there is very little endorsement of an even number of Justices after 1807, the actions of the First Congress are weighty. Since they chose to create a Court with an even number of Justices, it is extremely difficult to maintain the constitutional invalidity of a Senate moratorium based on a potential for deadlocks because vacancies have reduced the Court to an even number of Justices. Like recess appointments to the Court, having a Court with an even number of Justices may be unwise but not unconstitutional.

3. Other Tangible Impairments

It is certainly possible that the operation of the Court would be impaired by a vacancy-perpetuating moratorium in other tangible ways. Anything short of the full statutory complement of Justices would seemingly increase the workload or reduce the productivity of the Court below the implicit statutory expectation. Such

³⁵⁰ Judiciary Act of 1789 § 1.

³⁵¹ The outgoing Federalists passed a law in 1801 that reduced the Court to five seats by attrition, Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89, but the law was repealed before any vacancy arose, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (effective July 1, 1802).

³⁵² Seventh Circuit Act of 1807, ch. 16, § 5, 2 Stat. 420, 421.

³⁵³ Eighth and Ninth Circuits Act of 1837, ch. 34, § 1, 5 Stat. 176, 176.

³⁵⁴ Tenth Circuit Act of 1863, ch. 100, § 1, 12 Stat. 794, 794.

³⁵⁵ Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209, 209.

³⁵⁶ JOSEPH M. BESSETTE & JOHN J. PITNEY, JR., *AMERICAN GOVERNMENT AND POLITICS: DELIBERATION, DEMOCRACY, AND CITIZENSHIP* 463 (Carolyn Merrill et al. eds., Wadsworth Cengage Learning 2d ed. 2014) (2012).

³⁵⁷ Circuit Judges Act of 1869, ch. 22, § 1, 16 Stat. 44, 44; *see also* BESSETTE & PITNEY, *supra* note 356, at 463.

³⁵⁸ S. REP. NO. 75-711 (1937), *as reprinted in* DOCUMENTS OF AMERICAN HISTORY 562 (Henry Steele Commager ed., Appleton-Century-Crofts, Inc. 4th ed. 1948) (1934).

practical effects are relevant in an impairment analysis.³⁵⁹ Still, the impairment must be substantial, and this one may be hard to quantify.

ii. Intangible Effects

The gravest impairment that a Senate moratorium is likely to inflict on the Court is the intangible impact on its legitimacy. The political branches have a separation of powers duty to avoid impairing the integrity of the Judicial Branch by “undermin[ing] public confidence in [its] disinterestedness”³⁶⁰ The Court has expressed particular alarm at the prospect that the actions of the other branches could give the Court the public appearance of partisanship.³⁶¹

A Senate moratorium on Supreme Court nominations until a new President takes office may often produce this intangible but pernicious effect by creating the public impression that Supreme Court nominees are the mere partisan plants of their ideological champions. Legitimacy, almost by default, is essential for the Judiciary to perform its constitutional function and maintain its co-equal status among the three branches of government. With “no influence over either the sword or the purse,” Alexander Hamilton wrote in *Federalist No. 78*, the federal judiciary has “neither *force* nor *will*, but merely judgment[.]”³⁶² As a consequence, its real power flows from its legitimacy—the public’s “acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”³⁶³ It is a public acquiescence that can be fragile. “[A] product of substance and perception,”³⁶⁴ judicial legitimacy “ultimately depends on [the Court’s] reputation for impartiality and nonpartisanship.”³⁶⁵ Judges must take pains to separate their judgment from politics. To maintain legitimacy, they must render decisions that are genuinely principled and, even more importantly, “perceived as such.”³⁶⁶ While recusal and other methods exist to manage actual bias, “no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy.”³⁶⁷ It is for this reason that conservative Justices have repeatedly warned in substantive due process cases that “[t]he 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.”³⁶⁸ It is also why liberal Justices criticized the majority for

³⁵⁹ See *Mistretta v. United States*, 488 U.S. 361, 406–07 (1989).

³⁶⁰ *Id.* at 407.

³⁶¹ See *id.* at 407–08.

³⁶² THE FEDERALIST NO. 78, *supra* note 224, at 402 (Alexander Hamilton) (emphasis in original); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

³⁶³ *Casey*, 505 U.S. at 865.

³⁶⁴ *Id.*

³⁶⁵ *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

³⁶⁶ *Casey*, 505 U.S. at 866.

³⁶⁷ *Mistretta*, 488 U.S. at 407.

³⁶⁸ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (paraphrasing *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003);

terminating the vote recount in Florida and calling the 2000 election for President Bush.³⁶⁹ Notwithstanding divergent applications of the idea, most acknowledge that the Court undermines its authority if it appears to act as a “naked power organ.”³⁷⁰ At stake is the proposition that the Judicial Branch operates by the “rule of law, not men,”³⁷¹ which is why a Senate moratorium on Supreme Court nominees is so problematic.

In late 2016, when it had become apparent that President Obama’s nomination of Judge Garland would expire without Senate action and that the vacancy created by Justice Scalia’s death would be held open to be filled by Obama’s successor from the opposing party, the *New York Times* ran a staff editorial starkly entitled, “The Stolen Supreme Court Seat.”³⁷² In it, the editorial board reflected the opinion of many people in observing that “[t]he person who gets confirmed [to replace Scalia] will sit in a stolen seat. . . . It was stolen by top Senate Republicans, who . . . refused to consider any nominee Mr. Obama might send them, because they wanted to preserve the court’s conservative majority.”³⁷³ In truth, this assessment of the Senate’s motive—setting aside the editorial board’s condemnation of it—is understood by many conservatives as well. Although many may have recited ideologically neutral talking points about popular mandates, few were naïve enough to believe that those talking points described the actual motive behind the McConnell moratorium.³⁷⁴ Even if incorrect, the widespread public perception was

see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) (citing *Moore*); *City of Chicago v. Morales*, 527 U.S. 41, 106 (1999) (Thomas, J., dissenting) (quoting *Moore*); *Casey*, 505 U.S. at 953 (Rehnquist, C.J., dissenting) (same); *Foucha v. Louisiana*, 504 U.S. 71, 125 (1992) (Thomas, J., dissenting) (quoting *Hardwick*); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (citing *Moore*).

³⁶⁹ *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

³⁷⁰ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

³⁷¹ David E. Anderson, *Reflections on the Supreme Court, Constitutionalism, and the Rhetoric of Law*, 8 ST. LOUIS U. PUB. L. REV. 75, 76 (1989); *see also* John Adams, *Novanglus: or, a History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 3, 106 (Boston, Charles C. Little & James Brown 1851) (1774), http://lf-oll.s3.amazonaws.com/titles/2102/Adams_1431-04_Bk.pdf [<https://perma.cc/JB6D-SENA>].

³⁷² Editorial Board, Editorial, *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> [<https://perma.cc/5ZYY-Y8U3>].

³⁷³ *Id.*

³⁷⁴ *See* Lauren Carroll, *Mitch McConnell Exaggerates ‘Tradition’ of Not Confirming Election Year Supreme Court Nominees*, POLITIFACT (Mar. 22, 2016, 4:47 PM), <http://www.politifact.com/truth-o-meter/statements/2016/mar/22/mitch-mcconnell/mitch-mcconnell-exaggerates-tradition-not-confirmi/> [<https://perma.cc/98WS-NL4R>]; Jay Michaelson, *It’s Not Just Merrick Garland: Republicans Are Blocking So Many Nominees It’s [sic] Caused a Judicial Emergency*, DAILY BEAST (May 16, 2016, 1:00 AM), <https://www.thedailybeast.com/nra-usually-shuts-up-after-mass-shootings-not-this-time?ref=scroll> [<https://perma.cc/7QAD-4WZD>].

that the Senate was running out the clock in hopes of getting a conservative nominee from the next President, instead of a liberal one from the incumbent.³⁷⁵

Mistretta v. United States,³⁷⁶ may be the closest authority for assessing this concern. Against a separation of powers challenge, the Court there upheld the intermixing of federal judges and non-judges as members of the United States Sentencing Commission.³⁷⁷ The challengers argued, among other things, that having federal judges serve alongside non-judges on a policymaking board would impair the integrity of the judiciary by assigning the judges a political role.³⁷⁸ The Court acknowledged some concern about the claim “that the Judiciary’s entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch.”³⁷⁹ The issue was not so much any actual bias of the particular judges, but “the appearance of institutional partiality that may arise from judiciary involvement in the making of policy.”³⁸⁰ The Court recognized that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”³⁸¹ With admitted doubts, the Court rejected the claim that the participation of federal judges in the work of the Commission would “threaten, either in fact or in appearance, the impartiality of the Judicial Branch,”³⁸² but the Court’s rationale in dismissing the concern was limited to the particular context.³⁸³ The work of the Commission lay at “the heart of the judicial function”³⁸⁴—sentencing—so judicial participation brought “judicial experience and expertise”³⁸⁵ to the “essentially neutral endeavor”³⁸⁶ of formulating rules for the exclusive use of federal judges in sentencing. The Commission’s work did not touch on legislative or executive concerns within the purview of the political branches.³⁸⁷ It was not an attempt to co-opt the Judiciary’s reputation for impartiality for an endeavor that was “inherently partisan.”³⁸⁸

In contrast, the perils of a Senate moratorium on Supreme Court nominations until a preferred nominator takes office are stark and difficult to manage. Put simply, parties who lose a case because of a 5-4 decision can readily surmise, or at least strongly suspect or reasonably believe, that the outcome would have been

³⁷⁵ See, e.g., Carroll, *supra* note 374; Philip Rucker & Robert Barnes, *As Obama’s Nominees Languish in GOP Senate, Trump to Inherit More Than 100 Court Vacancies*, CHI. TRIB. (Dec. 25, 2016, 10:34 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-court-vacancies-20161225-story.html> [https://perma.cc/Z2SP-DQU2].

³⁷⁶ 488 U.S. 361 (1989).

³⁷⁷ *Id.* at 384.

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 407.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ See *id.* at 407-08.

³⁸⁴ *Id.* at 408.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 407.

³⁸⁷ See *id.* at 407-08.

³⁸⁸ *Id.* at 408.

different had one or more of those Justices *not* been the product of a lengthy moratorium designed to shift the opportunity for nomination and appointment from a President of one ideological stripe to a President of another.³⁸⁹ If one or more sitting Justices truly are ideological plants in that sense, it may severely impair the legitimacy of the Court and its work. Imagine a decision next year in which a 5–4 majority overruled *Roe v. Wade*³⁹⁰ and de-constitutionalized the right to abortion. Why should any woman or any supporter of abortion rights pretend that the outcome is not directly traceable, as a matter of but-for, foreseeable, and intentional causation, to the McConnell moratorium, which resulted in the substitution of Justice Neil Gorsuch in place of Judge Garland on the Supreme Court? While it is true that the Senate might not have confirmed Garland even in the absence of a moratorium, the Senate's failure to reject the nomination outright makes that possibility forever a subject of counterfactual speculation. The fear that public vetting would compel enough Republican Senators to support confirmation that he would be approved was the very reason why conservative activists demanded the moratorium in the first place. In any event, counterfactual speculation is unlikely to be sufficient to cleanse a widespread perception that the Senate's behavior was designed to pack the Court, including with the specific goal of eliminating abortion rights, and that it succeeded in doing so.

C. Senate Justifications

If a Senate moratorium on Supreme Court nominations does produce a constitutionally sufficient impairment on either the ability of the President or the Supreme Court to function, the moratorium likely will lack an adequate justification to outweigh the impact on the other branch. The simple truth is that the Senate has little real justification for an extended moratorium on vetting and considering Supreme Court nominations, and whatever its interest may be, the Senate has an obvious mitigation option: vetting nominees and voting to reject them.

Some of the Senate's possible rationales might be sufficient to justify a limited moratorium. Simply not having enough time left in a session to undertake an adequate confirmation process is surely a weighty justification for postponing the process to the next session. A desire to avoid the appearance of abuse of power by confirming a nomination made by a President during the ten-week "lame duck" period following an election that produced a new President-Elect also seems a legitimate and significant rationale for suspending nominations and confirmations after an incumbent-repudiating election. A desire to avoid a confirmation process

³⁸⁹ See Geoffrey R. Stone, *Sorry, Neil Gorsuch. The Supreme Court Vacancy Was Already Filled*, TIME (Feb. 1, 2017), <http://time.com/4656196/scotus-neil-gorsuch-geoffrey-stone/> [<https://perma.cc/W4PE-A6JE>].

³⁹⁰ 410 U.S. 113 (1973).

during an election season might justify a moratorium from the summer to the fall of an election year, as then-Senator Joe Biden once proposed.³⁹¹

Other rationales or motives, however, are either insubstantial or altogether illegitimate. The mere inefficiency of having to vet and consider nominees that the Senate may ultimately reject on partisan or ideological grounds is not sufficient. That a practice otherwise violating the separation of powers is efficient has never been a sufficient justification for sustaining the violation.³⁹² In any event, the separation of powers may not require a floor debate and vote of the full Senate. Vetting a nominee and rejecting the nomination in committee might be an acceptable accommodation of the conflicting interests of the President and the Senate. On the other hand, the mere desire to preserve a vacancy in hopes of winning an impending election may have some historical precedent—which may be enough to save it from invalidity³⁹³—but might not even qualify as constitutionally legitimate. Certainly, it is difficult to defend the proposition that a Constitution which takes no partisan or ideological sides contemplates ideological court-packing as sufficient justification for seriously impairing the functioning of either the Court or the President.

It may even be the case that the Senate itself is severely constrained in trying to justify a moratorium of more than a nominal length. In performing its advice and consent function, the Senate may be under the same constitutional duty as the President to “take Care that the Laws be faithfully executed.”³⁹⁴ The Senate has an “interest” in seeing that the President faithfully executes the laws that it helped to enact,³⁹⁵ but does it also sometimes share that “most important constitutional duty”³⁹⁶ of the Chief Executive? Although Article II expressly imposes that duty only on the President,³⁹⁷ the duty may extend implicitly to the Senate insofar as Article II gives the Senate a role in the exercise of an executive power.³⁹⁸

The extension of a constitutional duty from its explicit subject to an unnamed counterpart is hardly unprecedented.³⁹⁹ By rough analogy, constitutional duties that

³⁹¹ Clark, *supra* note 33, at 750–54.

³⁹² See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

³⁹³ See *infra* Part IV.

³⁹⁴ U.S. CONST. art. II, § 3.

³⁹⁵ See David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 715 (2008).

³⁹⁶ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

³⁹⁷ *Id.*; see also U.S. CONST. art. II, § 3.

³⁹⁸ Cf. TODD GARVEY, CONG. RESEARCH SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 3–5 (Sept. 4, 2014), <https://fas.org/sgp/crs/misc/R43708.pdf> [<https://perma.cc/LFM4-L2UL>]; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 n.21 (1994) (“[T]he Take Care Clause empower[s] the President to exercise control over subordinates, at least so far as those subordinates exercise ‘purely executive power.’”); *id.* at 10 (suggesting that those exercising executive power’s would be subject to the President’s duty “that the Laws be faithfully executed”); see also Jack M. Beeraman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 499–505 (2011) (detailing the overlap of powers between branches and arguing for power sharing).

³⁹⁹ See, e.g., Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347 (2013).

are explicitly imposed only on the government, for example, sometimes extend to private actors by way of exceptions to the state action doctrine. When private actors perform public functions⁴⁰⁰ or their conduct is entangled⁴⁰¹ or entwined⁴⁰² with state action, the constitutional duties of government attach to the private actors.⁴⁰³ The situations are exceptional, but the principle exists.

Akin to the circumstance of a private actor performing a public function, the Senate, a non-executive actor, performs an executive function when it participates in the appointment process.⁴⁰⁴ The Framers understood the Senate's role to be an exercise of executive power.⁴⁰⁵ Indeed, the function is prescribed in Article II, which vests executive power.⁴⁰⁶ Since the First Congress, the Senate itself has segregated its "executive" sessions, functions, and journal from its legislative proceedings.⁴⁰⁷ When constitutionally charged with participating in an executive action, the Senate should also be deemed constitutionally bound by the duty that governs executive action: taking care that the laws be faithfully executed.⁴⁰⁸

Similarly akin to the entanglement of private conduct with state action, the Senate's participation in the appointment process blends its conduct with presidential action.⁴⁰⁹ The advice and consent function does not appear as a freestanding power. It vests literally by way of an adverbial adjunct to the grant of

⁴⁰⁰ See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁴⁰¹ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944).

⁴⁰² See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–97 (2001).

⁴⁰³ See, e.g., *Shelley*, 334 U.S. at 8, 14–18.

⁴⁰⁴ Cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that participation in the process of removing federal officials constitutes participation in the execution of the laws); *id.* ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.")

⁴⁰⁵ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66–67 (Max Farrand ed., Yale Univ. Press 1911) (June 1, 1787) (noting the observation of James Madison that the grant of executive power alone might be sufficient to vest the appointment power but that the separate specification of the appointment power "might serve to prevent doubts and misconstructions"); 2 *id.* at 537 (Sept. 7, 1787) (noting George Mason's proposal to transfer most of the confirmation function from the Senate to a privy council in the executive branch to exclude the legislative branch from an executive power, while retaining Senate ratification of treaties on the theory that making treaties was sufficiently legislative to justify involving the legislative branch).

⁴⁰⁶ U.S. CONST. art. II, § 1.

⁴⁰⁷ See *The Senate in Executive Session*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ExecutiveSessions.htm [<https://perma.cc/8T2W-RKZG>] (last visited Feb. 22, 2018).

⁴⁰⁸ See generally *Morrison v. Olson*, 487 U.S. 654 (1988) (defining executive functions); see also *supra* note 398 and accompanying text.

⁴⁰⁹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., Yale Univ. Press 1911) (June 5, 1787) (statement by James Wilson) (opposing the Senate's role in the appointment of Supreme Court Justices); James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 351 (1989).

the appointment power to the President, who, “*by and with the Advice and Consent of the Senate, shall appoint . . .*”⁴¹⁰ Appointment is a power to be exercised by the President *with* the Senate.⁴¹¹ It may be understood as one power vested in two actors, each having a distinct role. Its exercise requires the concurrence of both actors, no less than if the Framers had opted for a plural executive, which is, in effect, what they did in this instance. When, thus, constitutionally charged to partake in the President’s exercise of the appointment power, the Senate should be deemed constitutionally subjected to the same duty that constrains the President’s exercise of it.

To be clear, this duty is the constitutional duty to “take Care that the laws be faithfully executed[.]”⁴¹² It is not a duty to *confirm* the President’s nominations. Whether that sort of duty exists is a separate question.⁴¹³ Rather, it is a duty to perform its function in such a way as to assure that the laws are faithfully executed. In other words, it is a duty to take care that the Senate’s own participation in the appointment process not impair the faithful execution of the laws. It is hard to imagine a clearer breach of a duty than a proclamation that one is boycotting the duty.

Without an extension of the duty, the Constitution would empower the Senate to both frustrate the President’s ability to take care that the laws be faithfully executed and undermine the execution of the laws themselves. In the ordinary case, the President can assure the faithful execution of the laws by supervising and controlling federal officers who exercise purely executive power.⁴¹⁴ Lacking such command over the Senate, the President could no longer assure the faithful execution of laws that call for the filling of federal positions. His lack of control over the Senate would presumably preclude a finding that he had breached his duty whenever Senate conduct was to blame for vacancies that interfered with the faithful execution of the laws. But such Senate conduct would, nevertheless, frustrate the constitutional policy of assuring that the laws be faithfully executed if the Senate itself were not also bound by the same duty insofar as it is charged with performing an essential function in the appointment process.

As with encroachment arguments, the contention that a Senate moratorium impermissibly impairs the ability of the President and the Supreme Court to perform their constitutional functions provides significant support for the proposition that a Senate moratorium on Supreme Court nominations is a *prima facie* violation of the separation of powers. As with the encroachment theories,

⁴¹⁰ U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

⁴¹¹ *Cf.* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring) (citing *Myers v. United States*, 272 U.S. 52, 117 (1926)) (“[T]he President . . . may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates.”). The Senate, of course, is not the President’s subordinate. *See* U.S. CONST. art. I, § 1.

⁴¹² U.S. CONST. art. II, § 3.

⁴¹³ Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1205–08 (1988) (reassessing and retracting the view that the Senate has a duty to confirm).

⁴¹⁴ *Morrison v. Olson*, 487 U.S. 654, 695–96 (1988).

however, the key determination of its constitutionality may be whether it is saved from invalidity by a historical tradition that legitimizes it.⁴¹⁵

IV. TRADITION

There are quite viable arguments that a Senate moratorium on Supreme Court nominations impermissibly encroaches on the President's nomination power or unduly impairs the ability of the President or the Supreme Court to perform their constitutional functions. If any one of those several theories is a correct application of the respective principles in a given situation, then a particular Senate moratorium would constitute a *prima facie* violation of the separation of powers. In this area of law, however, the historical practice of the branches receives considerable weight as a factor.⁴¹⁶ In effect, past practice may either confirm the application of the encroachment or impairment principle or undermine a conclusion reached by applying either of them in the abstract. Historical practice may provide a safe harbor for a practice, such as a Senate moratorium, that might otherwise be deemed an unconstitutional encroachment or impairment.

A look at the history of unsuccessful Supreme Court nominations, however, reveals no validating tradition of Senate moratoriums on nominations. Until the McConnell moratorium in the face of the Scalia vacancy in 2016, there is, literally, no past instance of a Senate imposing a moratorium on Supreme Court nominations and responding to unwelcome presidential nominations with calculated disengagement and determined inaction. Although there are cases of postponements for political or electoral reasons, none extends back to a point more than a few months before a presidential election. None of this history rises to the level of a consistent tradition of at least two decades in duration, which could justify the practice of imposing a Senate moratorium on Supreme Court nominations for many months or years until a new President takes office.⁴¹⁷ Nor is this a situation where there simply was no opportunity for such a tradition to develop.⁴¹⁸ There was ample opportunity. The Senate simply has not behaved in such a way until now, as a survey of previous unsuccessful nominations shows.

Since George Washington submitted the first Supreme Court nominations in 1789, the Senate has received 162 of them.⁴¹⁹ The vast majority were either

⁴¹⁵ See *infra* Part IV.

⁴¹⁶ NLRB v. Noel Canning, 134 S. Ct. 2550, 2559–60 (2014) (collecting cases).

⁴¹⁷ Cf. Pocket Veto Case, 279 U.S. 655, 690 (1929) (“[A] practice of at least twenty years duration ‘on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.’” (quoting *State ex rel. Norwalk v. South Norwalk*, 58 A. 759, 761 (Conn. 1904))).

⁴¹⁸ Cf. *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (noting the dearth of relevant historical instances of anyone even trying to sue a sitting President for unofficial conduct occurring before he took office).

⁴¹⁹ RUTKUS & BEARDEN, *supra* note 248, at 10 (identifying 160 nominations through 2012). Since 2012, there have been two additional nominations: Merrick Garland, whose nomination received no Senate action, and Neil Gorsuch, whom the Senate confirmed in 2017. *Supreme Court Nominations:*

confirmed or rejected in confirmation votes,⁴²⁰ and, thus, provide no indication of any tradition of ignoring Supreme Court nominations. Of the remaining twenty-six nominations, the President ultimately withdrew eleven for various reasons,⁴²¹ and fifteen, including the Garland nomination, expired without a direct confirmation vote.⁴²² Any tradition of ignoring Supreme Court nominations would have to appear somewhere among these twenty-six instances.⁴²³

During the first half-century of the Senate's existence, disposing of a presidential nomination required an affirmative act by the Senate. Its standing rules

Present-1789,

U.S.

SENATE,

<https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/33Q8-7P8Y>] (last visited Feb. 22, 2018). Although the U.S. Senate website contains the most recent data on Supreme Court nominations, in the subsequent discussion of historical Supreme Court nominations, the author will rely primarily on the 2012 RUTKUS & BEARDEN legislative report as it contains more descriptive and specific categorizations of Supreme Court nominees than the Senate website.

⁴²⁰ RUTKUS & BEARDEN, *supra* note 248, at 10. Based on current numbers, out of the 162 nominations, 125 have been confirmed and eleven have been rejected by the Senate, for a total of 136 nominees, or approximately eighty-four percent. *See id.*

⁴²¹ *Id.* at 10 & n. 35.

⁴²² *See id.* at 10–11, 11 n.36.

⁴²³ In chronological order, these twenty-six nominations were:

- (1) Washington's nomination of William Paterson in 1793 (withdrawn),
- (2) J.Q. Adams's nomination of John J. Crittenden in 1829,
- (3) Jackson's nomination of Roger B. Taney in 1835,
- (4) Tyler's first nomination of Reuben H. Walworth in 1844 (withdrawn),
- (5) Tyler's first nomination of Edward King in 1844,
- (6) Tyler's second nomination of John C. Spencer in 1844 (withdrawn),
- (7) Tyler's second nomination of Reuben H. Walworth in 1844,
- (8) Tyler's third nomination of Reuben H. Walworth in 1844 (withdrawn),
- (9) Tyler's second nomination of Edward King in 1844 (withdrawn),
- (10) Tyler's nomination of John M. Read in 1845,
- (11) Fillmore's nomination of Edward A. Bradford in 1852,
- (12) Fillmore's nomination of George E. Badger in 1853,
- (13) Fillmore's nomination of William C. Micou in 1853,
- (14) Buchanan's nomination of Jeremiah S. Black in 1861,
- (15) A. Johnson's nomination of Henry Stanbery in 1866,
- (16) Grant's nomination of George H. Williams in 1874 (withdrawn),
- (17) Grant's nomination of Caleb Cushing in 1874 (withdrawn),
- (18) Hayes's nomination of Stanley Matthews in 1881,
- (19) Cleveland's nomination of William B. Hornblower in 1893,
- (20) Harding's nomination of Pierce Butler in 1922,
- (21) Eisenhower's nomination of John M. Harlan, II in 1954,
- (22) L. Johnson's nomination of Abe Fortas in 1968 (withdrawn),
- (23) L. Johnson's nomination of Homer Thornberry in 1968 (withdrawn),
- (24) G.W. Bush's nomination of John G. Roberts, Jr. in 2005 (withdrawn),
- (25) G.W. Bush's nomination of Harrier E. Miers in 2005 (withdrawn), and
- (26) Obama's nomination of Merrick B. Garland in 2016.

Id. at 10–11 nn.35–36; Barack Obama, U.S. President, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme> [<https://perma.cc/EY44-KM7K>]; *see also About the Court: Justices 1789 to Present*, *supra* note 17; *Timeline Guide to the U.S. Presidents*, *supra* note 197.

made no provision for the expiration of presidential nominations.⁴²⁴ In the four instances during this period when the Senate objected to a Supreme Court nominee, it necessarily terminated each nomination by an affirmative act.⁴²⁵ In two of those instances it rejected the nominee, and in the other two it effectively rejected the nominee by voting to postpone consideration of the nomination indefinitely.⁴²⁶ In each of these instances, the Senate made the decision by a recorded vote on the Senate floor.⁴²⁷ In no instance during this first half-century did the Senate ever simply ignore a Supreme Court nomination.⁴²⁸ Unless the President himself withdrew a nomination, the Senate voted to confirm, reject, or postpone each Supreme Court nomination made by a President during this period.⁴²⁹ It was not until the difficult presidency of John Tyler that the Senate amended its standing rules to provide for the automatic expiration of presidential nominations at the end of each session of the Senate.⁴³⁰

In the span of history since 1789, the Senate has disposed of unwelcome Supreme Court nominations in several ways other than a direct up or down vote to reject.⁴³¹ Some of the instances can be dismissed as involving idiosyncratic trifles. In the other instances, Presidents have withdrawn nominations for political reasons unrelated to any Senate moratorium. In others, the Senate has effectively rejected nominations by a procedural vote that was essentially a proxy for a confirmation vote or has at least given nominations a meaningful committee vetting. In a few instances, the Senate took no action on a nomination and allowed it to expire, but the facts of those instances do not support the recognition of a sustained tradition of imposing a Senate moratorium on Supreme Court nominations.

⁴²⁴ See *infra* note 430; see also Clark, *supra* note 33, at 756 n.93. In one extraordinary instance, Andrew Jackson submitted a Supreme Court nomination to the Senate of the outgoing 24th Congress on the last full day of his term as President and its existence as a Congress. Dan McLaughlin, *The Garland Precedent Should Not Stop Gorsuch*, Nat'l Rev. (Mar. 20, 2017, 4:20 PM), <https://www.nationalreview.com/2017/03/neil-gorsuch-supreme-court-nominee-rejections-politics-has-lot-do-it/> [<https://perma.cc/EM3G-AHZ8>]. The Senate of the incoming 25th Congress then confirmed the nomination a few days later, and Martin Van Buren, the new President, appointed the confirmed nominee to the Supreme Court. *Id.*; see also RUTKUS & BEARDEN, *supra* note 248, at 21–22.

⁴²⁵ See RUTKUS & BEARDEN, *supra* note 248, at 18–22.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See *id.* (showing the breakdown of rejection or postponement votes).

⁴²⁹ See *id.*

⁴³⁰ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 171–72 (Washington, Gov't Printing Office, 1887) (Feb. 18, 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, and that such shall hereafter be the rule of the Senate.”).

⁴³¹ See RUTKUS & BEARDEN, *supra* note 248, at 18–40.

A. Irrelevant Instances

Three of the withdrawals⁴³² can be easily dismissed as irrelevant. In 1793, George Washington withdrew his first nomination of William Paterson upon realizing that a few days remained before his Senate term expired.⁴³³ Although Paterson had resigned from the Senate two years earlier to become governor of New Jersey,⁴³⁴ the Constitution bars a senator from appointment to any federal office that was created “during the Time for which he was elected[.]”⁴³⁵ Once the Senate term expired, Washington renominated him, and he was confirmed.⁴³⁶ Similarly, irrelevant was Lyndon Johnson’s withdrawal of the nomination of Homer Thornberry in 1968.⁴³⁷ Because he had been nominated for a vacancy that would exist only if Justice Fortas were elevated to Chief Justice, the withdrawal of the Fortas nomination eliminated the potential vacancy for which Thornberry was nominated.⁴³⁸ The last of these instances was George W. Bush’s 2006 withdrawal of his nomination of John Roberts to replace Justice O’Connor.⁴³⁹ Bush withdrew the nomination when Chief Justice Rehnquist died and renominated Roberts to replace Rehnquist instead of O’Connor.⁴⁴⁰ In none of these three instances did the withdrawal reflect some sort of capitulation to Senate stonewalling as to that nomination.

B. Rejection Res Judicata

Two last-ditch renominations by John Tyler may also be set aside as irrelevant.⁴⁴¹ On June 17, 1844, the final day of the Senate’s session, Tyler renominated two candidates whom the Senate had already rejected. In a flurry of activity, he renominated John Spencer, withdrew that nomination, and then renominated Reuben Walworth.⁴⁴² The Senate barely had time to act on either renomination. Tyler withdrew the Spencer renomination before the Senate could even act on it, and when it received the Walworth renomination just before adjournment, it refused to take it up.⁴⁴³ The Senate had rejected a previous

⁴³² These nominations are numbers (1), (23), and (24) on the chronological list. *See supra* note 423.

⁴³³ DENIS STEVENS RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 4 n.16 (2009).

⁴³⁴ *About Us: Who Was William Patterson*, WILLIAM PATTERSON U., https://www.wpunj.edu/university/history/WilliamPatterson_Bio.html [https://perma.cc/4QML-AD4M] (last visited Feb. 24, 2018).

⁴³⁵ U.S. CONST. art. I, § 6, cl. 2.

⁴³⁶ RUTKUS, *supra* note 433, at 4 n.16.

⁴³⁷ *Id.* at 47.

⁴³⁸ RUTKUS & BEARDEN, *supra* note 248, at 10 n.31.

⁴³⁹ RUTKUS, *supra* note 433, at 5 n.16.

⁴⁴⁰ *Id.*

⁴⁴¹ These nominations are numbers (6) and (7) on the chronological list. *See supra* note 423.

⁴⁴² RUTKUS & BEARDEN, *supra* note 248, at 22–23 (evidencing the tabling of Reuben Walworth and the rejection of John Spencer and their subsequent renominations).

⁴⁴³ *Id.* at 23.

nomination of Spencer several months earlier and had effectively killed a previous nomination of Walworth a mere two days earlier in a procedural vote.⁴⁴⁴ The Senate entertained a motion to proceed on Walworth's last-minute renomination but, hearing an objection, adjourned without re-voting on him.⁴⁴⁵ At most, this incident stands for the proposition that the Senate need not indulge a last-ditch, adjournment-day attempt by the President to have it reconsider a floor vote in which it had already effectively rejected the very same nomination two days earlier in the same session. There is no need to regard the Senate's refusal to act in this instance as anything more than a kind of confirmation *res judicata*.

C. Substantive Withdrawals

Three of the withdrawals⁴⁴⁶ can also be dismissed as attributable to the usual reason that Presidents withdraw nominations: recognition that the nominee has become so politically controversial that successful confirmation is doubtful.⁴⁴⁷ Consistent with this pattern were Ulysses Grant's 1874 withdrawal of two nominations—those of George Williams and Caleb Cushing.⁴⁴⁸ Similar too was George W. Bush's 2006 withdrawal of Harriet Miers' nomination to replace Justice O'Connor.⁴⁴⁹ None of these withdrawals involved the Senate outright ignoring the nominations. The Grant nominees were reported favorably out of committee.⁴⁵⁰ In the case of Miers, active committee deliberations were underway when the nomination was withdrawn.⁴⁵¹ The timing of these nominations and withdrawals is also inconsistent with a notion that the Senate was ignoring them in an effort to hold a vacancy open for the next President. Grant and Bush were both still in the first year of their second terms as President at the time,⁴⁵² and the Senate subsequently confirmed Supreme Court nominations made by both of them.⁴⁵³

⁴⁴⁴ *Id.* at 22–23.

⁴⁴⁵ *Id.* at 23.

⁴⁴⁶ These nominations are numbers (16), (17), and (25) on the chronological list. *See supra* note 423.

⁴⁴⁷ *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RL31171, SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789–AUGUST 2010, at 6 (2010) (listing the common reasons for unsuccessful Supreme Court nominations).

⁴⁴⁸ ABRAHAM, *supra* note 307, at 104.

⁴⁴⁹ HOGUE, *supra* note 447, at 12–13.

⁴⁵⁰ RUTKUS & BEARDEN, *supra* note 248, at 26.

⁴⁵¹ *See id.* at 39; Tom Curry, *Document Dispute Snags Miers Nomination*, NBC, [http://www.nbcnews.com/id/9773241/ns/us_news-the_changing_court/t/document-dispute-snags-miers-nomination/#.WghIexNSzUo%20\(last%20updated%20Oct.%202024,%202005,%207:46%20PM\)](http://www.nbcnews.com/id/9773241/ns/us_news-the_changing_court/t/document-dispute-snags-miers-nomination/#.WghIexNSzUo%20(last%20updated%20Oct.%202024,%202005,%207:46%20PM)) [<https://perma.cc/RYD2-RJ9D>] (last updated Oct. 24, 2005, 7:46 PM).

⁴⁵² *See Timeline Guide to the U.S. Presidents*, *supra* note 197.

⁴⁵³ *See Supreme Court Nominations: Present–1789*, *supra* note 419.

D. Procedural Rejections

Ten of the twenty-six nominations can be classified as effective rejections of the particular nominee on the merits.⁴⁵⁴ Some were later withdrawn while others languished until expiring at the end of the session, but they all reached the floor of the Senate, where further progress toward confirmation ended in a failed procedural vote that signaled the Senate's unwillingness to confirm the nominee. Eight of these nominations were either "postponed" or "tabled," usually with a recorded vote at some point: John Quincy Adams's nomination of John J. Crittenden in 1829,⁴⁵⁵ Andrew Jackson's nomination of Roger B. Taney as Associate Justice in 1835,⁴⁵⁶ John Tyler's first⁴⁵⁷ and third⁴⁵⁸ nominations of Reuben H. Walworth and his first⁴⁵⁹ and second⁴⁶⁰ nominations of Edward King in 1844, and Millard Fillmore's nominations of Edward A. Bradford in 1852⁴⁶¹ and of George E. Badger in 1853.⁴⁶² To similar effect were procedural floor votes in two other instances. In a recorded vote, the Senate refused to proceed to consider James Buchanan's nomination of Jeremiah S. Black in 1861,⁴⁶³ and also in a recorded vote, the Senate rejected a cloture motion seeking to cut off the filibuster of Lyndon Johnson's 1968 nomination of Abe Fortas to be Chief Justice.⁴⁶⁴ In none of

⁴⁵⁴ These nominations are numbers (2) through (5), (8), (9), (11), (12), (14), and (22) on the chronological list. *See supra* note 464.

⁴⁵⁵ 3 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 644 (Washington, Duff Green 1828); RUTKUS & BEARDEN, *supra* note 248, at 21.

⁴⁵⁶ 4 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 484 (Washington, Gov't Printing Office 1887) (Mar. 3, 1835); RUTKUS & BEARDEN, *supra* note 248, at 22.

⁴⁵⁷ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 344-45 (Washington, Gov't Printing Office 1887) (June 15, 1844) (tabling the nomination of Reuben Walworth in a 27-20 vote); RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁵⁸ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 387 (Washington, Gov't Printing Office 1887) (Jan. 21, 1845) (tabling Walworth's nomination by a voice vote); RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁵⁹ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 345 (Washington, Gov't Printing Office 1887) (June 15, 1844) (tabling Edward King's nomination in a 29-18 vote); RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁶⁰ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 387 (Washington, Gov't Printing Office 1887) (Jan. 21, 1845) (tabling King's second nomination in a voice vote); RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁶¹ 8 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 452 (Washington, Gov't Printing Office 1887) (Aug. 31, 1852) (tabling Bradford's nomination in a voice vote); RUTKUS & BEARDEN, *supra* note 248, at 24.

⁴⁶² 9 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 27-28 (Washington, Gov't Printing Office 1887) (Feb. 11, 1853) (postponing consideration of Badger's nomination in a vote of 26-25); RUTKUS & BEARDEN, *supra* note 248, at 24.

⁴⁶³ 11 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 278 (Washington, Gov't Printing Office 1887) (Feb. 21, 1861) (refusing to proceed in a vote of 25-26); RUTKUS & BEARDEN, *supra* note 248, at 25.

⁴⁶⁴ 114 CONG. REC. 28,933 (1968); RUTKUS & BEARDEN, *supra* note 248, at 35; *see* Fred P. Graham, *Senate Bars Move to End Filibuster by Fortas Critics*, N.Y. TIMES, Oct. 2, 1968, at 1.

these instances did the Senate merely treat the nomination as if it did not exist. All received some form of disapproving floor action in the Senate.

E. Committee Action

At least four of the twenty-six nominations received at least committee action instead of being outright ignored.⁴⁶⁵ While not as weighty as floor action, committee vetting of a nomination is inconsistent with the idea of a Senate moratorium on taking any action on any Supreme Court nomination made by an incumbent President.

i. Matthews

The first of these nominations met a fate similar to those rejected in a procedural vote, albeit in committee rather than on the Senate floor. In 1881, the Judiciary Committee considered and then voted to postpone Rutherford Hayes' nomination of Stanley Matthews,⁴⁶⁶ who was renominated a month later by James Garfield and confirmed.⁴⁶⁷ The committee postponement was driven by substantive objections. Because of the nominee's past association with "financial and railroad interests," Senators "exploded in anger" at his nomination, and the Judiciary Committee "flatly refus[ed] to report the nomination out for floor action."⁴⁶⁸ A committee vote against a nomination because of objections to the nominee on the merits constitutes Senate action on a nomination, not total disregard of a nomination without regard to its merits. Whether the separation of powers might require the Judiciary Committee to report an objectionable Supreme Court nomination to the Senate floor without a recommendation instead of disposing of it in committee may be an interesting question,⁴⁶⁹ but it is a significantly different question from whether the Senate and its Judiciary Committee may constitutionally decline even to consider the merits of a Supreme Court nomination and ignore it as though it were never made. Matthews also was nominated during

⁴⁶⁵ These nominations are numbers (10) and (18) through (20) on the chronological list. *See supra* note 423.

⁴⁶⁶ RUTKUS & BEARDEN, *supra* note 248, at 27.

⁴⁶⁷ *See id.*

⁴⁶⁸ ABRAHAM, *supra* note 307, at 109.

⁴⁶⁹ *Cf. Nixon v. United States*, 506 U.S. 224 (1993) (considering whether the Senate may constitutionally delegate impeachment trials to a committee); *see* RUTKUS & BEARDEN, *supra* note 248, at 21, 25, 28–29, 32, 38 (noting that the nominations of John J. Crittenden, Ebenezer R. Hoar, Lucius Q.C. Lamar, William B. Hornblower, John J. Parker, and Robert Bork were reported out of committee unfavorably and that the nominations of Melville W. Fuller, George Shiras, Wheeler Peckham, and Clarence Thomas were reported out of committee without a recommendation). In fact, when Stanley Matthews was renominated by James Garfield, his nomination was reported out of the Judiciary Committee unfavorably, but he was confirmed by the full Senate. RUTKUS & BEARDEN, *supra* note 248, at 27.

the lame duck period and, in fact, just a few weeks before the end of the existing presidency and Congress.⁴⁷⁰

ii. Read

Another nomination that expired without confirmation despite receiving Senate action was John Tyler's nomination of prominent Philadelphia lawyer John M. Read on February 8, 1845.⁴⁷¹ The nomination was referred to the Judiciary Committee the day it was received⁴⁷² and was reported out of committee less than a week later.⁴⁷³ Nevertheless, the Senate adjourned without acting on it.⁴⁷⁴

The reason seems to have been a simple lack of time, not any suspension of Supreme Court confirmations until a new President took office. Although it is true that Tyler's presidential term was ending and that he was being succeeded by Democrat James K. Polk,⁴⁷⁵ Read was also a Democrat at the time.⁴⁷⁶ On the very day that his nomination was reported out of committee, the Senate voted to confirm Justice Samuel Nelson, another late-term Democratic nomination by Tyler.⁴⁷⁷ It was far from inconceivable that Read might still be confirmed. The rush of business at the end of the Senate session, however, seems to have doomed the nomination. After it was reported out of committee, the Senate only had two additional executive sessions⁴⁷⁸ before the constitutionally mandated end of the session on March 4, 1845.⁴⁷⁹ At the end of the second of these executive sessions, Democrat James Buchanan even moved to have the Senate take up the nomination of his fellow Pennsylvanian,⁴⁸⁰ but the Senate opted, to recess at 3 p.m. to take a

⁴⁷⁰ RUTKUS & BEARDEN, *supra* note 248, at 10 n. 32, 27.

⁴⁷¹ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 392 (Washington, Gov't Printing Office 1887) (1845); RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁷² 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 392 (Washington, Gov't Printing Office 1887) (Feb. 8, 1845).

⁴⁷³ *Id.* at 396 (Feb. 14, 1845); *see also* RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁷⁴ RUTKUS & BEARDEN, *supra* note 248, at 23.

⁴⁷⁵ *See Timeline Guide to the U.S. Presidents*, *supra* note 197.

⁴⁷⁶ 1 A.K. MCCLURE, OLD TIME NOTES OF PENNSYLVANIA 343–44 (Library ed., John C. Winston Co. 1905). Although Read was a Democrat at the time of his nomination, he later became a member of the Republican party. *See id.* at 265, 285, 344 (noting that in 1856 Read announced his support for Republican presidential candidate, John C. Fremont).

⁴⁷⁷ RUTKUS & BEARDEN, *supra* note 248, at 23; *see also* 1 OTIS H. STEPHENS, JR. ET AL., AMERICAN CONSTITUTIONAL LAW, at app. C, C-1 (6th ed. Cengage Learning 2015) (2008) (showing Supreme Court Justices and their political parties).

⁴⁷⁸ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 396–97 (Washington, Gov't Printing Office 1887) (Feb. 17, 1845); *id.* at 397–410 (Feb. 26, 1845).

⁴⁷⁹ *See* U.S. CONST. amend. XII, *amended by* U.S. CONST. amend. XX, § 3; NCC Staff, *March 4: A Forgotten Huge Day in American History*, NAT'L CONST. CTR. (Mar. 4, 2013), <https://constitutioncenter.org/blog/march-4-a-forgotten-huge-day-in-american-politics> [<https://perma.cc/25UC-E64P>].

⁴⁸⁰ 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 410 (Washington, Gov't Printing Office 1887) (Feb. 26, 1845).

break before the start of an evening legislative session that lasted from 5 p.m. to 10 p.m.⁴⁸¹ There seems never to have been time for the Senate to return to that or any other pending nomination. The Senate's sessions ran into the evening on each remaining day of the session,⁴⁸² culminating in a final adjournment at 2:30 a.m. on March 4.⁴⁸³ Had Tyler nominated Read earlier in the lame-duck session, the nomination might have been confirmed. In any event, it was even reported out of committee and made the subject of a motion to proceed on the Senate floor. It was not ignored.

iii. Butler

A third example of these nominations was Warren Harding's first nomination of Pierce Butler on November 22, 1922.⁴⁸⁴ The nomination was referred to the Judiciary Committee⁴⁸⁵ and reported favorably on November 28.⁴⁸⁶ There was no further action.⁴⁸⁷ After that day of reporting, there was one more executive session for confirmations,⁴⁸⁸ but Butler, a Minnesotan, was not confirmed then.⁴⁸⁹ The *New York Times* reported, "In the executive session both of the Minnesota Senators, Nelson and Kellogg, pleaded for confirmation. All of the spoken opposition is understood to come from the Republican side."⁴⁹⁰ But the Judiciary Committee had received letters and memorials sharply critical of Butler for his background as a corporate lawyer representing railroads.⁴⁹¹ In light of the

⁴⁸¹ CONG. GLOBE, 28th Cong., 2d Sess. 351, 353 (Feb. 26, 1845); *see also* 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 410 (Washington, Gov't Printing Office 1887) (Feb. 26, 1845).

⁴⁸² The evening session on February 27 lasted from 6 p.m. to 9 p.m. CONG. GLOBE, 28th Cong., 2d Sess. 359, 363 (1845). On February 28, the Senate did not take an afternoon recess but worked straight through until 7 p.m. *Id.* at 365–69. On March 1, the Senate adjourned at midnight, after an 11-hour session. *Id.* at 375–83. After recessing for Sunday, March 2, the Senate's evening session on March 3—the final full day of the 28th Congress—lasted from 5:00 p.m. to 2:30 a.m. on the morning of March 4. *Id.* at 390–93.

⁴⁸³ *Id.* at 393.

⁴⁸⁴ S. EXEC. JOURNAL, 67th Cong., 3d Sess. 29 (1922); RUTKUS & BEARDEN, *supra* note 248, at 31.

⁴⁸⁵ S. EXEC. JOURNAL, 67th Cong., 3d Sess. 29 (1922).

⁴⁸⁶ S. EXEC. JOURNAL, 67th Cong., 3d Sess. 63 (1922); RUTKUS & BEARDEN, *supra* note 248, at 31.

⁴⁸⁷ RUTKUS & BEARDEN, *supra* note 248, at 31.

⁴⁸⁸ S. EXEC. JOURNAL, 67th Cong., 3d Sess. 64–101 (Dec. 4, 1922); 63 CONG. REC. 450–72 (Dec. 4, 1922).

⁴⁸⁹ S. EXEC. JOURNAL, 67th Cong., 3d Sess. 333 (Dec. 4, 1922) (listing unconfirmed nominations).

⁴⁹⁰ *Senate Sends Back Butler Nomination: Fails to Confirm President's Choice for Justice of the Supreme Court*, N.Y. TIMES, Dec. 5, 1922, at 1.

⁴⁹¹ *Attack Pierce Butler as Railroad Lawyer: Socialists of Minneapolis Council Force Through Resolution Assailing Appointee*, N.Y. TIMES, Nov. 25, 1922, at 10; *Objections Delay Action on Butler: Senate Judiciary Committee Gets Complaints About Nominee to the Supreme Bench*, N.Y. TIMES, Nov. 28, 1922, at 20 (illustrating the complaints the Judiciary Committee received); *Senate Sends Back Butler Nomination: Fails to Confirm President's Choice for Justice of the Supreme Court*, *supra* note 490, at 1.

substantive complaints, the Committee opted to postpone consideration of the nomination.⁴⁹² The problem was that the President had tried to get Butler's nomination confirmed during a two-week extra session of the Senate that Harding had convened for completely unrelated reasons.⁴⁹³ The Committee delay doomed the effort to confirm Butler during this brief session, but he was overwhelmingly confirmed a few weeks later in the next session.⁴⁹⁴

iv. Hornblower

Grover Cleveland's nomination of New York corporate lawyer William B. Hornblower on September 19, 1893,⁴⁹⁵ also fit the pattern. The nomination was referred to the Judiciary Committee, where it was considered without a hearing on September 25 and October 25 and 30.⁴⁹⁶ It was not reported out of committee.⁴⁹⁷ The obstacle was not a Senate moratorium on Supreme Court nominations, but a feud with powerful New York Senator, David B. Hill, over Cleveland's choice to nominate a conservative corporate lawyer and personal loyalist.⁴⁹⁸ Hill used senatorial courtesy to have the Senate ultimately reject the nominee following a subsequent renomination.⁴⁹⁹ Cleveland renominated Hornblower on December 6.⁵⁰⁰ Again, the nomination was referred to the Judiciary Committee, where it was considered again without a hearing on December 11, 14, and 18.⁵⁰¹ It was reported out of committee unfavorably on January 8, 1894, and then actually rejected a week later.⁵⁰²

⁴⁹² *Objections Delay Action on Butler: Senate Judiciary Committee Gets Complaints About Nominee to the Supreme Bench*, *supra* note 491, at 20.

⁴⁹³ 63 CONG. REC. 3 (Nov. 20, 1922). The reason for the extra session was to enact legislation to privatize and subsidize the government-owned fleet of shipping vessels left over from a World War I build up. *Id.* at 9–11 (Nov. 21, 1922); JOHN D. HICKS, *REPUBLICAN ASCENDANCY: 1921–1933*, at 9–10, 60–62, 89 (1960). The President's party had also lost seats in the 1922 election, so an extra session of the "lame duck" 67th Congress would give his party extra time to legislate before the influence of such progressive Republicans as Senator Robert La Follette would grow in the next one. HICKS, *supra*, at 88–89.

⁴⁹⁴ RUTKUS & BEARDEN, *supra* note 248, at 32.

⁴⁹⁵ *Id.* at 28; Albert M. Rosenblatt, *William Butler Hornblower*, *Hist. Soc'y N.Y. Cts.*, <http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-court-appeals.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/hornblower-william.html> [https://perma.cc/S2VP-2WJB] (last visited Mar. 3, 2018).

⁴⁹⁶ RUTKUS & BEARDEN, *supra* note 248, at 28.

⁴⁹⁷ *Id.*

⁴⁹⁸ Calvin R. Massey, Comment, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 4 (1991).

⁴⁹⁹ HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 134 (1974).

⁵⁰⁰ RUTKUS & BEARDEN, *supra* note 248, at 29.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

F. No Action

Including the Garland nomination, only four of the twenty-six nominations arguably received no meaningful Senate action.⁵⁰³ But, aside from the Garland nomination, each is explained by reasons other than a flat Senate moratorium on Supreme Court nominations.

i. Micou

The first Supreme Court nomination to receive no meaningful Senate action was Millard Fillmore's nomination of prominent Louisiana attorney William C. Micou on February 24, 1853.⁵⁰⁴ The Democratic-controlled Senate had already procedurally rejected two of Fillmore's previous Whig nominations to fill the vacancy, and was obviously disposed to save the vacancy for the incoming Democratic President, Franklin Pierce, to fill.⁵⁰⁵ Reporting on the nomination of Micou, the *New York Times* said, "There is a decisive majority against his confirmation."⁵⁰⁶ All in the same half-hour executive session,⁵⁰⁷ the Senate received the nomination,⁵⁰⁸ referred it to the Judiciary Committee,⁵⁰⁹ and then discharged it from the Committee.⁵¹⁰ The discharge motion came from Pierre Soulé,⁵¹¹ a Democratic Senator from Louisiana,⁵¹² perhaps as a gesture of respect for a prominent fellow Louisianan whose nomination was doomed. There was no recorded opposition to the motion,⁵¹³ so it apparently did not represent a credible

⁵⁰³ These nominations are numbers (13), (15), (21), and (26) on the chronological list. See *supra* note 423.

⁵⁰⁴ 9 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 34 (Washington, Gov't Printing Office 1887) (Feb. 24, 1853); see RUTKUS & BEARDEN, *supra* note 248, at 24.

⁵⁰⁵ ABRAHAM, *supra* note 499, at 102–03.

⁵⁰⁶ *Latest Intelligence by Telegraph to the New-York Daily Times: From Washington—Scene Between Hon. Geo. Briggs and the Postmaster-General—Nomination of Micou—Mail Contract—The Cabinet*, N.Y. TIMES, Feb. 16, 1853, at 4.

⁵⁰⁷ See *Latest Intelligence by Telegraph to the New-York Daily Times: XXXIII Congress . . . Second Session*, N.Y. TIMES, Feb. 25, 1853, at 1 ("The Senate then went into Executive Session for half an hour. Adjourned.") (summarizing Senate proceedings on February 24, 1853).

⁵⁰⁸ 9 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 34 (Washington, Gov't Printing Office 1887) (Feb. 24, 1853).

⁵⁰⁹ *Id.* at 35.

⁵¹⁰ *Id.* at 36.

⁵¹¹ *Id.*

⁵¹² Soulé, Pierre, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=s000682> [<https://perma.cc/X6L4-W8DM>] (last visited Feb. 24, 2018).

⁵¹³ 9 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 36 (Washington, Gov't Printing Office 1887) (Feb. 24, 1853); RUTKUS & BEARDEN, *supra* note 248, at 24.

threat to those opposed to confirming Micou. Indeed, the Senate took no further action on the nomination and allowed it to expire at the end of the session.⁵¹⁴

Merely getting discharged from the Judiciary Committee was still more action than the Garland nomination received from the Senate in 2016,⁵¹⁵ but there is another factor that renders the Micou nomination insignificant as a precedent. February 24, 1853, the day the Senate received Micou's nomination, was one week before the end of Fillmore's term as President, before the constitutionally mandated adjournment of the 32nd Congress, before the inauguration of President-elect Pierce, and before the convening of the next Congress.⁵¹⁶ If the Micou nomination stands as a precedent for the prerogative of the Senate to refuse to act on a Supreme Court nomination, it is a precedent as to nomination received only seven or fewer days before the end of the President's term. The Garland nomination, in contrast, was received 310 days before the end of the President's term—more than forty-four weeks, not one.⁵¹⁷

ii. Stanbery

The second Supreme Court nomination to receive no Senate action was Andrew Johnson's nomination of Henry Stanbery on April 16, 1866.⁵¹⁸ But it is actually incorrect to describe the Senate as having taken no action on the Stanbery nomination. True, it did not take any action directly on the nomination, but it certainly took action to dispense with the nomination.⁵¹⁹ The Senate actually took two highly significant actions. First, it passed a bill, which became law with the House's agreement, to abolish the Supreme Court seat for which Stanbery had been nominated.⁵²⁰ That action would seem to qualify as a kind of super-rejection of the nomination, and it also happened to have received the assent of Johnson, who signed the bill into law.⁵²¹ Second, Johnson effectively withdrew Stanbery's nomination the day he received the vacancy-eliminating bill by sending the Senate a new nomination of Stanbery to be Attorney General.⁵²² The Senate then

⁵¹⁴ See RUTKUS & BEARDEN, *supra* note 248, at 24.

⁵¹⁵ See Richard Cowan, *Senate Judiciary Committee Chairman Grassley Tells Garland No Hearings*, REUTERS (Apr. 12, 2016, 10:28 PM), <https://www.reuters.com/article/us-usa-court-garland/senate-judiciary-committee-chairman-grassley-tells-garland-no-hearings-idUSKCN0X91OO> [<https://perma.cc/57QD-84ZF>].

⁵¹⁶ ABRAHAM, *supra* note 499, at 102–03; see also *supra* notes 259, 478.

⁵¹⁷ The Garland nomination was received March 16, 2016, which was 310 days prior to January 20, 2017, the end of President Obama's term. See *Supreme Court Timeline: From Scalia's Death to Garland to Gorsuch*, USA Today (Jan. 31, 2017), <https://www.usatoday.com/story/news/politics/2017/01/31/timeline-of-events-after-the-death-of-justice-antonin-scalia/97299392/> [<https://perma.cc/TE9R-26QR>].

⁵¹⁸ RUTKUS & BEARDEN, *supra* note 248, at 25.

⁵¹⁹ See *infra* notes 520–523 and accompanying text.

⁵²⁰ HOGUE, *supra* note 447, at 5 & nn. 11–13.

⁵²¹ See Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209.

⁵²² 14, pt. 2 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 994 (Washington, Gov't Printing Office 1887) (July 20, 1866).

confirmed that new nomination three days later when Johnson signed the bill abolishing the Supreme Court seat.⁵²³

iii. Harlan

The third Supreme Court nomination to receive no meaningful Senate action was Dwight Eisenhower's first nomination of Justice John M. Harlan, II on November 9, 1954.⁵²⁴ The nomination was referred to the Judiciary Committee, which took no action on it and allowed it to expire at the end of the Senate session.⁵²⁵ Although the bare facts may seem similar to the Senate's response to the Garland nomination, the resemblance is superficial. There are significant differences that confound a comparison.

Perhaps most significant is the timing. Eisenhower submitted the Harlan nomination during the lame duck period following the 1954 elections, which had taken place on November 2,⁵²⁶ and the late nomination was pending before the Senate for only twenty-one days until the Senate adjourned.⁵²⁷ To the extent that it could serve as a precedent for Senate disregard of a Supreme Court nomination, it is a precedent covering only the last three weeks of a Senate session or, at the absolute most, fifty-five days before the constitutionally mandated dissolution of the existing Congress.⁵²⁸

But this first Harlan nomination does not provide a clear precedent for even that period of time. The failure to act on the nomination is attributable to a number of unique factors that have nothing to do with a decision to preclude a sitting President from appointing a Supreme Court Justice. Indeed, postponing the Harlan nomination until the end of this, the 83rd Congress would do nothing to keep Eisenhower from making a Supreme Court nomination when the 84th Congress convened on January 5, 1955.⁵²⁹ His first term as President would not end for another two years, and there was obviously reason to imagine that he might even serve for an additional four-year term.⁵³⁰ The failure to act on his first Harlan nomination decidedly was not motivated by a desire to hold the vacancy for two or six years for whomever the subsequent President might be. Indeed, the

⁵²³ *Id.* at 1043 (July 23, 1866); see Judicial Circuits Act of 1866, ch. 210, § 1, 14 Stat. 209.

⁵²⁴ 100 CONG. REC. 15,911 (1954).

⁵²⁵ RUTKUS & BEARDEN, *supra* note 248, at 34.

⁵²⁶ OFFICIAL CONGRESSIONAL DIRECTORY, 84TH CONG., 2D SESS., at III (Gov't Printing Office 1956).

⁵²⁷ See 100 CONG. REC. 15,911, 16,404 (1954); RUTKUS & BEARDEN, *supra* note 248, at 7, 10 n.32.

⁵²⁸ See U.S. CONST. amend. XX, § 1.

⁵²⁹ See 101 CONG. REC. 3 (1955) (marking the start of the 84th Congress); see also *Years of the 1st Through 115th Congresses* (1789–2018), U.S. SENATE, https://www.senate.gov/reference/Years_to_Congress.htm [<https://perma.cc/3BVN-XX49>] (last visited Feb. 25, 2018).

⁵³⁰ See *Dwight D. Eisenhower*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/presidents/dwight-d-eisenhower/> [<https://perma.cc/QB64-C2Z4>] (last visited Feb. 25, 2018).

Democratic-controlled Senate⁵³¹ overwhelmingly confirmed Harlan just ten weeks into the 84th Congress when Eisenhower resubmitted the nomination.⁵³²

The reasons for the failure to act on the first nomination of Harlan were altogether different from some effort to hold the vacancy for the next President. The first nomination was submitted during an unusual extra session of the Senate. The House of Representatives had already adjourned for the remainder of the 83rd Congress on August 20, 1954.⁵³³ The Senate had recessed then as well, but pursuant to a special resolution providing for their reconvening later in the year for an extra, final session without the House.⁵³⁴ The reason for that unusual session was to conduct the special business of debating and deciding whether to censure Senator Joseph McCarthy for his Communist witch-hunts.⁵³⁵ The Senate returned from its recess on November 8 to receive and begin debating committee reports on McCarthy's behavior.⁵³⁶ The Senate adopted special rules precluding workday committee hearings during the three-week debate over McCarthy,⁵³⁷ and upon voting to censure him, the Senate adjourned its final session of the 83rd Congress on December 2.⁵³⁸ It was during this unusual extra session that Eisenhower submitted his first Harlan nomination and tried to get it confirmed.⁵³⁹ Even White House officials were at best only "hopeful"⁵⁴⁰ that confirmation would be possible during this censure session, and one alternative was to try and secure confirmation without a committee hearing on the theory that the Senate had recently confirmed Harlan as a circuit judge.⁵⁴¹ Within two days of the nomination, however, the Republican Chair of the Judiciary Committee was saying "he saw no chance" of confirmation during the censure session and cited the restrictions on hearings imposed to prevent interference with the censure debate.⁵⁴² The Majority and Minority Leader had agreed that the Senate would not confirm nominations that required a hearing.⁵⁴³ The Chair nevertheless tried to schedule a Harlan hearing for November 19,⁵⁴⁴ but he finally gave up on the effort by the time that date arrived.⁵⁴⁵ The nomination would have to wait until Congress returned in January.

⁵³¹ *Party Division*, *supra* note 15.

⁵³² See HOGUE, *supra* note 447, at 3, 9; RUTKUS & BEARDEN, *supra* note 248, at 7 & n.20, 10 n.32, 34; *see also* RUTKUS, *supra* note 433, at 4.

⁵³³ RICHARD S. BETH & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RL33677, LAME DUCK SESSIONS OF CONGRESS, 1935–2012 (74TH–112TH CONGRESSES) 9, 21 (2014), <https://www.senate.gov/reference/resources/pdf/RL33677.pdf> [<https://perma.cc/7TA4-Z6KT>].

⁵³⁴ See 100 CONG. REC. 15,836 (1954); BETH & TOLLESTRUP, *supra* note 533, at 4, 9, 21.

⁵³⁵ 100 CONG. REC. 15,837 (1954); *see also* BETH & TOLLESTRUP, *supra* note 533, at 21.

⁵³⁶ BETH & TOLLESTRUP, *supra* note 533, at 9, 21.

⁵³⁷ See 100 CONG. REC. 16,050–51 (1954).

⁵³⁸ *Id.* at 16,392–95, 16,404.

⁵³⁹ *Id.* at 15,911.

⁵⁴⁰ *Eisenhower Names U.S. Judge Harlan to Supreme Court: Republican Is Now on Circuit Bench Here—Nomination Goes to Senate Today*, N.Y. TIMES, Nov. 9, 1954, at 1.

⁵⁴¹ *Id.*; *Senate Unit Backs Appointee to F.C.C.: However, the Democrats Raise Floor Bar to McConnaughey—Delay on Harlan Hinted*, N.Y. TIMES, Nov. 12, 1954, at 33.

⁵⁴² *Senate Unit Backs Appointee to F.C.C.*, *supra* note 541, at 33.

⁵⁴³ 100 CONG. REC. 16,050–51 (1954).

⁵⁴⁴ *Hearing on Harlan Set for Next Week*, N.Y. TIMES, Nov. 13, 1954, at 33.

It would not be accurate to say that politics and obstruction had nothing to do with the delay. The Democrats had won enough seats in the November election to flip control of the chamber to them when the 84th Congress convened in January.⁵⁴⁶ Still, they did confirm Harlan then, so it was not the case that the postponement was about precluding Eisenhower from making an appointment or even from appointing Harlan.⁵⁴⁷ To the extent that the postponement rested in part on Democratic political motives, they seemed to center on placating a handful of powerful segregationist Senators who remained apoplectic over the Supreme Court's landmark desegregation decision in *Brown v. Board of Education* from six months earlier.⁵⁴⁸ Even the segregationists' motive seemed only to be about buying a few months' time.⁵⁴⁹ The Supreme Court had scheduled oral arguments in the implementation phase of *Brown* for December 6.⁵⁵⁰ Without a full complement of Justices, the Court postponed the arguments indefinitely until the eventual filling of the vacancy for which Harlan was nominated.⁵⁵¹ Forcing the Court to delay the decision in *Brown v. Board of Education II* was the apparent goal of segregationist Senators.⁵⁵² As far as political motives are concerned, however, it was also true that the conservative Robert A. Taft wing of the Republican Party was not thrilled with the Harlan nomination either and vocalized their annoyance with Eisenhower's choice of a moderate New York Republican for the Court.⁵⁵³ The result was pressure for a hearing and more vetting of the nomination than the Judiciary Committee could manage in the short window of opportunity and alongside the time-consuming censure debate.⁵⁵⁴

Even with the expiration of the first nomination of Harlan, the intersession recess over the holidays, and the eventual confirmation after renomination, the

⁵⁴⁵ See William S. White, *Harlan Approval Blocked Until '55, Senate Consideration Put Off at Request of Eastland Until Next Congress*, N.Y. TIMES, Nov. 20, 1954, at 20.

⁵⁴⁶ *Party Division*, *supra* note 15.

⁵⁴⁷ RUTKUS & BEARDEN, *supra* note 248, at 34.

⁵⁴⁸ 347 U.S. 483 (1954); see, e.g., Norman Dorsen, *John Marshall Harlan*, in THE WARREN COURT: A RETROSPECTIVE 236, 237–38 (Bernard Schwartz ed., 1996); Herb Altschull, *Brown vs. Board of Education: Here's What Happened in [sic] 1954 Courtroom*, L.A. TIMES (May 18, 2014, 7:22 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-brown-v-board-ap-original-20140518-story.html> [<https://perma.cc/VJM6-B5QK>].

⁵⁴⁹ See William S. White, *Democrats Make Aggressive Plans: Senate Policy Group Decides to Delay Confirmations, Force Consultation*, N.Y. TIMES, Nov. 10, 1954, at 1 (indicating that the Democrats only intended to postpone confirmations until the McCarthy issue was resolved).

⁵⁵⁰ *Brown v. Bd. of Educ. of Topeka*, 348 U.S. 886 (1954) (order postponing oral arguments that had been scheduled for December 6, 1954).

⁵⁵¹ *Id.*

⁵⁵² *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); Luther A. Huston, *School Bias Case to Await Harlan: Implementation Arguments Delayed by Supreme Court Till There Is Full Bench*, N.Y. TIMES, Nov. 23, 1954, at 49. [BEHIND A PAY WALL: <https://www.nytimes.com/1954/11/23/archives/school-bias-case-to-await-harlan-implementation-arguments-delayed.html>]

⁵⁵³ See White, *supra* note 549, at 1.

⁵⁵⁴ See 100 CONG. REC. 16,050 (1954); White, *supra* note 549, at 1.

time from first nomination to confirmation was still only 127 days,⁵⁵⁵ significantly fewer than half of the 310 days that the Garland nomination would languish in deliberate disregard six decades later.⁵⁵⁶

G. Garland

The Senate's treatment of the Garland nomination in 2016 was significantly different. It represented a real, total moratorium on Supreme Court nominations, including the deliberate refusal to take any but the most rote and *de minimis* action.⁵⁵⁷ When the President submitted the Garland nomination on March 16, 2016,⁵⁵⁸ the Senate did next to nothing to act in response. By force of a pre-existing standing rule of the Senate,⁵⁵⁹ the nomination was referred as a matter of course to the Judiciary Committee.⁵⁶⁰ Once there, the nomination was all but ignored as if it did not exist.⁵⁶¹ The Committee did not draft the usual biographical questionnaire for a Supreme Court nominee or otherwise solicit information from the nominee to assist in assessing his fitness to serve.⁵⁶² At the nominee's own initiative, he submitted information on a form questionnaire designed for lower court nominees,⁵⁶³ which the Committee at least posted online along with a financial disclosure statement from the nominee.⁵⁶⁴ The Committee did not initiate the usual FBI background check of the nominee in preparation for assessing his fitness.⁵⁶⁵ The Committee did not schedule or hold any confirmation hearing,⁵⁶⁶ and only a handful of Republican Senators ever even met with the nominee.⁵⁶⁷ The

⁵⁵⁵ See RUTKUS & BEARDEN, *supra* note 248, at 34.

⁵⁵⁶ See Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), <http://www.scotusblog.com/2017/01/garland-nomination-officially-expires/> [<https://perma.cc/X7D5-SBDW>]; *supra* note 517 and accompanying text.

⁵⁵⁷ See, e.g., Clark, *supra* note 33, at 743–44; Huetteman, *supra* note 320.

⁵⁵⁸ 162 CONG. REC. S1551 (daily ed. Mar. 16, 2016).

⁵⁵⁹ S. DOC. NO. 113–18, at 43–44 (2013).

⁵⁶⁰ 162 CONG. REC. S1540, S1551 (daily ed. Mar. 16, 2016).

⁵⁶¹ *Supreme Court Nominations: Present–1789*, *supra* note 419.

⁵⁶² Huetteman, *supra* note 320; Sherman & Jalonick, *supra* note 319.

⁵⁶³ Huetteman, *supra* note 320.

⁵⁶⁴ PN1258-114: Merrick B. Garland, S. COMM. JUDICIARY, <https://www.judiciary.senate.gov/nominations/executive/pn1258-114> [<https://perma.cc/T24U-6T3L>] (last visited Feb. 25, 2018).

⁵⁶⁵ Transcript: *Legal View with Ashleigh Banfield: Obama Taps Merrick Garland to Succeed Scalia* (CNN television broadcast Mar. 16, 2016), <http://transcripts.cnn.com/TRANSCRIPTS/160316/lvab.01.html> [<https://perma.cc/VM2R-H2M5>].

⁵⁶⁶ Doug G. Ware, *Nomination Expires for Obama Supreme Court Appointee Merrick Garland*, UPI (Jan. 3, 2017, 4:25 PM), https://www.upi.com/Top_News/US/2017/01/03/Nomination-expires-for-Obama-Supreme-Court-appointee-Merrick-Garland/4841483472115/ [<https://perma.cc/M9GG-T2EB>].

⁵⁶⁷ *U.S. Senators on the Nomination of Merrick Garland*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senators_on_the_nomination_of_Merrick_Garland [<https://perma.cc/C8HA-A4Y8>] (last visited Feb. 25, 2018).

Committee did not vote on the nomination or report it out of committee,⁵⁶⁸ nor was the nomination ever discharged from the committee.⁵⁶⁹ Obviously, there was never any vote or other floor action on the nomination by the full Senate.⁵⁷⁰ Again by force of a preexisting Senate rule, the nomination expired⁵⁷¹ and was eventually returned to the President⁵⁷² when the Senate's session ended by constitutional mandate on January 3, 2017.⁵⁷³ The Judiciary Committee's online posting of two unsolicited documents supplied by the nominee at his own initiative appears to be the only discretionary act performed by the Senate in response to its receipt of the nomination.⁵⁷⁴

The Garland nomination stands out as the unique example. While electoral politics influenced a few of the previous unsuccessful nominations, the Senate simply does not have any history of announcing a flat moratorium on any Supreme Court nominations from the sitting President during the remainder of his term. Past practice cannot save a Senate moratorium from invalidity if it otherwise fails to satisfy a requirement of the separation of powers.

CONCLUSION

When Senate Majority Leader Mitch McConnell announced a total moratorium on Supreme Court nominations for as long as Barack Obama remained President,⁵⁷⁵ he opened a dangerous Pandora's box. The 419-day vacancy it imposed upon the Court may have clearly broken the modern record of 391 days set during the Nixon administration,⁵⁷⁶ but perhaps the country could adjust even to a Senate-imposed moratorium during every fourth year of a presidential term. In assessing separation of powers challenges to novel exercises of power, however, the Supreme Court has kept a wary eye on the prospect that approval of such an arrangement, however benign or at least tolerable it may seem in its present form, may easily "provide[] a blueprint for extensive expansion of the . . . power beyond its constitutionally confined role."⁵⁷⁷ The McConnell moratorium itself has already

⁵⁶⁸ See *Judiciary Committee Votes on Recent Supreme Court Nominees*, S. COMM. JUDICIARY, <https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes> [<https://perma.cc/L23B-9ECX>] (last visited Feb. 25, 2018).

⁵⁶⁹ *PN1258 — Merrick B. Garland — Supreme Court of the United States*, CONGRESS.GOV, <https://www.congress.gov/nomination/114th-congress/1258> [<https://perma.cc/NN5C-2438>] (last visited Feb. 25, 2018).

⁵⁷⁰ *Supreme Court Nominations: Present—1789*, *supra* note 419.

⁵⁷¹ S. DOC. NO. 113–18, at 44 (2013).

⁵⁷² *PN1258-114: Merrick B. Garland*, *supra* note 564.

⁵⁷³ U.S. CONST. amend. XX, § 1.

⁵⁷⁴ *PN1258-114: Merrick B. Garland*, *supra* note 564.

⁵⁷⁵ Carroll, *supra* note 374.

⁵⁷⁶ Drew DeSilver, *Long Supreme Court Vacancies Used to be More Common*, PEW RES. CTR. (Feb. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/> [<https://perma.cc/SCPJ-VXNP>].

⁵⁷⁷ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991).

cast a major shadow across the legitimacy of 5-4 decisions whose outcome is plausibly traced to the substitution of Justice Gorsuch for Judge Garland.⁵⁷⁸ The significance of that impairment of the Court's legitimacy may only become apparent over time. But what may also become apparent over time is the metastasizing of the McConnell moratorium into a routine practice of simply refusing to entertain any Supreme Court nomination from a President of a different party. Indeed, it only took months for interest groups to pressure Senate candidates into endorsing exactly that idea.⁵⁷⁹ Tradition plays a major role in defining the boundaries of the permissible dealings of the branches of government with each other, and tradition emerges from the first crack of a door. That door has now been opened to extended, politically motivated Senate moratoriums on Supreme Court nominations. The encroachment and impairment that it entails cast grave doubt on its constitutionality, and it currently finds no safe harbor in historical practice. Whether the imposition of such a moratorium will continue to present a grave constitutional question, however, depends on what tradition develops now that the door has been opened. The potential evils of further expansion are already audible just over the horizon. Calling out the probable constitutional invalidity of the McConnell moratorium, clearly repudiating it, and preventing a repetition and expansion are imperative if the practice is not to gain a constitutional safe harbor in a newly established tradition.

⁵⁷⁸ See Stone, *supra* note 389; see also text accompanying notes 389–390.

⁵⁷⁹ Eric Lipton, *Supreme Court Nomination Drives Groups from Left and Right to Fight*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/activists-protest-nomination-supreme-court.html> [<https://perma.cc/95SM-3GS7>].