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Difficult Questions for the Senate Minority

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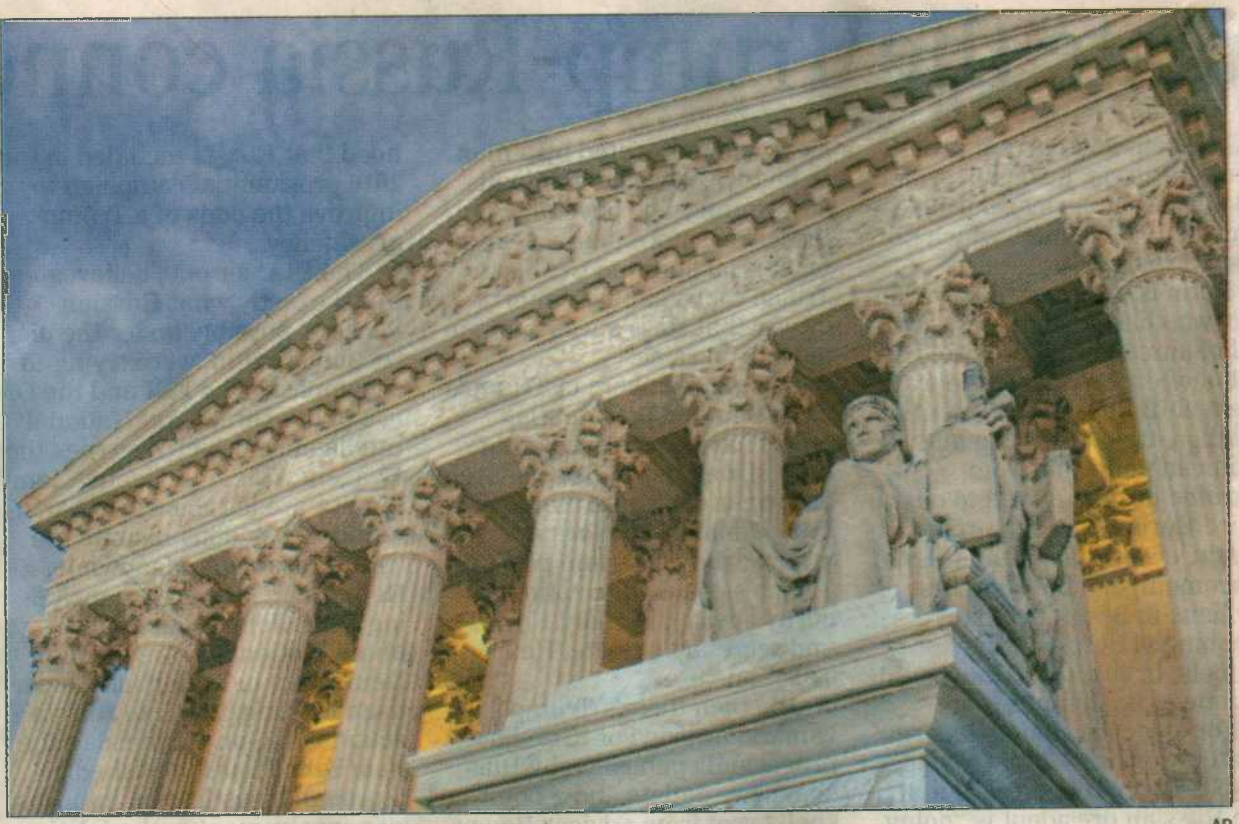

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The Supreme Court building at seen sunset in Washington in February.

Difficult questions for the Senate minority

Members face a challenge on Supreme Court nominees

JOHN GREABE
Constitutional Connections

This column is the first in a biweekly Constitutional Connections series that will examine the constitutional implications of various topics in the news. The author, John Greabe, teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.

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?

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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 it 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?

Many 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.