Difficult Questions for the Senate Minority

John M. Greabe

University of New Hampshire School of Law

Follow this and additional works at: https://scholars.unh.edu/law_facpub

Part of the American Politics Commons, Constitutional Law Commons, Law and Politics Commons, and the Supreme Court of the United States Commons

Recommended Citation

John M. Greabe, Difficult Questions for the Senate Minority, Concord Monitor, Dec. 18, 2016 at D1, D3.
Difficult questions for the Senate minority

Members face a challenge on Supreme Court nominees

A few months ago, I published an op-ed in this paper about the stalled nomination of Judge Merrick Garland to the United States Supreme Court. In that piece, I explained that a lawsuit claiming that the United States Senate was violating its constitutional duty to act on the nomination would almost certainly fail. Such a lawsuit would be dismissed as raising a political question not appropriate to resolution in a judicial proceeding. Nonetheless, I suggested, the absence of a judicial remedy...
Should the Senate minority oppose whomever Trump nominates?

CONSTITUTION FROM D1

compelling the Senate to act should not be taken to imply that the Senate's behavior has been consistent with constitutional norms. Sometimes, I explained, a court simply cannot serve as a constitutional enforcement agent – even when it is faced with a credible argument that the Constitution is being violated.

Sometimes, constitutional norms can be enforced only by "We the People" acting through our electoral and other political processes. This proposition lies at the heart of the political question doctrine that would bar any lawsuit on the Garland nomination.

To accept the argument that the Senate violated constitutional norms by refusing to act on the Garland nomination, one needs to view the Constitution as encompassing more than just its text. One needs to view the Constitution as also encompassing certain bedrock practices and understandings that, while not strictly required by the text, are essential to a functional government.

On this view, the Constitution simply cannot operate as a good and effective Constitution – one that appropriately empowers government actors to pursue the public good while simultaneously restraining them from exceeding their authority – unless those with power adhere to these bedrock practices and understanding.

Of course, there are many who would deny constitutional status to anything that is neither explicitly written into the Constitution's text nor necessarily implied by its structure. And there are others who would say that, while the Constitution should be understood to encompass some non-textual norms, the Senate's refusal to take up the Garland nomination was mere politics; it did not violate constitutional norms.

But be that as it may, many people certainly believe that the Senate violated constitutional norms in taking the unprecedented position that will not consider any appointment to the Supreme Court by President Obama during his last year in office.

Obviously, however, "We the People" did not punish the political officials responsible for the Senate's failure to act on the Garland nomination. In fact, we might reasonably be seen to have rewarded them for their intransigence.

We left the Senate in their control and elected their preferred presidential candidate, Donald Trump, who will soon nominate a candidate to fill the same Supreme Court vacancy for which President Obama nominated Judge Garland.

Faced with this prospect, the Senate minority will soon confront a number of difficult questions: Should it register its protest to the Senate's stonewalling of the Garland nomination by opposing whomever President Trump nominates to the Supreme Court, regardless of the nominee's qualifications and legal philosophies? If so, what form should the protest take?

Should it filibuster the nomination in an effort to prevent President Trump from filling the vacancy? Or should it merely vote "no" when the Senate schedules a vote? And what if another Supreme Court vacancy (or two or three) should arise over the next few years? Should it filibuster all of President Trump's Supreme Court nominees? Or should it merely vote against these nominees, regardless of their qualifications and legal philosophies?

May will say that the Senate minority must do all in its power to prevent President Trump's appointee(s) from being confirmed to the Supreme Court. They will argue that fire must be fought with fire, and that anything other than a commensurate response to the defeat of the Garland nomination would invite future breaches of constitutional norms by the majority. Others will say that the first step toward re-establishing adherence to constitutional norms is to model respect for them by operating within them. Under this view, the Senate minority should be prepared to provide President Trump's nominee(s) with a vote, but only after using all means at its disposal to pressure the president to nominate qualified candidates who would be acceptable to a broad swath of the American public.

Either way, it is unlikely that established norms about the filling of vacancies on the Supreme Court will continue to be observed unless "We the People" insist that they be respected.

How about four pork shanks in a wine and cream sauce for $79.95?

BURNS FROM D1

Neiman Marcus – the legendary department store that typifies wretched excess – is offering a rose-gold sheathed "raindrop sleek" private plane. The Cobalt Valkyrie-X will be "one of the fastest piston aircraft in the world" when it debuts next year. It will cost a mere $1.5 million.

Harry Barker Bucket of Bones, a galvanized recycled steel pail with eight doggy chew bones – in bright red, green, blue and orange – cleverly crafted of genuine recycled cotton yarns, a mere $85? Plus shipping charges. Alas, one popular food item is off the Neiman Marcus table. By the end of October, they'd run out of a special side dish of cooked collard greens that they were hawking for a mere $66 and an additional $15.50 shipping. (Yes, you read that right. $81.50 for something that was selling uncooked – for $1.99 a bunch at Market Basket last week. And it sells out. Go figure.)

But there are still lots of pricey gift victuals out there in Catalog Land. For all of them, by the way, shipping is not included.

An outfit called Mackenzie Limited is eager to send four pork shanks – braised in a mushroom, cream and wine sauce – to someone on your list for only $79.95. Or maybe instead a ready-to-bake apple pie, $59.95. Ice cream not included.

Not to be outdone, Williams-Sonoma, the temple of high-end kitchen gadgetry, gets into the food business big time this time of year. For just $119.95 you can gift your nearest and dearest the Williams-Sonoma Tailgating Meat Collection, which includes 12 pounds of really, really special hot dogs, Italian sausages and "burger blend" ground beef.

The dogs, for example, aren't just any old Oscar Mayer wieneros, but downright gourmet sausages, "made from all natural beef, raised humanely on small family farms, coarsely ground and blended for the perfect balance of fat and flavor. Free of antibiotics and hormones."

What enviro-sensitive carnivore could resist?

Still looking for something edible but just a tad, uh, cheaper for Uncle Harry and Aunt Honoria? The Vermont Country Store is there for you! For just $12.90 you can warm their winter table with "a Hefty Helping of Patriotism: The Bean Soup Served in the Senate's Dining Hall." It is, we're assured, "taste-tested and approved by one of our fine senators." I ask you, who could not trust Pat Leahy or Bernie Sanders when it comes to good ground beef?

In fact, if you're looking for nostalgic gifts – this is the year, after all, Americans elected a president who promises to return us to those good old days – you can't go wrong with the Vermont Country Store. If your gift list includes those hankering for a return to the days of yore, this is your place!

Where else can you find escape from today's bewildering high-tech gizmos with their confusing apps and instead enjoy once again the simple pleasures of, say, 1950 or '60? Just take a gander at the gems it offers (and I'm omitting the distracting capital letters the writer of the catalog is addicted to).

How about (for $39.95) a "classic" AM/FM portable radio with a simple analog tuner that "sounds great, goes anywhere" with a "full range mono speaker?" Or ($29.95) a handheld slide viewer to "view those old slides and relive the memories?"

How about a Vermont Country Store exclusive, a portable manual typewriter (complete with case!) that "types at a pace that lets you think?" $199.95, and I'd say worth every penny. Or this true gem: A Big Ben alarm clock, "the 1949 classic straight from the pages of The Saturday Evening Post."

(And if you don't know what The Saturday Evening Post is, chances are no one on your gift list will either).

One final suggestion. The nifty Alpenland International catalog offers – "directly from the Black Forest" – a cuckoo clock. And not just any cuckoo clock from the Munich Airport gift shop, but a musical extravaganza, "hand-carved and hand-painted by Black Forest craftsmen and sure to delight for generations!" When each hour strikes, "the cuckoo calls the hour, the musicians play, dancers spin, the bell ringer rings the bell and the water wheel turns" as it plays one of two popular German songs, "Edelweiss" or "The Happy Wanderer."

Just think. For just $750, every hour of every 24-hour day for 365 days a year, your loved one will be forcibly reminded of you! Isn't that a wonderful gift? Or perhaps you really ought to take another stroll downtown.

("Monitor" columnist Katy Burns lives in Bow.)