Scholars agree: Senate leaders don't have to consider Supreme Court pick

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So what gives Senate Majority Leader Mitch McConnell the right to block Senate consideration of Judge Merrick Garland, President Barack Obama's pick to the Supreme Court?

The U.S. Constitution, say several congressional and legal scholars. Even dissenters acknowledge the Senate can pretty much do what it wants.

Led by McConnell, R-Ky., and Senate Judiciary Committee Chairman Charles Grassley, R-Iowa, Republicans have vowed not even to consider Garland to replace the late Justice Antonin Scalia. Senate Republican leaders would rather leave the seat vacant in the hopes that a Republican wins the presidency in November and chooses a nominee more to their liking.

McConnell and Grassley have draped themselves around Article 2, Section 2 of theConstitution that says the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court."

Grassley, in a letter to McConnell shortly after Scalia's death, said "the Constitution is clear."

"The president may nominate judges of the Supreme Court," Grassley wrote. "But the power to grant, *or withhold*, consent to such nominees rests exclusively with the United States Senate."

Michael Gerhardt, a University of North Carolina-Chapel Hill constitutional law professor, says McConnell and Grassley's position is bolstered by Article 1, Section 5 of the Constitution, which states that the two chambers of Congress – the Senate and the House of Representatives – "may determine the Rules of its Proceedings."

Under Senate tradition of unanimous consent, any senator can halt consideration of an agenda item – something McConnell could certainly do. But McConnell, as majority leader, exercises more clout, deciding who gets what committee assignments, for instance, or what legislation comes to the floor.

"The Senate majority leader has discretion with regard to organizing the Senate floor business," Gerhardt said. "There is clearly a Senate authority to give its advice on nominations. It is not

uncommon for senators to construe that as essentially two things, one of which is giving their advice. But it could well be withholding their advice."

Roger Pilon, founder and director of Center for Constitutional Studies at the libertarian-leaning Cato Institute, agrees that McConnell and Grassley are interpreting their constitutional prerogatives correctly. The Constitution does not direct the Senate to take action, one way or the other, he said.

"Here, the Republicans are very clear that they're not going to confirm," Pilon added. "So what's the point in holding hearings, what's the point in going through the motions? Nothing will come of it."

Norman Ornstein, a political scholar at the center-right American Enterprise Institute, says he thinks McConnell and Grassley are bending the Constitution to the breaking point by not allowing Garland's nomination to go before the judiciary committee for a hearing.

"A failure to hold a hearing on a legitimately nominated individual for the Supreme Court, to say that, in effect, a presidential term lasts three years and the fourth year doesn't count on that front, is, at minimum, an egregious breech of norms of the Constitution," he said.

But he also acknowledged that the "fundamental reality is that the Senate can do pretty much whatever it wants."

Ornstein notes that the tactic of rebuffing a nominee isn't unique to Republicans or the Senate. Democrats refused to act on President George W. Bush's 2001 nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit, a panel viewed as a path to a Supreme Court seat.

Estrada relented to the filibuster by Democrats, who were in the minority party in the Senate at the time, and withdrew his name from consideration in 2003.

The late Sen. Edward Kennedy, D-Mass., called Estrada's withdrawal "a victory for the Constitution."

"We have plenty of precedent in both parties on not acting on nominations, that's true," Ornstein said. "But the idea that you'll ignore a president's legitimate nomination for a constitutional office like justice of the Supreme Court, not acknowledge that basically the nomination is legitimate, is a very shaky premise."

Garland has served on the U.S. Court of Appeals of the District of Columbia Circuit since 1997. He was confirmed to that post with some Republican support on a 76-23 vote and now serves as chief judge.

Garland has been making the rounds on Capitol Hill to meet senators, despite McConnell's vow to block his nomination. On Tuesday, he met with Grassley in a Senate dining room.

"I enjoyed talking to him but nothing has changed," Grassley told CNN on Tuesday. "We're not going to have a hearing."

But some Senate Republicans who are viewed as vulnerable in November's elections have suggested that Garland's nomination should be considered.

"He's been nominated by the elected president of the United States to fill a vacancy which we know exists on the court, and we need open-minded, rational, responsible people to keep an open mind to make sure the process works," Sen. Mark Kirk, R-Illinois, said last month.

Sen. Jerry Moran, R-Kan., last month called for the Senate to move on Garland's nomination, reportedly telling constituents, "I would rather have you complaining to me that I voted wrong on nominating somebody than saying I'm not doing my job."

After receiving a barrage of criticism from the right for his comments, a Moran aide said on CNN earlier this month, "Senator Moran remains committed to preventing this president from putting another justice on the highest court in the land."