9-14-2016

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

John M. Greabe
University of New Hampshire School of Law, john.greabe@law.unh.edu

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Recommended Citation
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This op-ed article originally appeared in the Concord Monitor.

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Wednesday, September 14, 2016
concordmonitor.com/opinion

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.

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. In the lifetimes of many readers, courts have invoked the Constitution to invalidate segregation and dismantle 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. Courts also have enforced constitutional boundaries in cases with serious implications for our political processes. They have invalidated the Constitution to invalidate segregation and dismantle 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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Citizens have a voice on Garland stonewalling

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That is not how the Founders saw things. The Founders came of age within the English constitutional tradition. In that tradition, judicial pronouncements declaring government conduct unconstitutional were rare to non-existent. But that does not mean that the concept of "unconstitutionality" was foreign to the English or the Founders. "Unconstitutional" government conduct was policed by the people themselves through the tools and techniques of popular constitutionalism, which included civil disobedience, anti-government jury verdicts, and, most pertinently, petitions and voting.

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 Constitution, James Madison acknowledged that "parchment barriers" - limits on government 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 Senate’s unprecedented refusal to provide Judge Garland with a hearing and the damage that could be visited on our political order if its stonewalling is rewarded. If you believe that the Constitution is comprised 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.

(John Greabe is a professor of law at the University of New Hampshire School of Law, where he teaches constitutional law.)