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Opinions

Obama can appoint Merrick Garland to the Supreme Court if the Senate does nothing

By Gregory L. Diskant April 8 at 9:01 PM

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On Nov. 12, 1975, while I was serving as a clerk to Supreme Court Justice Thurgood Marshall, Justice William O. Douglas resigned. On Nov. 28, President Gerald R. Ford nominated John Paul Stevens for the vacant seat. Nineteen days after receiving the nomination, the Senate voted 98 to 0 to confirm the president's choice. Two days later, I had the pleasure of seeing Ford present Stevens to the court for his swearing-in. The business of the court continued unabated. There were no 4-to-4 decisions that term.

Today, the system seems to be broken. Both parties are at fault, seemingly locked in a death spiral to outdo the other in outrageous behavior. Now, the Senate has simply refused to consider President Obama's nomination of Judge Merrick Garland to the Supreme Court. Meanwhile, dozens of nominations to federal judgeships and executive offices are pending before the Senate, many for more than a year. Our system prides itself on its checks and balances, but there seems to be no balance to the Senate's refusal to perform its constitutional duty.

The Constitution glories in its ambiguities, however, and it is possible to read its language to deny the Senate the right to pocket veto the president's nominations. Start with the appointments clause of the Constitution. It provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States." Note that the president has two powers: the power to "nominate" and the separate power to "appoint." In between the nomination and the appointment, the president must seek the "Advice and Consent of the Senate." What does that mean, and what happens when the Senate does nothing?

In most respects, the meaning of the "Advice and Consent" clause is obvious. The Senate can always grant or withhold consent by voting on the nominee. The narrower question, starkly presented by the Garland nomination, is what to make of things when the Senate simply fails to perform its constitutional duty.

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It is altogether proper to view a decision by the Senate not to act as a waiver of its right to provide advice and consent. A waiver is an intentional relinquishment or abandonment of a known right or privilege. As the Supreme Court has said, " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be

forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' "

It is in full accord with traditional notions of waiver to say that the Senate, having been given a reasonable opportunity to provide advice and consent to the president with respect to the nomination of Garland, and having failed to do so, can fairly be deemed to have waived its right.

Here's how that would work. The president has nominated Garland and submitted his nomination to the Senate. The president should advise the Senate that he will deem its failure to act by a specified reasonable date in the future to constitute a deliberate waiver of its right to give advice and consent. What date? The historical average between nomination and confirmation is 25 days; the longest wait has been 125 days. That suggests that 90 days is a perfectly reasonable amount of time for the Senate to consider Garland's nomination. If the Senate fails to act by the assigned date, Obama could conclude that it has waived its right to participate in the process, and he could exercise his appointment power by naming Garland to the Supreme Court.

Presumably the Senate would then bring suit challenging the appointment. This should not be viewed as a constitutional crisis but rather as a healthy dispute between the president and the Senate about the meaning of the Constitution. This kind of thing has happened before. In 1932, the Supreme Court ruled that the Senate did not have the power to rescind a confirmation vote after the nominee had already taken office. More recently, the court determined that recess appointments by the president were no longer proper because the Senate no longer took recesses.

It would break the logjam in our system to have this dispute decided by the Supreme Court (presumably with Garland recusing himself). We could restore a sensible system of government if it were accepted that the Senate has an obligation to act on nominations in a reasonable period of time. The threat that the president could proceed with an appointment if the Senate failed to do so would force the Senate to do its job — providing its advice and consent on a timely basis so that our government can function.

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