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My Turn: 'We the People' and the Garland Nomination

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MY TURN

‘We the People’ and the Garland nomination

Legal challenge to stonewalling won’t work, but that doesn’t mean voters are powerless

By JOHN M. GREASE

for the Monitor

Because I teach constitutional law, a friend recently asked me whether Judge Merrick Garland or President Obama might successfully sue to compel the Senate to take action on the nomination of Judge Garland to fill the vacancy on the United States Supreme Court. Almost certainly not, I told him. Under settled precedent, a judge would dismiss such a case as raising a non-legal “political” question. It would be very difficult to develop acceptable decisional standards for such a claim. Moreover, courts are reluctant to entertain lawsuits challenging mechanisms that the Senate uses to oversee the judiciary.

So, my friend replied with dismay, the Senate’s refusal to take up the Garland nomination is perfectly constitutional? Not necessarily, I responded. My friend’s assumption — that the Senate’s inaction on the Garland nomination is constitutional if no lawsuit could successfully challenge it — is no doubt widely shared. We tend to think of constitutional enforcement as the job of courts.

Courts also have enforced constitutional boundaries in cases with serious implications for our political processes. They have invalidated segregation and dismantled Jim Crow, to insist that persons accused of serious crimes be provided with lawyers and advised of basic rights, and to identify and protect a number of other individual rights — including rights to procreation, abortion, marriage, speech and non-speech, association and non-association, religious freedom and freedom from religious compulsion, equal governmental treatment, and gun ownership.

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Merrick Garland walks with President Obama and Vice President Joe Biden from the Oval Office to the Rose Garden at the White House to be introduced as Obama’s nominee for the Supreme Court on March 16.
Citizens have a voice on Garland stonewalling

GARLAND FROM B1

dated unfairly apportioned legislative dis-
ticts, ordered a sitting president to hand
over tape recordings that effectively ended
his presidency, and halted a ballot recount
that could have altered the outcome of a
presidential election.

More recently, they have stricken down
"anti-fraud" state election laws
on the

ground that their true purpose was to
make it more difficult for people of color to
vote. Little wonder, then, that we tend to
regard government conduct as "constitu-
tional" if there is no remedy for it in a
court of law.

But that is how the Founders saw
things. The Founders came of age within
the English constitutional tradition.

In that tradition, judicial pronounce-
ments declaring government conduct un-
constitutional were rare to non-existent.
But that does not mean that the concept of
"unconstitutionality" was foreign to the
English or the Founders. "Unconstitu-
tional" government conduct was policed by
the people themselves through the tools
and techniques of popular constitutional-
ism, which included civil disobedience,
anti-government jury verdicts, and, most
pertinently, petitions and voting.

True, the Founders set out to improve
upon the English constitution. But to the
extent that the Founders envisioned the ju-
diciary as a constitutional enforcement
agent, they certainly did not regard it as a
replacement for popular enforcement of the
Constitution.

Recall Benjamin Franklin's famous
statement, upon exiting Independence Hall
on the final day of the 1787 constitutional
convention, when someone asked him
whether the proposed Constitution set up a
monarchy or a republic: "A Republic," he
answered, "if you can keep it."

Consider also that, in Federalist No. 48,
while arguing for ratification of the Con-
stitution, James Madison acknowledged that
"parchment barriers" - limits on govern-
ment written into the Constitution's text -
would never hold if the system of checks
and balances specified in its structure was
not vigilantly maintained. And who was to
oversee the faithful maintenance of this
system? Who else, ultimately, but "We the
People"?

Much has been written about the Sen-
ate's unprecedented refusal to provide
Judge Garland with a hearing and the
damage that could be visited on our politi-
cal order if its stonewalling is rewarded. If
you believe that the Constitution is com-
prised not only of words, but also of our
long-settled historical practices, and that
the Senate's refusal to take up the Garland
nomination is therefore unconstitutional,
do not despair the absence of a judicial
remedy. Join with others to enforce your
understanding of our Constitution through
formal petition, letters to your senators
and casting your ballot on Nov. 8 against
politicians who support this departure
from constitutional norms.

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