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## Garland Nomination Shouldn't Change The #NoHearingsNoVotes Strategy

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Now that President Obama has nominated an unassuming “moderate” with a sterling resumé, should Senate Republicans abandon their position—which I endorsed [in these webpages](#) right after Justice Scalia’s passing—of not considering *any* nominee until after the election? In a word, no.

For one thing—the most important thing—the #NoHearingsNoVotes strategy has always been about the Supreme Court as an institution, not any particular nominee. We live in a polarized political world, with the most turbulent election campaign of my lifetime. President Obama was reelected in 2012, but the Tea Party response to crony capitalism and ever-growing government solidified the opposition in the House and brought the Senate to the GOP in 2014. (And I would argue that the only reason Obama was reelected was that the Republicans managed to nominate the one person who couldn’t credibly run against the ever-unpopular Obamacare.)

The Senate is fully within its rights, given the unique nature of this judicial vacancy, to fulfill its “advice and consent” function by telling the president that we should let this fall’s election determine the Supreme Court’s direction.

I can’t emphasize enough how unprecedented this event is in our legal and political history. The last time that an election-year high-court vacancy was filled before the presidential election was 1916—which was also the first time there were confirmation hearings, which came about largely due to anti-Semitic opposition to Justice Louis Brandeis. The last time that a Senate *of the opposing party* confirmed someone to fill such a vacancy was 1888, when a handful of Republicans joined the minority Democrats to approve Grover Cleveland’s appointment of Chief Justice Melville Fuller.

You'll recall that this was the time of tall hats and bushy sideburns, when the federal government satisfied Grover Norquist's test of being small enough to drown in a bathtub. It was a different world.

More importantly, it was a different Supreme Court, one not known for ideological divisions and that did not loom large in the nation's political debates, annually deciding cases that roil our culture and economy. Because this isn't simply an argument from (mostly irrelevant) precedent.

Here we have the unexpected death of a titan of American jurisprudence, someone who irrevocably changed the way judges interpret law and also was one of the locomotives of the modern conservative legal movement. And at a time when the Court has never been more ideologically split: three conservatives (one of whom, John Roberts, elevates minimalism and deference over the originalism and textualism that Justice Scalia pioneered), four progressives who never defect on major cases, and a swing vote who represented the last bulwark against the evisceration of the First and Second Amendments, the separation of powers, federalism, and any other limits on federal power.

The idea that in these circumstances, a pivotal seat should be filled by the most radical president in American history who has easily surpassed even the heady standard of his predecessors for abuse of executive power is not to be taken lightly. Hence no hearings, no votes; sorry Merrick Garland, it's not you, it's the fate of the nation.

But second, even when you look into Garland's impressive qualifications, you realize that, as the indispensable Kevin Williamson points out, a "moderate" appointed by a Democratic president isn't much different from a "radical." After all, someone who would only do "moderate" damage to the rule of law shouldn't be acceptable as a "compromise" pick. Heck, the New York Times says that he's to the left of Justices Breyer and Kagan, almost as far gone as Justices Ginsburg and Sotomayor.

But even if Chief Judge Garland isn't the second coming of Justices William Brennan or Thurgood Marshall—the most progressive justices we've had—his extreme deference to administrative agencies and law enforcement (and any other government actors he can find) make him in many ways scarier than some firebrand who wants to constitutionalize Bernie Sanders's platform. To those of us who toil in the legal trenches, fighting to restore the constitutional order after decades of doctrinal deviance, this simply will not do.

And so I'm heartened, and very pleasantly surprised, by the steel we've seen thus far in Republican senatorial spines. There will always be time to reconsider this principled stance should conditions on the ground change—even a Hillary Clinton nominee with a Democratic Senate may simply be a "diversity" pick of the same basic ideology—but for now, there's no reason not to wait for the voters to weigh in on whether we can keep this republic we have.

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