ESSAY

THE GARLAND AFFAIR:

WHAT HISTORY AND THE CONSTITUTION *REALLY* SAY ABOUT PRESIDENT OBAMA'S POWERS TO APPOINT A REPLACEMENT FOR JUSTICE SCALIA

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After Justice Antonin Scalia's death, politicians wasted no time before teeing up a political battle over his replacement. Republican Senators—led by Senate Majority Leader Mitch McConnell—immediately announced that they would not consider or vote on any replacement nominees from President Barack Obama. Instead, Senate Republicans deliberately seek to transfer President Obama's power to appoint Justice Scalia's replacement to the next elected President. This plan has generated substantial debate, but the debates have yet to engage with some of the most important historic, pragmatic, and constitutional risks of the plan. With Judge Merrick Garland's nomination to the U.S. Supreme Court pending and Donald Trump, the presumptive nominee of the Republican Party, announcing his alternative list of nominees if elected, this Article seeks to bring greater attention to these risks.

We begin with history and show a striking fact that has not yet been recognized: There have been 103 prior cases in which—like the case of President Obama's nomination of Judge Garland—an elected President has faced an actual vacancy on the Supreme Court and began an appointment process prior to the election of a successor. In all 103 cases, the President was able to both nominate and appoint a replacement Justice, by and with the advice and consent of the Senate. This is true even of all eight such cases where the nomination process began during an election year. By contrast, there have been only six prior cases in which the Senate pursued a course of action that—like the current Republican Plan—deliberately sought to transfer a sitting President's Supreme Court appointment power to a successor. In all six such cases, there were, however, contemporaneous questions, not present here, about the status of the nominating President as the most recently elected President. The historical rule that best accounts for senatorial practices over the entirety of U.S. history is thus the following: While the Senate has the constitutional power to provide advice and consent with respect to particular Supreme Court nominees and reject (or resist) particular candidates on a

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broad range of grounds, the Senate may only use this power to deliberately transfer a sitting President's Supreme Court appointment powers to a successor in the highly unusual circumstance where the President's status as the most recently elected President is in doubt.

Given this more than two-century long tradition, the Senate Republicans' current plan marks a much greater departure from historical precedent than has thus far been recognized. There is, however, still a further question whether the historical rule we uncover reflects a mere senatorial tradition, which should govern internal senatorial practices of fair dealing, or has further ripened into a constitutional rule that should inform the best interpretation of constitutional text and structure. In either case, the consequences of the plan are far more serious than its architects could have originally understood. After describing both possibilities, we suggest that Senate Republicans should rethink their plan so as to avoid these newly exposed historical, pragmatic and constitutional risks. Instead of continuing forward, the Senate should do what it has always done in similar past circumstances. It should proceed to full Senate consideration of Judge Garland or any other nominees that President Obama submits in a timely manner.

INTRODUCTION

After Justice Antonin Scalia's recent death, politicians wasted no time before teeing up a political battle over his replacement.[1] Republican Senators—led by Senate Majority Leader Mitch McConnell—immediately announced that they would not vote on any replacement nominations by President Barack Obama.[2] Senate Republicans indicated that they would not meet with any nominee either, or hold confirmation hearings within the Judiciary Committee.[3] Instead, Senate Republicans contend that President Obama's successor should nominate the next member of the Supreme Court, thus giving the voters an opportunity to weigh in—through their choice of President—on Scalia's replacement.[4] In a subsequent meeting

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1 *See, e.g.*, Mark Landler & Peter Baker, *Battle Begins Over Naming Next Justice*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/politics/battle-begins-over-naming-next-justice.html?_r=0 [http://perma.cc/CNZ6-YBT4] ("Within hours of Justice Scalia's death, both sides began laying the groundwork for what could be a titanic confirmation struggle fueled by ideological interest groups."); Matt Viser & Annier Linskey, *GOP Leaders Say Obama Must Not Fill Supreme Court Seat*, BOS. GLOBE (Feb. 14, 2016), https://www.bostonglobe.com/news/politics/2016/02/13/partisan-dispute-breaks-out-immediately-over-antonin-scalia-replacement-process-for-supreme-court/CSPFenWpAZIK8kExPQiY8H/story.html [https://perma.cc/RR98-L2MC] ("Scalia's death immediately thrusts control of the Supreme Court to the forefront of the presidential campaign agenda for both parties.").

2 On the very day of Scalia's death, McConnell stated that the Senate should not confirm any replacement for Justice Scalia until after the 2016 election. *See, e.g.*, Burgess Everett & Glenn Thrush, *McConnell Throws Down Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248 [https://perma.cc/J8RL-BH4N] ("'The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president,' McConnell said . . . ."). Many members of the G.O.P., including Senator Chuck Grassley, the Chairman of the Judiciary Committee, vowed to support McConnell soon thereafter. *See* David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will be Rejected*, N.Y. TIMES (Feb. 23, 2016), http://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html [https://perma.cc/D4Q9-GH39] ("[T]he chairman of the Judiciary Committee, who has the power to hold confirmation hearings but signed the letter to Mr. McConnell on Tuesday, along with every other committee Republican, saying no such proceedings would take place until a new president is in the White House.").

3 *See* Herszenhorn, *supra* note 2.

4 *See, e.g.*, Senator Chuck Grassley, *Coequal Branches of Government*, SCOTUSBLOG (Mar. 1, 2016, 7:00 AM), http://www.scotusblog.com/2016/03/coequal-branches-of-government/ [https://perma.cc/ZP28-RL2E]; Press Release, Mitch McConnell, Republican Majority Leader, U.S. Senate, McConnell on Supreme Court Nomination (Mar. 16, 2016), http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=50492600-6758-4FC2-928D-302FAB54BEA8/ [https://perma.cc/Y7TL-FGQQ] ("The American people may well elect a President who decides to nominate Judge Garland for Senate consideration. The next President may also nominate someone very different. Either way, our view is this: Give the people a voice in the filling of this vacancy.").

with President Obama on these issues, these Senators held firm to that stance.[5] Obama nevertheless signaled that he would make a nomination,[6] and, on March 16, 2016, nominated Judge Merrick Garland, the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, to the Supreme Court.[7] In response, Republican Senators reiterated their plan to refuse to consider Garland or any other nominee from the current President.[8] To

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[5] *See* Kevin Liptak, *Obama Meets with McConnell, Others on Supreme Court Nomination*, CNN (Mar. 1, 2016), http://www.cnn.com/2016/03/01/politics/obama-mitch-mcconnell-supreme-court-nomination/index.html [https://perma.cc/3XP5-LYJ3].

[6] *See* President Barack Obama, *A Responsibility I Take Seriously*, SCOTUSBLOG (Feb. 24, 2016, 8:00 AM), http://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/ [https://perma.cc/QC9P-FTCA] ("The Constitution vests in the President the power to appoint judges to the Supreme Court. It's a duty that I take seriously, and one that I will fulfill in the weeks ahead."); *see also* Maya Rhodan, *Obama Says He Will Pick a "Qualified" Supreme Court Nominee*, TIME (Feb. 16, 2016), http://time.com/4226680/obama-supreme-court-nominee/ [https://perma.cc/9T9J-RKXJ] ("'I intend to nominate in due time a very well-qualified nominee . . . .'").

[7] *See* Press Release, President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme [https://perma.cc/4XE8-VNAJ].

[8] *See* John Voorhees & Leon Neyfakh, *How Washington and Everyone Else is Reacting to President Obama's SCOTUS Pick*, SLATE (Mar. 16 2016, 11:53 AM), http://www.slate.com/blogs/the_slatest/2016/03/16/republican_reaction_to_obama_s_scotus_nomination_of_merrick_garland.html [https://perma.cc/TSL5-RNMY] (collecting statements to this effect from numerous Republican Senators on the Senate Judiciary Committee, including from Senators Mitch McConnell, Chuck Grassley, Orrin Hatch, Lindsey Graham, David Vitter, John Cornyn, Mike Lee, and Kelly Ayotte). There is, however, some indication that some Republicans could break rank. *See id.* (collecting statements by other Republican Senators indicating a willingness to at least meet with Judge Garland). Some Republican Senators have indicated they might proceed to consider Garland should a Democrat win the White House in the November 2016 election. *See* Amanda Terkel & Jennifer Bendery, *Senate GOP Could Consider Obama's Supreme Court Nominee in Lame-Duck Period*, HUFFPOST POL. (Mar. 16, 2016, 04:43 PM), http://www.huffingtonpost.com/entry/merrick-garland-lame-duck_us_56e9a842e4b0b25c91843849 [https://perma.cc/3CST-ZTQJ] (reporting on comments by Senators Orrin Hatch and Jeff Flake). Striking a less partisan note, Republican Senator Lindsey Graham has worried that the Senate's current move would be unprecedented and may cause problems with nomination processes for both parties down the line. *See* Chris Geidner, *Lindsey Graham Warns Blocking Obama Court Pick Could Haunt Republicans*, BUZZFEED NEWS (Mar. 10, 2016, 4:10 PM), http://www.buzzfeed.com/chrisgeidner/lindsey-graham-warns-of-consequences-if-gop-blocks-obama-cou#.jqnZ263OP [https://perma.cc/QS2N-TDQT]. Over the course of these developments, Republican Senator Chuck Grassley, Chair of the Judiciary Committee, has sometimes made inconsistent comments. *Compare* Voorhees & Neyfakh, *supra* ("[T]he Senate has decided to fulfill its constitutional role of advice and consent by withholding support for the nomination during a presidential election year, with millions of votes having been cast in highly charged contests." (quoting Sen. Grassley)), *with* Juliegrace Brufke, *Grassley Agrees to Meet with Obama's SCOTUS Nominee*, DAILY CALLER (Mar. 17, 2016, 8:04 PM), http://dailycaller.com/2016/03/17/grassley-agrees-to-meet-with-obamas-scotus-nominee/ [https://perma.cc/36WR-FCZM] ("Republican Sen. Chuck Grassley said Thursday he won't rule out meeting with President Barack Obama's nominee, but is standing by his decision not to consider a nomination until a new president is sworn in.").

date, key Senate Republicans are publicly holding firm to this plan.[9] Nonetheless, some Republican Senators have indicated they would support hearings immediately after the November 2016 elections should Democrats retain control of the White House;[10] and some prominent conservative commentators support confirming Garland as the best option under current political circumstances.[11]

As these events have unfolded, constitutional commentators have begun to debate whether Senators have the constitutional power to refuse to vote on or otherwise consider an Obama nominee to the Supreme Court.[12] So far, this debate has centered on the President's role in nominating a candidate and the Senate's role in providing advice and consent. Some argue, for example, that the Senate is not fulfilling a purported duty to provide advice and consent if it refuses to consider Obama's nominee or nominees.[13] Others respond that the President has the power to nominate but the Senate has both no duty to provide advice and consent and the power to withhold consent on any ground (and in any procedural manner).[14]

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9 *For Merrick Garland and Republicans, a Tango of Praise and Rejection*, N.Y. TIMES (May 9, 2016) http://www.nytimes.com/2016/05/10/us/politics/for-merrick-garland-and-republicans-a-tango-of-praise-and-rejection.html?_r=0 [https://perma.cc/J7W7-PV7T]; Mark Walsh, *Senate Hold on Merrick Garland Nomination Is Unprecedented, Almost*, ABA J. (May 1, 2016 02:30 AM CDT), http://www.abajournal.com/magazine/article/senate_hold_on_merrick_garland_nomination_is_unprecedented_almost [https://perma.cc/DM99-TEVD].

10 *See* Megan Cassella & David Morgan, *Senators Say They Might Confirm Obama's High Court Pick After Election*, REUTERS (Mar. 18, 2016), http://www.reuters.com/article/us-usa-court-garland-idUSKCN0WJ251 [https://perma.cc/GM6D-CKAU] ("Republican senators . . . raised the possibility they would confirm Barack Obama's Supreme Court nominee Merrick Garland before the U.S. president leaves office in January if Democrats retain the White House in the Nov. 8 election.").

11 *See, e.g.*, Leon H. Wolf (Diary), *Republicans Should Confirm Merrick Garland ASAP*, REDSTATE (May 4, 2016), http://www.redstate.com/leon_h_wolf/2016/05/04/republicans-confirm-merrick-garland-asap./ [https://perma.cc/SAP9-GMFD] ("Republicans must know that there is absolutely no chance that we will win the White House in 2016 now. They must also know that we are likely to lose the Senate as well. So the choices, essentially, are to confirm Garland and have another bite at the apple in a decade, or watch as President [Hillary] Clinton nominates someone who is radically more leftist and 10-15 years younger, and we are in no position to stop it.").

12 *See, e.g.*, Akhil Amar & Vikram Amar, *Can Obama be Reagan? Can the Senate be Reasonable?*, L.A. TIMES (Feb. 16, 2016), http://www.latimes.com/nation/nationnow/la-oe-amar-scotus-choice-stakes-20160216-story.html [https://perma.cc/FM6K-BZ8Y]; Josh Chafetz, *What the Constitution Has to Say About the Supreme Court Vacancy*, THE HILL (Feb. 16, 2016), http://thehill.com/blogs/pundits-blog/the-judiciary/269486-what-the-constitution-has-to-say-about-the-supreme-court [https://perma.cc/D9B5-KN4U].

13 *See, e.g.*, Obama, *A Responsibility*, *supra* note 6 (referring to Senators' "constitutional responsibility to consider the person I appoint"); Senator Patrick Leahy (D-Vt.), *Confirmation Hearings Bring Sunshine to the Court*, SCOTUSBLOG (Mar. 6, 2016, 5:00 PM), http://www.scotusblog.com/2016/03/confirmation-hearings-bring-sunshine-to-the-court/ [https://perma.cc/AKP2-XA8Q] ("Senators have a sworn obligation to provide advice and consent on the president's nominations.").

14 *See, e.g.*, Press Release, Mitch McConnell, *supra* note 4 ("It is a President's constitutional

Both sides, in our judgment, overlook important lessons that emerge from a fuller assessment of the historical record of Supreme Court appointments and the ways that record informs the pragmatic and constitutional considerations at stake.

In particular, history suggests that while there may be no general duty on the part of the Senate to provide advice and consent with respect to every nomination to a federal office that a President may make, the Supreme Court presents a special case. As we show, the Senate has only refused to consider a President's Supreme Court nominations in the highly unusual circumstance where the nominating President's status as the most recently elected President has been in doubt. Once this fact is recognized, it will become clear that the Republican plan is historically unprecedented and entails more extensive pragmatic and constitutional risks than have thus far been recognized. These risks may well outweigh the originally perceived benefits of the plan, even to Senate Republicans. At the very least, the arguments developed in this Article should prompt Senate Republicans to publicly reevaluate their plan and explain why it does not generate the new category of constitutional risks exposed in this Article.

Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the advice of consent of the Senate, shall appoint . . . Judges of the [S]upreme Court . . . ."[15] The text is thus clear that the current President "shall nominate" Scalia's replacement.[16] But the text is equally clear that the current President "shall *appoint*" Scalia's successor "by and with the consent of the Senate."[17] A President's power to appoint a Supreme Court Justice has both constitutional and extra-constitutional dimensions. The power clearly arises from the Constitution but it is exercised through a process of engagement—"advice and consent"—with the Senate. The way the Senate exercises its own power to provide advice and consent is, in turn, constrained by various constitutional and non-constitutional factors. For example, the Senate has no

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right to nominate a Supreme Court justice and it is the Senate's constitutional right to act as a check on a President and withhold its consent."). Josh Chafetz has similarly argued: "So what does the Constitution actually have to say about the matter? Not a lot: '[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.' The provision creates a power—and perhaps even a duty—in the president to make a nomination, but it does not give him a right to have his nominee confirmed or even considered. That power lies with the Senate." *Chafetz*, *supra* note 12. *See also* STANDING RULES OF THE SENATE REVISED TO JANUARY 24, 2013, S. DOC. NO. 113-18, at 43–44 (2013) https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf [https://perma.cc/U92M-22CJ] (Rule XXXI Executive Session – Proceedings on Nominations, Section 6).

15 U.S. CONST. art. II, § 2, cl. 2.

16 *Id*.

17 *Id*. (emphasis added).

constitutional power at all to provide "advice and consent" until after a President has made a nomination. Once a nomination has been made, however, the Senate operates under long-standing, self-imposed norms of conduct. Such norms provide a benchmark of fair dealing within the Senate. Norms can also ripen into constitutional rules that inform the best interpretation of the Constitution's text and structure.[18] Hence, while the text of the Constitution is a good starting point, it does not provide the only basis for assessing the permissibility or prudence of the Senate Republicans' current plan. As virtually all observers (including current Republican leaders in the Senate) acknowledge, historical practice matters a great deal.[19]

Accordingly, many commentators have begun to discuss the history of Supreme Court appointments in relation to the present appointments controversy.[20] Yet most of the historical accounts offered thus far are partial, misleading, or erroneous. The historical record itself is actually

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18 *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)); James Madison, *Letter to Spencer Roane* (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908) ("It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them."). In his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Frankfurter similarly explained that "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." He decried the "inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them" and pointed to "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Id.* at 610–11 (Frankfurter, J., concurring).

19 *See, e.g.*, Letter from Republican Members of Senate Judiciary Committee to Senator Mitch McConnell (Feb. 23, 2016), http://www.nytimes.com/interactive/2016/02/23/us/politics/document-Senate-SCOTUS-Letter.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news [https://perma.cc/2G9U-MK3Q] ("Not since 1932 has the Senate confirmed in a presidential election year a Supreme Court nominee to a vacancy arising in that year.").

20 *See, e.g.*, Gregor Aisch et al., *Supreme Court Nominees in Election Years Are Usually Confirmed*, N.Y. TIMES (Mar. 16, 2016), http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html [https://perma.cc/ETG2-2AK8]; Nick Bauman, *Here's What Happened Last Time an Outgoing President Made a Supreme Court Nomination*, HUFFINGTON POST (Feb. 14, 2016), http://www.huffingtonpost.com/entry/scalia-supreme-court-vacancy-history_us_56bfaaf0e4b08ffac1258cec [https://perma.cc/E79A-7VYX]; Jay Sekulow, *Historical Precedent Favors Letting Our Next President Appoint Justice Scalia's Replacement*, AM. CTR. FOR L. & JUST. (Feb. 2016), http://aclj.org/supreme-court/historical-precedent-favors-letting-our-next-president-appoint-justice-scalias-replacement [https://perma.cc/F2LY-SRSZ].

quite complex. Part I therefore begins with a close look at the entire relevant history. By examining every Supreme Court appointment process in U.S. history, we uncover a principled but underappreciated distinction between cases where the Senate has provided advice and consent on particular Supreme Court nominees—by considering them (and either confirming, rejecting, or resisting them on the merits using a wide array of senatorial procedures)—and cases where the Senate has sought deliberately to transfer a sitting President's complete Supreme Court appointment powers to a successor. We show that tactics of the latter kind have always been limited to the unusual circumstance where there were contemporaneous questions concerning the *status* of the nominating President as the most recently elected President. More specifically, all such cases involved a President who either (a) attained office by succession rather than election or (b) began the nomination process after the election of his successor. Neither circumstance applies to President Obama's nomination of Judge Garland. Moreover, bracketing these highly unusual circumstances, we show that there have been 103 prior cases in which—as in the case of Obama's nomination of Garland—an elected President nominated someone to fill an actual Supreme Court vacancy and began the nomination process prior to the election of a successor.[21] In all 103 cases, which go back all the way to the earliest days of the Republic, the sitting President was able to both nominate *and appoint* a replacement Justice—by and with the advice and consent of the Senate,[22] and regardless of the senatorial rules and procedures in place.[23] Hence, in none of the 103 cases that most closely resemble the current controversy has a sitting President been unable to fill an existing Supreme Court vacancy with *some* nominee.

The historical rule that best accounts for the entire history of Supreme Court appointments is thus the following: Although the Senate has the constitutional power to provide advice and consent on particular Supreme Court nominees (and hence to reject or resist individual nominees on the merits), the Senate may only deliberately transfer one President's Supreme Court appointment powers to an unknown successor—as Senate Republicans are currently attempting to do with their plan—if there are contemporaneous questions about the status of the nominating President as the most recently elected President. There are no such credible questions about President Obama's status. Hence, while Senate Republicans have

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21 *See infra* Part I.C.

22 *See id.*

23 For example, this is true regardless of the rules allowing for filibuster, motions to postpone, motions to table, cloture votes, the use of voice or roll call votes, or the use of subcommittees to vet Supreme Court candidates prior to full Senate consideration. Some of these senatorial procedures have, however, occasionally been used to block a President's first choice and forced subsequent nominations.

framed their opposition to the nomination of Judge Garland as hewing to historical practices, their plan in fact presents a major departure from more than two centuries of historical tradition.

After setting forth the historical tradition in Part I, Part II identifies several pragmatic risks associated with departing from this unbroken line of practice. A departure of this magnitude poses special challenges to the norms of cooperation and democratic decision-procedures that have traditionally allowed appointments processes to function. The logical terminus of the current Republican plan may also be that no future Supreme Court Justice will be appointable unless the President and the Senate are of the same political party. Such a result can only lead to a more—rather than less—politicized appointment process and, ultimately, to a more politicized Court. Section III, finally, turns to the possibility that the historical rule that we uncover has ripened into a constitutional rule that informs the best interpretation of constitutional text and structure. If such ripening has occurred, then the Senate Republicans' plan raises difficult and unprecedented constitutional issues relating to separation of powers. These questions are important in their own right. They also exacerbate the pragmatic risks involved with the current plan.

In order to avoid the historic, pragmatic, and constitutional risks we set forth, Senate Republican leaders should reconsider their current plan. They should not breach a tradition that goes back more than two centuries and began in the earliest days of the Republic. They should instead do what has always been done in similar circumstances. They should proceed to full Senate consideration of Judge Garland or any other nominee that President Obama puts forth in a timely manner.

I.
WHAT HISTORY *REALLY* SAYS ABOUT PRESIDENT OBAMA'S SUPREME COURT APPOINTMENT POWERS

In asserting the power to refuse to consider any Obama nominee to the Court, Senate Republicans rely heavily on historical practice. One of their primary arguments is, for example, that no President in the past eighty years has filled a Supreme Court vacancy during an election year.[24] Historical practice can indeed help clarify both the content of senatorial traditions of fair dealing and the meaning of constitutional text.[25] Yet a full

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24 *See, e.g.*, Max Ehrenfreund, *What Happens When a Supreme Court Justice Dies in an Election Year? Nobody Really Knows*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/13/what-happens-when-a-supreme-court-justice-dies-in-an-election-year-nobody-really-knows/ [https://perma.cc/ULH2-748M] (quoting Sen. Ted Cruz, a current member of the Senate Judiciary Committee, as saying that "[w]e have 80 years of precedent of not confirming Supreme Court Justices in an election year").

25 *See generally* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION (2012); *see*

and fair consideration of the entire history of Supreme Court appointments cuts against the propriety of the Senate Republicans' current plan.

Despite the importance of history to the present controversy, many current discussions of the history of Supreme Court appointments have proven partial, misleading, or erroneous. The historical record is much more nuanced than many have recognized. This Section, along with the accompanying historical Appendix,[26] therefore sets the historical record straight. A careful examination of the entire historical record shows that it is actually the Senate Republicans' plan not to consider any Obama nominee—rather than Obama's attempt to appoint a replacement for Scalia during an election year—that is unprecedented in the history of Supreme Court appointments.

History demonstrates, as an initial matter, that Supreme Court appointments have always been treated with special care.[27] In addition, a careful examination of the entire record of Supreme Court nominations reveals an important distinction between senatorial actions designed to provide advice and consent on particular nominees (by confirming, rejecting or resisting them on the merits) and senatorial actions designed deliberately to transfer one President's appointment powers to a successor. Notably, actions of the latter kind have always been limited to a narrow set of circumstances, where there have been contemporaneous questions about the *status* of the nominating President as the most recently elected President. As we will show, the complete historical record establishes, in fact, the following rule:

> *Whenever a Supreme Court vacancy has existed during an elected President's term and the President has acted prior to the election of a successor, the sitting President has been able to both nominate* and appoint *someone to fill the relevant vacancy, by and with the advice and*

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also Curtis A. Bradley & Neil Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 S. CT. REV. 1 (2014); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1806–08 (2013).

26 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 107.

27 For discussion of the special nature of the Supreme Court, see *infra* Part I.C.2. *See also* RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789–2011, 1 (2011) https://fas.org/sgp/crs/misc/RL33247.pdf [https://perma.cc/PFL2-2XWE] (noting that the Congressional Research Service recognizes that "[t]he nomination of a Justice to the Supreme Court of the United States is one of the rare moments when all three branches of the federal government come together"); Daniel P. Moynihan, *Debate in Senate on Nomination of Ruth Bader Ginsburg*, 139 CONG. REC. 18142 (Aug. 2, 1993) ("[The Senate] is perhaps most acutely attentive to its duty when it considers a nominee to the Supreme Court. That this is so reflects not only the importance of our Nation's highest tribunal, but also our recognition that while Members of the Congress and Presidents come and go . . . the tenure of a Supreme Court Justice can span generations.").

consent of the Senate.[28]

The above rule—which directly applies to President Obama's nomination of Judge Garland—might seem an overstatement given some historical cases where Presidents have failed to fill Supreme Court vacancies.[29] Yet as the remainder of this section shows, all such prior cases fall into one of two categories—neither of which is applicable to the present controversy. In every such prior case, the nominating President either (a) assumed office by succession rather than election or (b) began the nomination process after the election of a new President. In both circumstances, discussed in Sections A and B below, the elected status of the nominating President was very different—and was treated as very different—from that of an elected President like Obama whose successor has not yet been chosen. Section C further elaborates on the general historical rule and discusses three possible objections to our account of the historical record.

A. The First Category of Deliberate Transfers: Nominations by Presidents Not Elected as Presidents

The first historical cases that conflict with the general rule against deliberate senatorial transfers of one President's Supreme Court appointment powers to a successor all fall into a single and clearly definable category. These are all cases where the Senate refused to allow a President *who was not elected as President* to fill a Supreme Court vacancy. Under the Constitution's rules of succession, a President who was not elected as President can assume the office following the removal, death, or resignation of an elected President.[30]

On three early occasions in U.S. history, the Senate deliberately blocked an appointment to the Supreme Court by a President who—unlike

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[28] *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 105 n.198.

[29] Part I.A discusses three such cases relating to nominations made by Presidents Tyler, Fillmore, and Johnson. Part I.B discusses three other such cases relating to nominations made by Presidents John Quincy Adams, Buchanan, and Johnson. In addition, Abe Fortas was not confirmed to the position of Chief Justice in 1968. *See id*. Part I.C. discusses this historical episode.

[30] Article II, Section 1 of the Constitution sets forth the original rules of presidential succession as follows: "In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." U.S. CONST. art. I, § 1, cl. 5. In 1967, however, these constitutional rules of succession were partly clarified and amended through the ratification of the Twenty-fifth Amendment. *See generally* U.S. CONST. amend. XXV. The relevant changes are discussed below.

twice-elected Obama—assumed office by succession rather than election. In so doing, the Senate deliberately transferred the choice of the Supreme Court Justice to the next President.

The first case arose when Vice President John Tyler assumed the Presidency due to the death of President William Henry Harrison in April of 1841.[31] Two Supreme Court vacancies subsequently opened up due to the deaths of Justices Thompson and Baldwin.[32] These nominations presented the first cases in U.S. history where a President-by-succession sought to fill Supreme Court vacancies.[33]

The Senate ultimately allowed Tyler to fill one—but only one—of these vacancies. On February 4, 1845, after an election year, Tyler nominated Justice Nelson to replace Justice Thompson.[34] The Senate confirmed Nelson just eighteen days before the inauguration of President James Polk, Tyler's successor.[35] But the Senate took a very different tack with respect to the Baldwin vacancy.[36] The Senate indefinitely postponed action on one of Tyler's nominees to Baldwin's seat and took no action at all on the other nominee.[37] Therefore, it was ultimately President Polk who filled this second Supreme Court vacancy.[38]

Importantly, Tyler's Supreme Court nominations were submitted at a time when there was ambiguity over the *status* of Presidents who took office under the contemporaneous rules of succession of Article II, which referred to the "office . . . devolv[ing] on the Vice President" and to the Vice President as "act[ing] as President."[39] Tyler asserted that he was the literal President and not simply acting as President under these early rules.[40] That claim nevertheless drew criticism from many members of the Senate and the public.[41] Given ambiguity over President Tyler's status as

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31 *See* WHITE HOUSE, THE PRESIDENTS [hereinafter "WHITE HOUSE PRESIDENTIAL HISTORY"], JOHN TYLER, https://www.whitehouse.gov/1600/presidents/johntyler [https://perma.cc/F2VR-5DEC] (last visited May 2, 2016).

32 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 112.

33 *See generally id*.

34 *See id*.

35 *See id*.

36 *See id*.

37 *See id*.

38 *See id*.

39 U.S. Const. art. II, § 1. *See generally* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, 60–62 (Randall W. Bland et al. eds., 5th ed. 1984) (discussing ambiguity of these provisions).

40 *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 682–83 (2003) ("Tyler refused to accept [the alternative] interpretation of constitutional law. Tyler immediately assumed the title of president, rather than acting president, and he went on to take the presidential oath of office specified by the Constitution and collect the presidential salary.").

41 Professors Calabresi and Yoo point to "doubts about Tyler and general Whig hostility to

President, Tyler's nominees "made easy targets for Senators bent on dealing personal blows to Tyler, whom many of them resented as an 'accidental' or 'acting' President rather than a legitimately elected one."[42] In addition, although Tyler was elected as Vice President on the Whig ticket, he had taken several actions that led to his being expelled from the Whig Party.[43] That fact further undermined Tyler's claim to be the President who represented his electing constituents—a particular problem in the context of a Whig-controlled Senate.[44] The Senate's ambivalent responses to Tyler's two Supreme Court nominations thus took place while questions about Tyler's presidential status were publicly disputed in the very first case of its kind in U.S. history.[45]

The next time a similar situation arose was when President Zachary Taylor died in July of 1850 and Vice President Millard Fillmore assumed the Presidency.[46] Once again, two vacancies opened up on the Supreme Court—this time due to the deaths of Justices Woodbury and McKinley.[47] As in President Tyler's case, the Senate ultimately allowed President Fillmore to fill one—but only one—of the vacancies. On December 11, 1851, Fillmore nominated Benjamin Robbins Curtis to replace Justice Woodbury, and the Senate confirmed the nomination on December 20, 1851.[48] But the Senate took no action on all three of Fillmore's nominations to fill the vacancy left by Justice McKinley[49]—thus allowing his successor,

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presidential power" as part of the reason why "many congressional Whig leaders, upon learning of Harrison's death, immediately attempted to undermine Tyler's nascent presidency." *Id.* at 682. These leaders did so "by advancing the textually plausible claim that the Constitution did not permit a vice president actually to become president but instead only allowed the vice president to adopt the role of 'acting president' while continuing in the official title of vice president." *Id.*

42 Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 592 (2015).

43 *See* BETH & PALMER, *supra* note 27, at 6 ("[Tyler's] relations with the Whig party were strained, and after he vetoed a banking bill, Tyler's entire Cabinet but for one resigned, and Tyler was later expelled from the Whig party.").

44 Calabresi & Yoo, *supra* note 40, at 682.

45 *See* Michael J. Gerhardt, *Constitutional Construction and Departmentalism: A Case Study of the Demise of the Whig Presidency*, 12 U. PA. J. CONST. L. 425, 446 (2010) ("None of the rejections had anything to do with the nominees' credentials, which were generally quite good. Instead, the opposition arose primarily to keep one if not both vacancies unfilled so that the incoming President, James Polk, could fill them.").

46 *See* WHITE HOUSE PRESIDENTIAL HISTORY, MILLARD FILLMORE, *supra* note 31.

47 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 112.

48 *See id.*

49 Fillmore submitted the first nomination to fill the McKinley vacancy on August 16, 1852—approximately two and a half months before the election of his successor. *See id.* Fillmore's next two nominations were, however, submitted after the election, and, indeed, in the year after an election year. *See id.* In one case, the nominee withdrew before there was any Senate action. *See id.*

President Franklin Pierce, to fill this second vacancy.[50] This episode thus closely followed the only prior precedent set for Presidents who assumed their role by succession (during President Tyler's term).[51]

The third and final example of the phenomenon under discussion occurred when Vice President Andrew Johnson assumed the Presidency following the assassination of Abraham Lincoln.[52] A single vacancy subsequently opened up on the Supreme Court due to the death of Justice Catron.[53] Johnson nominated Henry Stanbery to fill this vacancy on April 16, 1866, but the Senate took no immediate action.[54] This case presented additional, special circumstances because, at the time, Congress was also reorganizing the Court and in the midst of considering legislation that ultimately eliminated the seat that Stanbery would fill.[55] Stanbery's nomination was rendered moot when this legislation passed.[56]

These three cases might seem to furnish some historical precedent for senatorial transfers of one President's Supreme Court appointment powers to a successor. Yet these precedents are of limited relevance to the current controversy. They only apply to Presidents who were originally elected as Vice President and assumed the Presidency upon death of an elected President. In addition, all of these cases occurred prior to the passage of the Twenty-fifth Amendment, when there was still some ambiguity over whether a Vice President literally became the President or merely acted as President under the Constitution's rule of succession then in place.[57] The Twenty-fifth Amendment, ratified on February 10, 1967, clarifies that Vice Presidents indeed become President upon removal, death, or resignation of an elected President[58] (although they merely act as President during circumstances of momentary disability).[59] Hence today, a Vice President

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50 *See id*.

51 In addition, one of the reasons explicitly cited by the Democratic-led Senate to decline to provide advice and consent with respect to President Fillmore's nominees to replace Justice McKinley and instead transfer this appointment choice to Fillmore's successor was that a Democratic President, Franklin Pierce, had already been elected. MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 90 (2013); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 58 (2000).

52 *See* WHITE HOUSE PRESIDENTIAL HISTORY, LYNDON B. JOHNSON, *supra* note 31.

53 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 111.

54 *See id*.

55 *See* Judicial Circuits Act, ch. 210, 14 Stat. 209 (1866).

56 *See id*.

57 *See generally* William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: The Emperor Has No Clones*, 75 GEO. L.J. 1389, 1393–400 (1987).

58 *See* U.S. CONST. amend. XXV, § 1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall *become* President" (emphasis added)).

59 *See id*. § 6 ("Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to

who assumes the Presidency upon removal, death, or resignation of an elected President clearly has the full powers to nominate and appoint Justices to the Supreme Court.[60]

Given the passage of the Twenty-fifth Amendment, the three early cases where the Senate deliberately transferred one President's Supreme Court appointment powers to a successor are of little modern relevance. Moreover, even before ratification of the Twenty-fifth Amendment, senatorial resistance to the Supreme Court appointment powers of Presidents who attained that status under the constitutional rules of succession was not entirely uniform. In two instances already described—relating to Justice Nelson and Justice Curtis—a President-by-succession was in fact able to make an appointment. In six other cases after the Civil War but prior to the ratification of the Twenty-fifth Amendment, the Senate confirmed a nominee by a President who attained the office by succession.[61] Hence, in total and prior to the passage of the Twenty-fifth Amendment, the Senate confirmed nominees in eight of the eleven cases in the category currently under discussion. The early historical record thus suggests at most the *permissibility*—as opposed to the *necessity*—of the Senate transferring a sitting President's Supreme Court appointment power to a successor when the President assumed the office only by succession.

There are no other cases of Supreme Court vacancies opening during terms of Presidents who attained their status by succession rather than

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discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.").

60 There is only one case of a President who assumed office by succession, rather than election, after the ratification of the Twenty-fifth Amendment and who faced a subsequent Supreme Court vacancy. This case confirms the above proposition. On August 9, 1974, President Gerald Ford assumed the Presidency after President Nixon's resignation. *See* WHITE HOUSE PRESIDENTIAL HISTORY, GERALD FORD, *supra* note 31. A Supreme Court vacancy subsequently arose due to the retirement of Justice Douglas. *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 108. Ford nominated John Paul Stevens to the position on November 28, 1975, and the Senate confirmed with a vote of 98-0. *See id*.

61 After President Garfield was assassinated on July 2, 1881, for example, President Chester Arthur successfully filled two Supreme Court vacancies—by and with the advice and consent of the Senate. *See id*. at 111. These processes led to the appointments of Justices Horace Gray and Samuel Blatchford. *See id*. Samuel Blatchford was nominated shortly after a prior nominee, Roscoe Conkling, declined on March 2, 1882. *See id*. Similarly, after President William McKinley's assassination on September 14, 1901, President Theodore Roosevelt filled two Supreme Court vacancies—by and with the advice and consent of the Senate (and before being elected as President in his next term). These processes led to the appointments of Justices Oliver Wendell Holmes and William Day. *See id*. at 110. Finally, after President Franklin Roosevelt's death on April 12, 1945, President Truman filled two additional vacancies on the Supreme Court—by and with the advice and consent of the Senate (and before being elected as President in his next term). These processes led to the appointments of Justice Harold Burton and Chief Justice Fred Vinson. *See id*. at 109.

election.[62] Despite some early rocky historical precedent, in all of the most recent cases, Presidents in this category exercised full Article II, Section 2 powers to nominate and appoint Supreme Court Justices. No senatorial transfers of the President's Supreme Court appointment powers have, in fact, occurred with respect to a President-by-succession since 1866. In any event, the Twenty-fifth Amendment now makes clear that Presidents by succession have full authority with respect to appointments and the exercise of other executive powers.[63] Hence, the three cases that fall into this first line of precedent provide no support for the Senate Republicans' plan to deliberately transfer President Obama's Supreme Court appointment powers to his successor.

B. The Second Category of Deliberate Transfers: Nominations Started Only After Election of a New President

The only other historical cases that arguably involve the Senate's deliberate transfer of one President's Supreme Court appointment power to a successor comprise a separate but equally distinguishable category. These are all cases in which a sitting President first nominated someone to fill a Supreme Court vacancy *only after* the election of a presidential successor. This possibility arises because of the lag time between an election and inauguration of a new President. During this brief "lame duck" period, there are two elected Presidents: one still serving and another soon to take office.

On three occasions in U.S. history, the Senate responded to Supreme Court nominations submitted after the election of a President's successor by deliberately transferring the President's Supreme Court appointment powers to his more recently elected successor. First, on December 17, 1828, President John Quincy Adams nominated John Crittenden to replace Justice Trimble.[64] Adams, however, began this nomination process *only*

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62 *See generally id*. There were, however, other Presidents who died during their terms but their deaths did not create any Supreme Court appointments for their successor's terms. For example, President Warren Harding died in August of 1923 of a heart attack, but no Supreme Court vacancies opened up until after his successor, Calvin Coolidge, was elected as President. *See* WHITE HOUSE PRESIDENTIAL HISTORY, WARREN HARDING, *supra* note 31; COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 109. After John F. Kennedy was assassinated on November 22, 1963, no Supreme Court vacancies opened up until after his successor, Lyndon B. Johnson, was elected for a second term as President. *See* WHITE HOUSE PRESIDENTIAL HISTORY, JOHN F. KENNEDY, *supra* note 31; COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 108.

63 *See* U.S. CONST. amend. XXV; *see also supra* notes 58–60 and accompanying text.

64 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 113.

after Andrew Jackson's election to succeed Adams.[65] The Senate postponed action on the Crittenden nomination, with some Senators citing the fact that "the [Crittenden] nomination took place after Adams'[s] successor, Andrew Jackson, had been elected."[66] Hence, "[o]pposition to Crittenden by supporters of Jackson prevented the Senate from confirming him,"[67] and it was ultimately Jackson, Adams's successor, who filled this vacancy with the appointment of Justice McLean.[68]

This was the first case in U.S. history in which the Senate deliberately refrained from providing advice and consent with respect to an *elected* President's Supreme Court nominations and instead sought to transfer that President's Supreme Court appointment powers to a more recently-elected successor. Yet this transfer did not occur without robust dissent and discussion among the Senators. For example, Senator John Holmes of Maine argued vociferously against the transfer, noting that:

> At the close of Mr. Jefferson's administration, to which I have already referred in reply to the honorable Senator from Virginia, I have not been able to find a single case of postponement to throw the appointment into the hands of his successor. The postponements at the close of Mr. Madison's term are accounted for on the ground of the hurry and pressure at the close of the war, and that they were for appointments to offices which might be filled or not, at the discretion of the appointing power. And at the close of Mr. Monroe's term, nominations to important offices were made and acted on, even down to its last hour, *and no one postponed but for objections that went to the character and qualifications*. Give us a case of a vacancy in a permanent office established by law, and a nomination in December to fill it, postponed on the 4th of February to the 4th of March, passing by entirely the merits of the candidate, *for the purpose of giving the appointment to the succeeding administration,* and you furnish a precedent—you establish an analogy. But all your attempts have miserably, fatally failed.[69]

Holmes's argument did not persuade the Senate to vote on Crittenden.[70] Nonetheless, the debate surrounding the nomination shows just how exceptional the Senate's refusal was even in these circumstances, and just how decisive it was that a newly-elected President was awaiting inauguration.

The second case that falls into this category arose in the 1860s. On

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65 *See id*. at 112.

66 *See* BETH & PALMER, *supra* note 27.

67 *Id*.

68 *See id*.

69 5 CONG. DEB. 90 (1829) (emphases added).

70 The Senate approved a resolution "[t]hat it is not expedient to act upon the nomination of John J. Crittenden, as a Justice of the Supreme Court of the United States, during the present session of Congress." *Id*. at 81.

February 5, 1861, President James Buchanan nominated Jeremiah Black to replace Justice Daniel.[71] Buchanan nevertheless submitted this nomination well after the election of President Abraham Lincoln on November 6, 1860, and, indeed, only a month before Lincoln's inauguration, on March 4, 1861.[72] On February 21, 1861, just a little over a week prior to Lincoln's inauguration, the Senate voted to reject Black.[73] Some Senators voted against Black in order to preserve the vacancy for incoming President Lincoln. Historians have noted, for example, that "Democrat James Buchanan's nomination of Jeremiah S. Black in December 1860, three months before his term ended, fell 25-26, chiefly because Republican Senators wanted to hold the seat for Abraham Lincoln to fill."[74] On July 12, 1861, Lincoln, who was Buchanan's successor, ultimately nominated Samuel Miller to replace Justice Daniel and the Senate confirmed Miller by voice vote on the same day.[75]

The third and final case that falls into this category occurred in the 1880s. On January 26, 1881, President Hayes nominated Stanley Matthews to replace Justice Swayne.[76] Hayes made the nomination, however, well after the election of James Garfield (on November 2, 1880).[77] Once again, the Senate postponed action on this nomination until Garfield's inauguration on February 9, 1881.[78] This particular postponement ended up making no difference, however, because Garfield renominated Matthews ten days after his inauguration and the Senate confirmed on May 12, 1881.[79]

These three cases may seem to provide a second line of historical

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71 *See* BETH & PALMER, *supra* note 27, at 4–5.

72 *See id*.

73 *See id*.

74 HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, 31 (2008).

75 *See id*.

76 *See id*.

77 *See id*.

78 *See id*. Interestingly enough, the fact that this nomination occurred during a true "lame duck" period does not appear to have been mentioned as much as a source of opposition as other factors, including Matthews's judicial philosophy. For example, Matthew D. Marcotte writes that "[t]he Matthews nomination was rarely criticized on the grounds that 'lame duck' presidents should not be entitled [to] great deference in the making of appointments," and, instead "the opposition appears to have been almost purely political—based on concerns about the judicial philosophy Matthews was likely to invoke were he to be confirmed to the Supreme Court." Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 543–44 (2002). Still, whatever the grounds cited for opposition, we find it notable that opposition has only led to an actual transfer of a President's Supreme Court appointment powers in one of the two circumstances we identify. These facts suggest that transfers have only been deemed *permissible* in one of these two highly unusual circumstances—even if the actual grounds for resistance have been more varied.

79 *See id*.

precedent that permits the Senate to transfer a President's Supreme Court appointment powers to a successor. However, each of these cases involved a nomination process started by one President after a new President had already been elected. In these circumstances, unique considerations emerge. A nomination for a lifetime appointment to the Supreme Court following the election of the nominating President's successor implicates the interests of an identifiable individual whom the electorate has more recently chosen as President. Hence, the Senate—some of whose members might also be on their way out of office as a result of the election—might reasonably believe that considerations of democratic legitimacy and respect for presidential power warrant taking no action on an outgoing President's last-minute choice. Yet cases like these present very different circumstances from President Obama's current nomination of Judge Garland.

In any event, even in cases where nominations have been submitted after the election of a presidential successor, the Senate's actions have not been completely uniform. While in the three cases described above, the Senate deliberately transferred one President's Supreme Court appointment powers to his more recently elected successor, in six other instances the Senate instead confirmed a Supreme Court choice by the outgoing President.[80] These facts reflect the inherent difficulty of the position the Senate is in when two elected Presidents beckon, with no simple method to

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[80] First, on December 18, 1800, President John Adams nominated John Jay to replace Chief Justice Ellsworth. *See id*. Adams submitted this nomination only after Thomas Jefferson was elected to the Presidency on October 31, 1800. *See id*. Jay declined the nomination the next day and on January 20, 1800, Adams nominated John Marshall to be Chief Justice. *See id*. This new nomination was submitted in the *year after* an election, but the Senate still voted to confirm Marshall seven days later (and only a little over a month before Jefferson's inauguration). *See id*. Second, on March 3, 1837, President Andrew Jackson nominated John Catron to fill a new seat created on the Supreme Court. *See id*. Jackson submitted this nomination long after Martin Van Buren was elected President on November 4, 1836. *See id*. Still, the Senate confirmed Justice Catron on March 8, 1837, four days *after* Van Buren's inauguration. *See id*. Third, Jackson had submitted another nomination for another new seat at the same time, and this nominee—William Smith—was also confirmed on March 8, 1837. *See id*. (Smith nevertheless declined the appointment. *See id*.) Fourth, on February 4, 1845, three months *after* a presidential election, outgoing President John Tyler nominated Samuel Nelson to the Supreme Court. *See id*. These events, discussed in the previous section, led to the confirmation of Justice Nelson on February 14, 1845, just a little over two weeks before the new President's inauguration. *See id*. Fifth, on December 15, 1880, President Hayes nominated Williams Woods to replace Justice Strong. *See id*. The Senate voted to confirm on December 21, 1880, and this entire appointment process thus took place after Garfield was elected to the Presidency on November 2, 1880. *See id*. Sixth, on February 2 1893, again in a *year after* an election, outgoing President Benjamin Harrison nominated Howell Jackson to replace Justice Lucius Quintus Cincinnatus Lamar who had died that January. *See id*. The Senate confirmed Jackson on February 18, 1893—just twenty-four days before the inauguration of Harrison's successor, Grover Cleveland. *See id*. All told, even in these highly unusual circumstances, the Senate has thus allowed sitting Presidents to fill six out of nine of the vacancies that fall into this second category.

resolve their competing claims to legitimacy.

Given this lack of uniformity, this second line of historical precedent—much like the first—suggests at most the *permissibility*, as opposed to the *necessity*, of senatorial transfers of one President's Supreme Court appointment powers to a successor in the limited circumstances where a new President has already been elected. Those circumstances do not apply to the present controversy, however, over President Obama and Judge Garland. There are, moreover, no other cases in U.S. history in which the Senate has deliberately transferred one President's Supreme Court appointment powers to a successor. Hence, the Senate Republican's current plan is truly unprecedented.

C. The General Rule Against Deliberate Transfers and Three Possible Objections

The previous two sections described every case in U.S. history in which an actual Supreme Court vacancy occurred and the Senate deliberately transferred one President's Supreme Court appointment power to a successor. There have only been six such cases, and all involved a President who either was not elected to that office or began the nomination process after the election of his successor.[81] In addition, all happened prior to the twentieth century—and three occurred in circumstances that would clearly no longer be permissible after the ratification of the Twenty-fifth Amendment.

Although the specific reasons for senatorial resistance to particular nominees have varied, the best way to harmonize this precedent is to see it as reflecting the following rule:

> *Although the Senate has the constitutional power to provide advice and consent on particular nominees to the Supreme Court (which it does by considering them and either confirming, rejecting, or resisting them on their merits), the Senate is only permitted to deliberately transfer one President's Supreme Court appointment powers to a successor when there are contemporaneous questions concerning the status of the nominating President as the most recently-elected President.*

This historical rule applies specifically to Supreme Court appointments—and does not appear to reflect entrenched historical practices in relation to other types of appointments or other forms of advice and consent.

There is, in other words, simply no historical precedent—recent or otherwise—for the deliberate transfer of presidential authority that Senate Republicans seek to effect with respect to the Supreme Court vacancy left by Justice Scalia. To the contrary, once the two historical categories of

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81 *See supra* Part II.B.

deliberate transfer are bracketed, as they should be given their distinguishability, a long-standing and unbroken line of historical practice emerges. The attached Appendix shows that there have been 103 prior cases in total in which—as in the case of Obama's nomination of Garland—an elected President nominated someone to fill an actual Supreme Court vacancy prior to the election of the President's successor.[82] In all 103 cases, which go all the way back to the earliest days of the Republic, the sitting President has been able both to nominate *and appoint* a replacement Justice—by and with the advice and consent of the Senate.[83] Given this clear and long-standing historical tradition, President Obama should therefore be able to appoint Scalia's replacement, by and with the advice and consent of the Senate, so long as he is able to nominate a candidate who can obtain sufficient support from the full Senate as part of a good faith confirmation process.[84]

Before discussing what such a process entails and clarifying reasons to adhere to it, we address three possible objections to our analysis of the historical record. These are the claims that: (1) no President has nominated a Supreme Court Justice during an election year in the last eighty years; (2) the Senate's past actions have not always been so uniform with respect to appointments other than to the Supreme Court; and (3) Abe Fortas's failed nomination to the position of Chief Justice in 1968 represents a possible counterexample. Clearing away these objections will reveal just how powerful the historical tradition is in the context of Supreme Court appointments. Later sections will then draw on this tradition to expose the grave pragmatic and constitutional risks of continuing forward with the Senate Republicans' current plan.

1. The Past Eighty Years

A first possible objection to our assessment of the historical record involves the claim, pressed vigorously by Republican Senators, that during the past eighty years no President has appointed a Supreme Court Justice during an election year.[85] This argument has little force.

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82 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 107.

83 *See generally id.* at 107–14; *see also id.* at 107 n.198.

84 The full reasons for this claim will be discussed *infra* Parts II & III.

85 *See, e.g.*, Ehrenfreund, *supra* note 24 (reporting statement of Senator Ted Cruz during Republican presidential debate that "[w]e have 80 years of precedent of not confirming Supreme Court Justices in an election year."); Sen. Chuck Grassley, *Statement on the Death of Supreme Court Justice Antonin Scalia* (Feb. 13, 2016), http://www.grassley.senate.gov/news/news-releases/grassley-statement-death-supreme-court-justice-antonin-scalia [https://perma.cc/5JQV-5XT4] ("[I]t's been standard practice over the last nearly 80 years that Supreme Court nominees are not nominated and confirmed during a presidential election year."); John Hageman, *Hoeven: People Should Have Say in Scalia Successor*, INFORUM (Feb. 15, 2016),

The core problem with the argument is that the past eighty years is precisely the period in which *no* Supreme Court vacancies occurred during an election year. Hence, there are no cases in the last eighty years that speak to a sitting President's power to appoint a Supreme Court Justice during an election year. This period appears to have been cherry-picked.

In order to find the most recent case that is on point, one must instead go back just one more election—*i.e.*, to the past eighty-*four* years. On February 15, 1932, President Herbert Hoover nominated Benjamin Cardozo to replace Justice Holmes, who retired during an election year.[86] Although Hoover first submitted this nomination during an election year, the Senate ultimately confirmed Justice Cardozo on February 24, 1932.[87]

The next two most recent cases that are directly on point occurred in 1916, when President Woodrow Wilson nominated Louis Brandeis to replace Justice Joseph Lamar and John Hessin Clarke to replace Justice Hughes.[88] President Wilson submitted the Brandeis nomination on January 28, 1916, in an election year, and Justice Brandeis was confirmed on June 1, 1916.[89] President Wilson submitted the Clarke nomination on July 14, 1916, in the same election year, and Justice Clarke was confirmed ten days later.[90] Both of these Justices were thus nominated and confirmed during an election year.

The next most recent case that is on point occurred when President William Howard Taft nominated Mahlon Pitney to replace Justice John Marshall Harlan.[91] Taft submitted this nomination on February 19, 1912, during an election year, and the Senate confirmed less than a month later, on March 13, 1912.[92] All four of these cases—relating to Cardozo, Brandeis, Clarke, and Pitney—thus stand in opposition to the claim that an election year excludes appointments to the Supreme Court.

If—as Senate Republicans argue—historical practices matter, then one should at least consider the entire twentieth century and the most recent precedents that are actually on point. Beginning in the twentieth century, however, there are *no* cases in which an elected President nominated someone to fill an actual Supreme Court vacancy during an election year

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http://www.inforum.com/news/3948629-hoeven-people-should-have-say-scalia-successor [https://perma.cc/K67Q-4HV3] (reporting statement of Sen. John Hoeven that "[t]here is 80 years of precedent for not nominating and confirming a new justice of the Supreme Court in the final year of a president's term so that people can have a say in this very important decision.").

86 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 109.

87 *See id.*

88 *See id.* at 110.

89 *See id.*

90 *See id.*

91 *See id.*

92 *See id.*

and failed to fill the vacancy. Instead, as we have just demonstrated, all relevant precedents run in the other direction.

The same point holds when the earlier historical record is considered. Even before the twentieth century, there is no case in U.S. history where an elected President nominated a Supreme Court Justice during an election year (but prior to the election of his presidential successor) and failed to appoint a replacement Justice. During this earlier period, there were four instances of such nominations, and in all four the outgoing President was able to both nominate *and appoint* a new Justice.[93] Another five Justices were confirmed even though nominated by an outgoing President *after* the election of the President's successor.[94] Hence, in every single prior case, nominations made by an elected President during an election year (but prior to the election of a presidential successor) have been treated the same as nominations made prior to an election year.

One other more recent case deserves discussion in this context. On November 30, 1987, President Ronald Reagan nominated Anthony Kennedy to replace Justice Powell—who had retired earlier that year.[95] The Senate confirmed Kennedy on February 3, 1988, during an election year[96]—thus providing the closest precedent that speaks to election-year confirmation within the last eighty years. This case is, however, admittedly distinguishable from the vacancy created by Scalia because the vacancy created by Powell arose *prior* to an election year. Indeed, Kennedy was Reagan's third choice for the Powell seat.[97] Still, this is the one case in the last eighty years in which an actual vacancy still existed during an election year—and the Senate ultimately confirmed a nominee.

In sum, the first potential objection has little force for several reasons. By focusing on only the eighty most-recent years of historical precedent, it

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93 *See generally id.* at 107–14.

94 *See generally id.*

95 THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 931 (Kermit L. Hall ed., 1922) (entry for "Anthony Kennedy") [hereinafter OXFORD COMPANION].

96 *Id.*

97 Reagan first nominated Robert Bork on July 7, 1987, before an election year, but the Senate rejected this nomination after public confirmation hearings and a full Senate vote on October 23, 1987. *Id.* at 79 (entry for "Robert Bork"). Following Bork's defeat, on October 29, 1987, Reagan announced his intention to nominate Douglas Ginsburg; after allegations of drug use, however, Ginsburg withdrew from consideration, on November 7, 1987, *Id.* at 339 (entry for "Douglas Ginsburg"), before the official nomination reached the Senate. *See* Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U. L. REV. 1, 3 (1989) ("The best known case of withdrawal prior to nomination, but after White House announcement, was that of Judge Douglas H. Ginsburg. Judge Ginsburg withdrew from consideration for the United States Supreme Court after published reports stated that he, at one time, used marijuana prior to his federal service."). Reagan nominated Anthony Kennedy later that same month (and well before the presidential election the next year).

excludes all of the precedents that actually bear on the question of election-year appointments to the Supreme Court. Once focus is expanded to the entirety of U.S. history, all of the precedents that speak to this question speak *against* the view that the Senate may deliberately transfer one President's Supreme Court appointment powers to a successor just because it is an election year. More generally, while individual Senators from both sides of the political aisle have occasionally offered contrary accounts,[98] nothing in the constitutional text or the history of senatorial practices supports a distinction between nominations made during an election year (but prior to the election of a presidential successor) and earlier nominations.

2. Beyond the Supreme Court

A second possible objection arises from the fact that the Senate has often failed to take action on *non*-Supreme Court nominations that were submitted toward the end of a President's term.[99] Under this objection, the clear and long-standing historical traditions relating to Supreme Court appointments cannot resolve the current debate because there is no principled reason to limit attention to historical precedents that pertain to the Supreme Court.

The fact of the matter is, however, that Supreme Court appointments *are* special. As the Congressional Research Service explains:

> The nomination of a Justice to the Supreme Court of the United States is one of the rare moments when all three branches of the federal government come together: the executive branch nominates, and the legislative branch considers the nomination, deciding whether the nominee will become a member of the high court. Presidents and Senators have said that, short of declaring war, deciding who should be on the Supreme Court is the most important decision they will make while in office.[100]

In part because the Supreme Court is the single final arbiter of questions of constitutional meaning, the special nature and functions of the Supreme

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98 The Upshot Staff, *Where the Senate Stands on Nominating Scalia's Supreme Court Successor*, N.Y. TIMES (Feb. 17, 2016, updated May 12, 2016, 9:45 AM ET), http://www.nytimes.com/interactive/2016/02/17/upshot/scalia-supreme-court-senate-nomination.html [https://perma.cc/E45E-GFHD]. *See also* DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RESEARCH SERV., RL 34615, NOMINATION AND CONFIRMATION OF FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS (2008), https://www.fas.org/sgp/crs/misc/RL34615.pdf [https://perma.cc/E6PF-QX7A].

99 *See generally* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 164–66 (2003) (describing historical instances of lapsed nominations).

100 *See* BETH & PALMER, *supra* note 27.

Court have long been recognized.[101] It thus makes sense that Supreme Court appointments have traditionally been treated with special care and that distinct patterns and practices of dealing with Supreme Court appointments have emerged over the course of U.S. history.

One way to measure the special care with which Supreme Court appointments have traditionally been treated is to consider the number of Supreme Court nominations that have failed to reach the Senate floor, along with the limited circumstances in which this has occurred. Members of the Senate might, in theory, attempt to divest a sitting President of his Supreme Court appointment power by refusing to allow his nominations to proceed to the full Senate floor. As it turns out, however, there are only twelve cases (out of 160 nominations) over the entire course of U.S. history where a Supreme Court nomination has failed to reach the Senate floor.[102] Three of these involved nominations submitted very late in a congressional term, with resubmission by the same President (and a full vote) during the next congressional term.[103] Another six involved presidential withdrawals of particular nominees—either so that the President could nominate a subsequent candidate who obtained confirmation or because the vacancy never materialized.[104] Hence, none of these nine cases involved the Senate's refusal to proceed to full Senate consideration of a President's

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101 BARRY J. MCMILLION, CONG. RESEARCH SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 2 (2016), https://www.fas.org/sgp/crs/misc/R44235.pdf [http://perma.cc/AWX3-HT6X] ("The Senate 'is perhaps most acutely attentive to its [advise and consent] duty when it considers a nominee to this Supreme Court. That this is so reflects not only the importance of our Nation's highest tribunal, but also our recognition that while Members of the Congress and Presidents come and go . . . the tenure of a Supreme Court Justice can span generations.'" Sen. Daniel P. Moynihan, debate in Senate on Supreme Court nomination of Ruth Bader Ginsburg, 139 CONG. REC. 18142, August 2, 1993.).

102 *Id*. at 15–16.

103 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 109. Confirmation of John Harlan and Pierce Butler occurred in such circumstances. In the third case, the Senate rejected the nomination of William Hornblower. *See id*. at 110. President Grover Cleveland subsequently filled that vacancy with another nominee, Edward White. *See id*.

104 *See* BETH & PALMER, *supra* note 27, at 16. Most recently, for example, President George W. Bush withdrew the nomination of Harriet Miers in 2005 in response to mounting opposition to her candidacy and instead successfully nominated Justice Samuel Alito. *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 107–08. President Bush also withdrew his initial nomination of John Roberts as an Associate Justice in order to nominate him instead—again, successfully—to the position of Chief Justice. The other instances in this category are as follows: President Johnson nominated Homer Thornberry to the Court in 1968 but the nomination was withdrawn because the vacancy to which he was nominated never materialized. President Grant's nomination of Caleb Cushing and President Tyler's nomination of John C. Spencer were withdrawn before any floor action was taken. George Washington withdrew the nomination of William Patterson shortly before his second inauguration and before any floor action was taken but then successfully resubmitted it. *Id*. at 108, 111–13

Supreme Court nominees in an effort to completely divest a President of his Supreme Court appointment powers. The three remaining cases involved the nominations of Stanley Matthews, Henry Stanbery, and William Micou.[105] As described above, however, all three of these cases concerned nominations made either after the election of the nominating President's successor or by a President who obtained office only by succession.[106] Hence, except in these unusual circumstances, the Senate has never once before prevented full Senate deliberation on a President's Supreme Court nominees.[107]

Another way to measure the special care with which Supreme Court appointments have traditionally been treated is to consider the number of Supreme Court nominees who have obtained an up-or-down vote once reaching the Senate floor. The Senate might also attempt to divest a sitting President of his Supreme Court appointment power by preventing a final vote on any and all nominees from a particular President. Of the 148 nominations that have reached the Senate floor, however, all but thirteen have obtained a vote.[108] Here, too, we see a difference in how nominations are treated when made by elected Presidents who began the nomination process prior to the election of a successor and Presidents whose status as the most recently-elected President was in question.

In particular, ten such nominations were made by Presidents whose status as the most recently elected President was in question.[109] In these ten

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105 *See* BETH & PALMER, *supra* note 27, at 16.

106 *See supra* Parts I.A & I.B.

107 *See* BETH & PALMER, *supra* note 27, at 16.

108 *Id*.

109 In five of the thirteen cases in question, the nominations were tabled by the Senate in order to deliberately transfer one President's Supreme Court appointment powers to a successor. *See id*. But in all five of those cases, the nominees came from either President Tyler or Fillmore, who obtained office by succession rather than election prior to the ratification of the Twenty-fifth Amendment. In three other cases the Senate moved to postpone a final vote, thereby deliberately and effectively extinguishing a President's Supreme Court appointment power. *See id*. But in two of these three cases, which related to George Badger and John Crittenden, there were contemporaneous questions about the status of the nominating President as the most recently elected President. *Compare id*., *with* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 112. In three other cases, which involved the nominations of Jeremiah Black, John Read, and Reuben Walworth, the Senate used other senatorial procedures to deliberately transfer a President's Supreme Court appointment powers to his successor, but in these three cases, there were similarly contemporaneous questions about the status of the President as the most recently elected President. In the case of Jeremiah Black, who was nominated after the election of new President, the Senate defeated a motion to consider Black on the merits. *See* BETH & PALMER, *supra* note 27, at 16. In the case of John Read, who was nominated by President Tyler, no procedures were taken but no vote ever occurred either. *See id*. In the case of one of Reuben Walworth's nomination, also by President Tyler, a motion to consider was met with objection. *See id*. Hence, altogether ten of the cases where nominees obtained no vote up or down involved cases where there were contemporaneous questions about the status of the President as the most recently elected President.

cases, the Senate *did* use senatorial procedures of various kinds (including filibustering or motions to postpone or take no action) to deliberately prevent a vote on the President's nominee. But in the remaining three cases, where no questions of status existed, the Senate cannot be fairly understood to have done any such thing. This is especially clear in two of the three cases, because it was the nominating President himself who withdrew the nominations before the Senate could vote in order to nominate another candidate, who was subsequently confirmed.[110] The third case, which involved President Lyndon B. Johnson's nomination of Abe Fortas to the position of Chief Justice, is more complex and will therefore be discussed separately in the next subsection. That case did involve the filibustering of a candidate, but—for reasons we will explain—it cannot be fairly understood as a deliberate attempt to divest a particular President of his Supreme Court appointment powers in circumstances where an actual vacancy existed. Hence, absent questions about the status of a President as the most recently-elected President, the Senate has never before refused a full up-or-down vote on all of the nominees from a *particular* President in order to divest that President of his Supreme Court appointment powers.

The fact that the Senate may have withheld advice and consent (or full Senate consideration, or a final vote) on some *non*-Supreme Court appointments in the past is thus irrelevant to the present analysis. A close examination of the relevant evidence suggests that throughout U.S. history, Supreme Court appointments have simply been treated with special urgency and care. The historical rule that we uncover is therefore limited to the context of Supreme Court appointments—and appropriately so. Still,

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110 First, when Ulysses S. Grant's nomination of George Williams to the position of Chief Justice met with considerable opposition, and looked like it would not pass, Williams requested Grant to withdraw the nomination before a final vote. *See* OXFORD COMPANION, *supra* note 95, at 931 (entry for "George Williams"). This did not lead to any transfer of President Grant's Supreme Court appointment power with respect to this vacancy, however, because President Grant subsequently nominated Justice Morrison Waite to the position and Justice Waite was confirmed. *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 111. Second, President Andrew Jackson nominated Roger Taney to replace Associate Justice Gabriel Duvall, who retired on January 12, 1835. The Senate scheduled a vote on Taney's confirmation on the last day of its session that same month but Jackson's opponents blocked the vote and moved to abolish the open seat on the Court. *See* ABRAHAM, *supra* note 74, at 858 (entry for "Roger Brooke Taney"); MELVIN UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 466 (2006) (entry for "Roger B. Taney"); Charles M. Ellis, *Roger B. Taney, the Leviathan of Slavery*, THE ATLANTIC (Feb. 1865), http://www.theatlantic.com/magazine/archive/1865/02/roger-b-taney-the-leviathan-of-slavery/387241/ [https://perma.cc/QG2B-WQ8L]. While that motion was unsuccessful, Jackson's opponents did succeed in postponing indefinitely any vote on Taney's candidacy during that congressional term. *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 112. In that case, however, no actual transfer of power occurred because President Jackson was still in office and simply renominated Taney to the position of Chief Justice the following year, and the Senate confirmed the appointment. *See id*.

within this special context, nominations have always gone to the full Senate floor, unless withdrawn by the President or submitted by one whose status as the most recently-elected President was in doubt. The Senate has always proceeded to a final vote on *some* nominee to fill every *actual* Supreme Court vacancy—unless there were contemporaneous doubts about the status of the nominating President as the most recently-elected President.

3. Abe Fortas

The closest possible exception to our historical account lies in the events surrounding the nomination of Abe Fortas to replace Chief Justice Warren.[111] When President Lyndon B. Johnson (LBJ) submitted this nomination, on June 26, 1968, Abe Fortas was already an Associate Justice.[112] On that same day, LBJ therefore nominated another person—Homer Thornberry—to fill the seat that Abe Fortas would relinquish if confirmed to the position of Chief Justice.[113] The Senate commenced hearings on Fortas's nomination but Fortas faced especially harsh questioning and severe resistance from a number of conservative Senators.[114] On October 4, 1968, in part as a face-saving measure for Fortas, LBJ withdrew Fortas's nomination to the position of Chief Justice.[115] This withdrawal occurred following four days of floor debate and a failed motion for cloture to force a full Senate vote.[116] Because Fortas's seat was never vacated and LBJ did not seek to nominate anyone else to the position of Chief Justice, this withdrawal effectively mooted Thornberry's nomination as well.[117]

While the Fortas case might appear to challenge our historical account, it in fact fits with our principal conclusions. As an initial matter, although immediately after Fortas was nominated eighteen Senators signed a letter stating that they believed the next President should nominate a new Chief Justice, the Senate Judiciary Committee promptly met with and held confirmation hearings on Fortas—even though the nomination occurred during an election year.[118] Fortas's nomination also made its way to the full Senate floor, where the full Senate began to consider Fortas's nomination

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111 *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 108.

112 OXFORD COMPANION, *supra* note 95, at 308 (entry for "Abe Fortas").

113 *Id*. at 872 (entry for "William Homer Thornberry").

114 *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 327–56 (1992) (detailing the Senate hearings on Fortas's nomination to position of Chief Justice).

115 *Id*. at 355.

116 *See* KALMAN, *supra* note 114, at 355.

117 *Id*.

118 *Id*. at 351–55.

on the merits.[119] The Senators who opposed Fortas thus voiced their opposition in public confirmation hearings and floor debates where they cited numerous particular reasons to oppose this particular nominee for the position of Chief Justice.[120] Some Senators noted that Fortas was, for example, a close, personal advisor to LBJ and continued to advise him (daily, as it turns out) during his presidency.[121] These Senators argued that Fortas's ascension to the position of Chief Justice, a position of special influence and authority, would thus create special problems relating to the separation of powers.[122] Fortas had also been at the center of several ethical controversies; he was ultimately forced to resign his position as Associate Justice in 1969, after several further ethical scandals emerged.[123]

Because of these facts, the Fortas episode is readily distinguishable from the current one involving Garland. As an initial matter, the Fortas episode did not involve the Senate announcing in advance that it would not consider or vote on any nominee from a particular President. Nor was it a case in which the Senate refused to hold confirmation hearings or floor debates on a Supreme Court nomination. By voicing their reasons for opposing Fortas in public confirmation hearings and floor debates, all Senators who opposed Fortas were able to represent their constituents but also risked the threat of losing reelection if their positions on this candidacy deviated too far from those of their constituents. Senators who supported Fortas faced similar risks. But no such national democratic constraints can operate with respect to Garland's nomination because only a handful of Senators are effectively preventing the full Senate from publicly considering and voting on Judge Garland. Unlike the current situation, which involves a vacancy created by Justice Scalia's death, the Fortas episode also never involved any *actual* vacancy on the Supreme Court. Chief Justice Warren had merely announced his intention to retire from the Court "effective at [LBJ's] pleasure."[124] Warren's intention was to allow LBJ, a Democrat, to appoint his replacement (perhaps a reason-in-and-of-

119 *Id*. at 331–32.

120 *See id*. at 337 (describing shift in strategy of senators opposed to Fortas from a claim that Johnson was a lame-duck President and thus ineligible to appoint a Supreme Court Justice to a focus on Fortas's close relationship with the President and behavior as an Associate Justice).

121 *Id*. at 337–40 (recounting Senators' vigorous questioning of Justice Fortas about advice he provided the President on a variety of issues, including the Vietnam War and selection of judges, and the implications of this role for separation of powers).

122 *See id*. at 357 ("It was Fortas's misfortune to have his advisory role exposed at a time when there was increasing anxiety among the public and members of Congress about the growth of presidential power. To senators, that fear made it more important than ever to maintain the sanctity of the separation of powers doctrine.").

123 *See* Gerard N. Magliocca, *The Legacy of Chief Justice Fortas*, 18 GREEN BAG 2D 261, 268 (2015) (describing disclosure by *Life* magazine that Fortas had received a $20,000 retainer from a foundation seeking access to the President).

124 *Id*. at 264.

itself for the Senate to withhold consent). Ultimately, however, Chief Justice Warren remained in office throughout and after these proceedings—with the result that there was never any actual vacancy with respect to this position during LBJ's term. For all of these reasons, the Fortas episode cannot be fairly understood as one in which the Senate deliberately refused to let a sitting President fill an actual Supreme Court vacancy regardless of the merits of his particular nominees.

Our principal historical conclusions therefore hold true without exception. Put simply, the Senate has sometimes used its "advice and consent" powers to shape some Presidents' Supreme Court choices—either by rejecting or resisting some particular nominees on their merits and with full Senate consideration. Absent contemporaneous doubts about the status of a nominating President as the most recently-elected President, however, the Senate has never before acted as if it had the further power to completely divest a sitting President of his Supreme Court appointment powers.

II.
THE GRAVE PRAGMATIC RISKS OF A BREAK FROM HISTORICAL TRADITION

Supreme Court appointments have always been subject to politics. It might, therefore, be tempting to conclude that the current Senate Republicans' plan to transfer President Obama's Supreme Court appointment power to his successor is nothing more than politics as usual. The historical account offered in the previous Part suggests, however, that this is plainly not the case. The Senate Republicans' current plan is qualitatively different from anything that has occurred before. At minimum, the plan therefore represents a much more significant break from more than two centuries of U.S. history and practices of fair dealing than has thus far been appreciated. A break of this magnitude carries with it grave pragmatic risks,[125] which are serious enough in their own right and exist regardless of the constitutional status of the plan. This Part highlights these pragmatic risks. The Part that follows, then, turns to the attendant constitutional problems.

A defining feature of the Senate—and one of the primary bases upon which it has been able to operate despite inevitable political differences among its members—is a commitment to traditions of fair play, which

[125] For similar arguments, see Vikram David Amar, *The Grave Risks of the Senate Republicans' Stated Refusal to Process any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016), https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them [https://perma.cc/2MDK-2544].

allow it to function in politicized circumstances.[126] Even when senatorial traditions have not achieved the status of constitutional rules, they therefore create practices of fair dealing that allow the Senate to play its constitutionally-designated roles regardless of which party holds a majority of seats at any particular moment.

The historical rule that we have uncovered is a prime example of such of tradition: It allows for Supreme Court appointments to proceed even in circumstances where the nominating President and Senate majority are of different parties. Indeed, one of the primary ways this tradition has typically functioned is by helping to produce relative consensus appointments to the Supreme Court.

The Senate thus has some constraints on how it can proceed if it is to maintain consistency with its own traditional rules of fair play. To be sure, the Senate can and should scrutinize particular nominees to replace Justice Scalia—as it has past nominees to the Court. It can also confirm or reject (or resist) particular nominees after full Senate consideration on a broad range of grounds.[127] The history we have described suggests, however, that the Senate cannot go further, by deliberately transferring President Obama's Supreme Court appointment powers to an unknown successor, and maintain consistency with more than two centuries of senatorial tradition.

Some recent commentators have suggested, to the contrary, that the Senate is, in fact, providing advice—in the traditional sense—to President Obama by refusing to act on any of his nominees.[128] On this view, the Senate is performing its constitutionally described role by, in effect, advising the President not to bother nominating anyone at all to replace Justice Scalia. This argument confronts two serious difficulties. First, the

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126 *See, e.g.*, RICHARD A. BAKER, TRADITIONS OF THE SENATE 1 (2007) ("The U.S. Senate relies heavily on tradition and precedent. Change comes slowly."); L. SANDY MAISEL & MARK D. BREWER, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 360 (2011) ("The Senate's norms, traditions, and unique historical development preclude strong party control."); NEIL MACNEIL & RICHARD A. BAKER, THE AMERICAN SENATE: AN INSIDER'S HISTORY 10 (2013) ("New senators learn quickly the role tradition plays in the institution's culture.").

127 *See, e.g.*, PAUL M. COLLINS & LORI RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 14 (2013) ("[C]onfirmation hearings are valuable because they act as a democratic forum for the discussion and ratification of constitutional change."); CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 33 (2016) ("Partisan wrangling has always been a part of the Supreme Court confirmation process.").

128 For critical discussion of these views, see David H. Gans, *Republicans Who Block Obama's Supreme Court Pick Are Violating the Constitution*: *The Originalist Case for the Senate to Do Its Job*, NEW REPUBLIC (Mar. 16, 2016), https://newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution [https://perma.cc/Z2HM-SC6C] (observing "[t]he claims made by [some] senators that they can fulfill their 'advice and consent' responsibilities under the Constitution by doing nothing").

full Senate is not acting to provide advice at all in such circumstances. Rather, a number of Republicans on the Senate Judiciary Committee are preventing floor debates on the ultimate question whether *the Senate* advises and consents to the Garland nomination. Second, and more practically, advice that takes the form of "we will not act on any nominee by a particular President" cannot provide a President with any actionable advice for how to nominate a candidate who might be appointed through the Constitution's designated mechanisms.

Senate rules confirm this assessment. Senate Rule 31 states: "When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees."[129] The same rule also states, however, that "the *final* question on every nomination shall be, 'Will *the Senate* advise and consent to this nomination?'"[130] Hence, under existing Senate rules, it is ultimately the *full Senate* that provides "advice and consent" through floor consideration leading, typically, to a full Senate vote.[131] No rule of the Senate presently authorizes the Senate Judiciary Committee to exercise that power on the Senate's behalf or to offer its prediction of how full Senate consideration will come out as a substitute for full Senate consideration.[132]

To be sure, the Senate is free to change its own rules. A departure from the approach Rule 31 embodies would, however, mark a quite serious break from more than two centuries of Senate tradition. Before Rule 31 was enacted, Supreme Court nominations always went to the full Senate floor;[133] and even thereafter, Senate traditions have always only allowed for deliberate transfers of Supreme Court appointment powers in the past in certain highly unusual circumstances not present here.

To break now with this long-standing historical tradition would generate grave pragmatic risks. We highlight three such risks below.

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129 STANDING RULES OF THE SENATE REVISED TO JANUARY 24, 2013, S. DOC. NO. 113-18, at 43–44 (2013) https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf [https://perma.cc/U92M-22CJ] (Rule XXXI Executive Session–Proceedings on Nominations, Section 6). *See* BETH & PALMER, *supra* note 27, at 5.

130 *Id*. (emphases added).

131 *See supra* Part I.C (discussing limited circumstances in which Supreme Court nominations that have reached the Senate floor have not received a full Senate vote—none of which involved deliberate attempts to transfer a President's Supreme Court appointment power to a successor absent contemporaneous questions about the status of the nominating President as the most recently elected President).

132 *Cf*. THE FEDERALIST NO. 77, 398 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that if a smaller committee or council is given the confirmatory authority, then "all idea of responsibility is lost").

133 *See* BETH & PALMER, *supra* note 27.

A. Democratic Considerations Unmoored

One pragmatic risk arises from the fact that absent reliance on historical tradition, there is no evident stopping point for the particular type of breach that the Republican plan entails. Senate Republicans claim motivation by democratic concerns—that is, they want "the people" to have a chance to weigh in on the pending Supreme Court appointment by way of voting in the upcoming election.[134] While the justification has an appealing ring, the problem is that without some reliance on tradition, there is no principled method to determine the best timing or appropriate mechanisms through which the people's voice should be heard and followed. Arguments concerning the possibility of Supreme Court vacancies were, for example, amply raised during the *previous* presidential election.[135] It stands to reason that voters selected President Obama to, among other things, fill any Supreme Court vacancies that might arise during his term in office. In addition, if the Senate were to hold confirmation hearings and floor debates leading to a vote on President Obama's particular nominees to replace Justice Scalia, the people could still speak *now* by holding their particular Senators accountable for their votes. (Indeed, some Republican Senators, either facing tight election battles or in response to the views of their constituents may, after public confirmation hearings, ultimately vote in favor of Garland.[136]) By contrast, it is not plausible to think that the decisions of a handful of Senators on the Senate Judiciary Committee, representing a minority of the States, can adequately reflect the democratic will of the Nation.

Some might set aside whatever democratic mechanisms exist now in favor of those that would arise in the context of the pending election. Here, however, tradition serves as an important anchor. Without some deference

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134 Mitch McConnell has explained, for example, that: "The American people may well elect a president who decides to nominate Judge Garland for Senate consideration. . . . The next president may also nominate someone very different. Either way, our view is this: Give the people a voice." *See* Erin Kelly, *GOP Senators Vow Not to Consider Garland to Fill Supreme Court Vacancy*, USA TODAY (Mar. 17, 2016), http://www.usatoday.com/story/news/2016/03/16/gop-senators-vow-not-consider-garland-fill-supreme-court-vacancy/81856428/ [https://perma.cc/6SVE-QNRR] (quoting Senate Majority Leader Mitch McConnell).

135 During the 2012 election, Mitt Romney, for example, explicitly argued that: "In his first term, we've seen the president try to browbeat the Supreme Court. In a second term, he would remake it. Our freedoms would be in the hands of an Obama court, not just for four years, but for the next 40. That must not happen." *See* Trip Gabriel, *Romney Warns Gun Lobby of a Second Obama Term*, N.Y. TIMES: THE CAUCUS (Apr. 13, 2012), http://thecaucus.blogs.nytimes.com/2012/04/13/romney-to-warn-gun-lobby-of-a-second-obama-term/?_r=0 [https://perma.cc/3DNQ-GKRU] (quoting Mitt Romney).

136 *See, e.g.*, Amber Phillips, *Here Are the Republicans Who Could Break Ranks and Give Merrick Garland a Shot at the Supreme Court*, WASH. POST (Mar. 16, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/03/16/here-are-the-gop-senators-who-could-give-merrick-garland-a-shot-at-the-supreme-court/ [https://perma.cc/AC8H-BB2B].

to historical precedent, there would be little reason to limit *future* attempts to transfer a President's Supreme Court appointment powers to election-year nominations. A commitment to election-year exceptionalism is far too easy to abandon when faced with abstract appeals to democracy. Why not, for example, proceed to think that once *half* of a President's term has passed, it is more democratically legitimate to wait until the next election to fill any Supreme Court vacancies that may arise? And once that has happened, why not think that the people should weigh in on every Supreme Court vacancy as part of the next election? Developments like these could lead to the unfortunate consequence that the judiciary would come to be viewed as little more than an arm of politics. Absent some anchor in history, the very decision procedures that allow for democratic deliberation can become unsettled and subject to intractable contestation.

Fortunately, democratic concerns do not require that we start down this dangerous path. Our constitutional structure is set up to allow the people's voice to be heard at any moment in time through a complex set of checks and balances—one of which is the traditional system of dealing with Supreme Court appointments. To break with the more than two centuries of tradition that have allowed representative democratic decision-making to function in this context would leave these deliberative procedures unmoored.

B. Politicization of the Judiciary

A second pragmatic problem with the Senate Republicans' current plan is that its logical terminus may well be that no Supreme Court Justices will be appointable unless the President and the Senate are of the same political party. Such a change in tradition can only lead to a more, rather than a less, politicized Court, and the rule of law will suffer. Shortly before Justice Scalia's death, Chief Justice Roberts warned, in fact, about the general risks to the Court's legitimacy that can arise when appointments processes become overly politicized. He explained:

> When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms. . . . If the Democrats and Republicans have been fighting so furiously about whether you're going to be confirmed, it's natural for some member of the public to think, well, you must be identified in a particular way as a result of that process.[137]

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137 Robert Barnes, *The Political Wars Damage Public Perception of Supreme Court, Chief Justice Roberts Says*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html [https://perma.cc/ZU8J-3ZAJ].

If anything, the risks that Roberts identified understate the hazards involved with the Senate Republicans' current plan. Roberts's comments at least presupposed a willingness—consistent with two centuries of senatorial tradition—to consider and debate particular nominees on the merits.

The Senate Republicans' current plan, by contrast, involves one political party's resistance to any and all nominations by a President from the opposing political party. The plan seeks to deliberately divest a democratically-elected President of his Supreme Court appointment powers in order to put the choice of a Supreme Court Justice up for a kind of new national election. Prior to Justice Scalia's death, this level of politicization of Supreme Court appointments would have been quite unimaginable.

C. Heightened Risks of Retaliation and Cooperative Breakdown

Should Republican Senators succeed in preventing full senatorial consideration of all of President Obama's nominees, there is, finally, little question that retaliatory measures will result. As Vikram Amar has observed, "moves in this appointments game can generate countermoves," such that "[g]ood players . . . need to calibrate their countermoves carefully to avoid putting themselves in more vulnerable situations later."[138] At the very least, the unprecedented nature of Republican Senators' current plan is therefore likely to make Supreme Court appointments much more difficult in the future for Republicans and Democrats alike.

In addition, as Professor Amar explains, if "Democrats feel [this] move was overly sharp-elbowed," they may retaliate in equally unprecedented ways.[139] For example, if Hillary Clinton were to win the next presidential election, Obama might withdraw the nomination of Judge Garland, and allow her to appoint a much more liberal Justice instead.[140] Or, if Democrats were to win the Senate but lose the White House, a new majority of Democratic Senators may undo the existing senatorial filibuster rule by simple majority vote.[141] They may then push an Obama nominee through during the lame-duck session before the inauguration of the next President.[142] Democrats may even try to persuade Justices Ginsburg and Breyer to resign in early January so that President Obama can name three younger and more liberal Justices instead of making the single nomination of Judge Garland.[143]

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138 Amar, *supra* note 125.
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*

On the other hand, should a Republican take the White House in an upcoming election, Senate Democrats might well adopt the position that their President was cheated out of a Supreme Court appointment. There might be some merit to this claim because the historical traditions we have described appear to reflect at minimum long-standing conventions of fair play. If Democrats gain control of the Senate, they may therefore refuse to consider *any* Republican President's nominees to the Court until the next election occurs four years down the road. Or, if in the minority, Democrats may deploy unprecedented procedural tactics to block or prolong consideration of any such nominee. The end result could well be a continued spiraling of Supreme Court appointment processes into increasingly protracted and acrimonious strategies deployed by both parties in ways that have nothing to do with the merits of any particular candidate.

Indeed, with so much historical tradition jettisoned, it is possible to imagine things escalating until both sides feel cheated and begin to pursue more dramatic and unprecedented tactics. Some might, for example, try to impeach members of the Supreme Court so as to remove Justices appointed by Presidents of the opposing party and free up spots to allow past grievances to be settled by way of new appointments. Threats of impeachment might also be directed toward shaping judicial decisions, thus undermining the impartiality of the Court and the protective function that lifetime tenure serves. With Supreme Court vacancies relatively rare, there are also likely to be spillover effects. Retaliation and counter-moves may well infect lower court appointments and non-judicial appointments and hence paralyze many other operations of government.

It is precisely for these reasons that long-standing senatorial traditions and practices of fair dealing are so critical to the functioning of our government. Tradition can help governmental officials avoid escalating cycles of tit-for-tat so that they can fulfill their constitutionally designated roles despite their political differences. But while Senate Republicans may believe that their current plan is consistent with tradition, our examination of the full history relating to Supreme Court appointments suggests that Senate Republicans have instead—perhaps unwittingly—taken the one position that is most clearly at odds with the entire U.S. tradition that governs Supreme Court appointments. A breach of such magnitude can only serve to widen existing divisions and undermine the traditional appointments processes that have worked for over two centuries to keep the Supreme Court and our constitutional government working.

At the same time, however, we do not believe that the original architects of the Senate Republican plan could have fully understood the magnitude of these risks without an understanding of the historical traditions that we identify in this Article. Hence, they could not have

accurately weighed the benefits of the plan against the heightened pragmatic risks described in this Part. The tradition we set forth and the hazards of departing from it provide compelling new reasons for Senate Republicans to rethink their plan, regardless of its constitutional propriety. The next Part suggests that—given the historical tradition we have uncovered—this plan also raises a further and unprecedented category of constitutional risk.

III.
THE UNPRECEDENTED CONSTITUTIONAL RISKS OF A BREAK FROM HISTORICAL TRADITION

Thus far, we have described a historical tradition that has governed senatorial practices relating to Supreme Court appointments over the entire course of U.S. history. We have also described how a breach of that tradition would create grave pragmatic risks—the full extent of which have not yet been fully appreciated. There is, however, another reason to pay close attention to the historical tradition we have identified. Longstanding practices can also guide constitutional interpretation, particularly on issues relating to the scope of power of the elected branches of government. In *NLRB v. Noel Canning*, for example, the Supreme Court explained that "great weight" should be given to "[l]ong settled and established practice" when construing "constitutional provisions regulating the relationship between Congress and the President."[144] Five members of the *Noel Canning* Court relied on historical practices to conclude that the Recess Appointments Clause confers broad authority on the President to fill any existing vacancies during recesses of sufficient length, whether these recesses occur during or between congressional sessions.[145] The other four Justices acknowledged that longstanding historical practices can at least guide constitutional interpretation in cases of textual ambiguity.[146] In a similar manner, the historical traditions we have uncovered may well have ripened into *constitutional* rules that should inform the best interpretation of constitutional text and structure in relation to Supreme Court appointments.

The historical rule we identify suggests, at minimum, that the Senate Republicans' current plan raises an underappreciated constitutional question of first impression. This Part describes that constitutional question

144 NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

145 *Id.* at 2558–78 (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor & Kagan, JJ.).

146 *Id.* at 2594 (Scalia, J., concurring, joined by Thomas, Alito & Roberts, JJ.) ("Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.").

and its significance. We start by presenting, in Section A, what we view to be the best argument for concluding that the Senate Republicans' plan in fact violates the Constitution. Section B then describes some limitations of the argument. Because the constitutional question is difficult, unsettled, subtle, and concerns a politically divisive topic, we do not purport to resolve it definitively. We contend instead that the question presents a paradigmatic "hard case"—that is, one that is underdetermined by the available legal and historical evidence and cannot be easily settled either way.[147] Our final conclusions are therefore quite cautious. We suggest that the plan generates a category of constitutional risk that has not yet been appreciated or weighed in these debates. This fact requires some responsible reconsideration of the plan. In addition, the constitutional risks that we describe make the pragmatic risks of the plan, discussed in the previous Part, all the more serious. The architects of this plan should therefore rethink it based on a complete understanding of all its attendant risks.

A. The Constitutional Argument: Historical Gloss on Presidents' Supreme Court Appointment Powers

To understand the novel constitutional question raised by the Senate Republicans' current plan, it helps to return to the text of Constitution. Article II, Section 2 of the Constitution, the "Appointments Clause," provides that that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the [S]upreme Court."[148] The President thus has two separate constitutional powers: first, the power, exercised by the President alone, to *nominate* a member of the Court; and second, the power, upon receiving the advice and consent of the Senate, to *appoint* a member of the Court.[149]

Given this text, the Appointments Clause provides for a three stage process to complete an appointment: first, the President, acting alone, nominates an individual; second, the Senate, acting through its own processes, advises and (if it is so inclined) gives its consent to a nominee; and third, assuming consent is received, the President appoints the nominee.[150] The appointment is complete when the President signs the

147 For the classic definition of a "hard case," see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (defining 'hard cases' as those 'in which the result is not clearly dictated by statute or precedent.'). Later, we will expound on this definition and clarify how it applies here. *See* Part III.B, *infra*. We will also describe why the problem arises from indeterminacy not only in the textual but also in the historical evidence. *See id*.

148 U.S. CONST. art. II, § 2, cl. 2.

149 *See id*.

150 For an especially clear description of this three step process, see generally John O. McGinnis, Essay, *The President, the Senate, the Constitution, and the Confirmation Process: A*

commission.[151]

At the first (nomination) stage, the President's power is unrestricted as a matter of constitutional law and requires no input from any other government actor.[152] But both the Senate and the President require the other's cooperation to complete an appointment at the next stages. If, for example, the Senate does not consent to a nominee at the second stage, then that nominee cannot be appointed and the President must submit another nomination;[153] but even if the Senate unanimously approves of a nominee, the President can prevent the appointment at the third stage by refusing to sign the commission.[154]

So far much of the commentary on President Obama's constitutional power to fill the Scalia vacancy has centered on whether the Senate is properly exercising its role—or performing a purported duty—to provide advice and consent at the second stage if it refuses to consider any Obama nominee.[155] That question is important but it obscures a separate and equally important issue: As noted, the President has constitutional powers at *both* the nomination *and* the appointment stages. Regardless of what it means to provide advice and consent, senatorial refusal to consider any nominee from a particular President *with the express purpose of transferring his appointment powers to a successor* may therefore implicate a deeper problem of separation of powers.

This problem has not yet been fully appreciated by participants in the current debates. Senate Republicans, for example, clearly believe that they are acting within the limits of the Constitution;[156] many commentators who disagree with their plan view it as unprecedented and harmful but not constitutionally impermissible.[157] The problem itself is, however, easy

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Reply to Professors Strauss and Sunstein, 71 TEX. L. REV. 633 (1993).

151 U.S. Const. art. II, § 3, cl. 4.

152 *See* McGinnis, *supra* note 150, at 638–46.

153 *See id*. at 652–59.

154 *See id*. at 639.

155 *See generally* John Voorhees & Leon Neyfakh, *How Washington and Everyone Else is Reacting to President Obama's SCOTUS Pick*, SLATE (Mar. 17, 2016, 8:04 PM), http://www.slate.com/blogs/the_slatest/2016/03/16/republican_reaction_to_obama_s_scotus_nomination_of_merrick_garland.html [https://perma.cc/TSL5-RNMY] (collecting statements from many Republicans that the Senate has the right to refuse to consider any Obama nominee, pursuant to its role in providing "advice and consent," and from many Democrats that this role includes a duty to consider Judge Garland).

156 *Hatch: "Democrats are Peddling False Claims about the Constitution and the Supreme Court Vacancy,"* STATE NEWS SERV. (Apr. 20, 2016), https://www.highbeam.com/doc/1G1-450114381.html [https://perma.cc/TP7J-BQYE]; Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldn't-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html [https://perma.cc/5B64-LHSV].

157 *The Folly of the GOP's Pre-emptive Strike over a Supreme Court Nominee*, ECONOMIST

enough to state: The outright senatorial refusal to consider any nominee from the current President in a deliberate attempt to divest him of his Supreme Court appointment powers (and transfer them to his successor) may go beyond the provision of "advice and consent," as it has traditionally been construed in the context of Supreme Court appointments, to undermine one of the President's constitutionally-designated powers. The rule that we uncover from the entire history of Supreme Court appointment processes suggests that the Senate may, in fact, only engage in deliberate transfers of this kind and maintain consistency with historical tradition if there are contemporaneous questions about the *status* of the nominating President as the most recently-elected President. When such questions about a President's status exist, the separation-of-powers issues are different. If the historical rule that we have uncovered has indeed ripened into a constitutional rule, then the Senate Republicans' current plan may therefore run afoul of the Constitution.

In our view, the best argument that the Senate Republicans' current plan violates the Constitution would therefore draw upon the history we set forth in this Article as a gloss on constitutional text and structure. More specifically, it would deploy the historical record in support of three claims: (1) Supreme Court appointments have traditionally been treated (and should now, as a historical gloss on constitutional text and structure, continue to be treated) with special care and as raising distinct separation-of-powers issues from other types of presidential appointments; (2) there is a principled distinction between senatorial actions that respect a sitting President's Supreme Court appointment powers while providing advice and consent (even if the Senate ultimately opposes or rejects some nominees, as the Constitution clearly permits it to do) and senatorial attempts to deliberately transfer one President's Supreme Court appointment powers to a successor; and (3) outright attempts to transfer a sitting President's Supreme Court appointment powers have always been limited (and should, as a historical gloss on constitutional text and structure, continue to be limited) to circumstances where there are contemporaneous questions about the status of a nominating President as the most recently-elected President. All three of these claims find some measure of support in constitutional

(Feb. 24, 2016, 17:43), http://www.economist.com/blogs/democracyinamerica/2016/02/replacing-antonin-scalia [https://perma.cc/8VYX-AA4V]; Glenn Kessler, *Does Senate have a Constitutional Requirement to Act?*, WASH. POST (Mar. 20, 2016), at A02, https://www.washingtonpost.com/news/fact-checker/wp/2016/03/16/does-the-senate-have-a-constitutional-responsibility-to-consider-a-supreme-court-nomination/ [https://perma.cc/H9Q5-2BJ6]; Ilya Somin, *The Constitution Does Not Require the Senate to Give Judicial Nominees an Up or Down Vote*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/the-constitution-does-not-require-the-senate-to-give-judicial-nominees-an-up-or-down-vote [https://perma.cc/H2FB-T8AV].

text and structure, but—on the current argument—it is ultimately the historical gloss of more than two centuries of past practices that creates a special constitutional rule concerning how separation of powers functions in relation to Supreme Court appointments.

So how would this argument work? As an initial matter, it is critical to distinguish the Senate's (indisputable) power to confirm, reject, or resist particular Supreme Court nominees from its (more questionable) power to divest a particular President of his constitutionally-designated power to appoint Supreme Court Justices. Attempts by one branch to divest a President of a constitutional power should always be viewed with suspicion. As the Supreme Court has explained, "[t]he roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political."[158] In addition, while separation of powers problems typically involve "the danger of one branch's aggrandizing its power at the expense of another,"[159] a second risk exists with respect to appointments: "The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."[160] In other words, it is no defense that Senators might not be seeking to enhance their own power. Reducing the current President's appointment power is problem enough.

Textually, the Constitution does provide an explicit mechanism for Congress to transfer *some* presidential appointment powers to other bodies as well as to authorize the President simply to act alone. Article II, Section 2 empowers Congress to "vest the Appointment of . . . *inferior Officers* . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[161] A Supreme Court Justice is not an "inferior officer,"[162] however, and there is no analogous constitutional provision to transfer a sitting President's Supreme Court appointment powers to anyone else. Hence, the Constitution simply does not provide for one half of the

158 Freytag v. C.I.R., 501 U.S. 868, 878 (1991).

159 *Id.* (citing Mistretta v. United States, 488 U.S. 361, 382 (1989).

160 *Id.*

161 U.S. CONST. art. II, § 2, cl. 2 (emphasis added). It should be noted that this delegation power refers only to "inferior Officers", *see id.*, and thus does not apply to principal officers. *See, e.g.*, *Freytag*, 501 U.S. at 884; Buckley v. Valeo, 424 U.S. 1, 129–31 (1976). In *Freytag*, the Court thus explained that "the [Appointments] Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branch." *Freytag*, 501 U.S. at 884. Moreover, "[e]ven with respect to 'inferior Officers', the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of department, and the courts of law." *Id.*

162 The text of the Appointments Clause explicitly distinguishes "judges of the [S]upreme Court" from "inferior officers". *See* U.S. CONST. art. II, § 2. This distinction is also clear from Supreme Court precedent. *See, e.g.*, *Freytag*, 501 U.S. at 884.

Congress—here, the Senate—to deliberately divest a sitting President of his or her Supreme Court appointment powers. In addition, the constitutional text suggests that Supreme Court appointments raise separation-of-powers concerns that are distinct from many other types of appointments.

One might argue that these separation-of-powers concerns are limited to powers held by the *office* of the President rather than by a *particular* President. If so, then the deliberate transfer of a Supreme Court appointment power from one President to a successor could not raise any genuine separation-of-powers concerns. One need not focus on the current controversy over Obama and Garland, however, to recognize that there are constitutional limits to Congress's authority to limit even a sitting President's Supreme Court appointment powers. Given the text of the Constitution just discussed, it seems clear, for example, that Congress lacks the constitutional power to prohibit through legislation an elected President from appointing any Supreme Court Justices during an election year. It seems equally clear that Congress lacks the constitutional power to transfer through legislation a sitting President's Supreme Court appointment powers to a successor. If the historical rule we have uncovered has indeed ripened into a constitutional rule, then it would seem equally impermissible for the Senate itself to deliberately transfer an elected President's Supreme Court appointment powers to an unknown successor. The historical rule in this sense comports with the constitutional text, even if it cannot be derived from it.

Because the history we uncover is limited to the context of Supreme Court appointments, it is no objection that appointments to other positions are sometimes allowed to lapse late in a President's term. Indeed, a distinction between Supreme Court Justices and other officers is consistent with several other aspects of constitutional text and structure. When it comes to non-life-time appointments and appointments of inferior officers, for example, a particular President's appointment powers are by necessity limited to his or her own term of office. Hence, there is no analogous separation-of-powers issue at stake. In addition, in such cases, Congress's greater power to transfer the President's appointment powers through legislation arguably includes the lesser power to implicitly consent to long-standing senatorial practices that allow for such transfers late in a President's term.[163] No analogous legislative power exists, however, in

163 *See generally* DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL31635, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT & CIRCUIT COURTS, 1977–2003, at 11 & tbl.7 (2004) (tabulating lapsed judicial nominations and reporting that "[i]n each Congress ending in a presidential election year judicial nominations pending at the final adjournment constituted a larger percentage of all nominations received than in either the immediately preceding or immediately following Congress"). A recent example is Andre M.

relation to Supreme Court appointments.

Lower federal judges are not inferior officers[164] and they have Article III protections.[165] Thus, appointments relating to lower federal judges might seem to provide an important counterexample to the previous argument. Still, lower federal courts are themselves created by legislation, whereas the Supreme Court is established by the Constitution and cannot be extinguished by Congress.[166] Hence, Congress's greater power to create or abolish lower federal courts through legislation arguably includes the lesser power to implicitly consent to long-standing senatorial practices that allow for the transfer of some lower federal judicial appointments submitted late in a President's final term. Once again, however no analogous legislative power exists with respect to the Supreme Court.[167]

Congress does, on the other hand, have the power to change the *number* of Justices on the Supreme Court through legislation.[168] One might therefore argue that this greater power should include the lesser power to

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Davis; in October, 2000, President Clinton nominated Davis to the U.S. Court of Appeals for the Fourth Circuit but the Senate took no action on the nomination. *See* Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 248 (2001) (describing the nomination of Davis and of other Clinton judges who did not receive a vote in the Senate). President Obama, however, subsequently nominated Davis to the same court and the Senate voted in favor of the nomination. *Senior Judge Andre M. Davis*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, http://www.ca4.uscourts.gov/judges/judges-of-the-court/senior-judge-andre-m-davis [https://perma.cc/686N-BKF5] (last visited May 20, 2016).

164 *See, e.g.*, *In re* Sealed Case, 838 F.2d 476, 483 (D.C. Cir. 1988) (describing lower federal judges as "principal officers" because they are "not subject to personal supervision"), *rev'd sub nom*, Morrison v. Olson, 487 U.S. 654 (1988).

165 U.S. Const. art. III, § 1 ("The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.").

166 *See id.* (stating that the federal judicial power "shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish").

167 For further discussion concerning distinctions in how different appointment traditions have arisen with respect to Supreme Court as opposed to lower federal court appoints, see JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 314 (1953) (explaining that "[t]he customs and traditions in the nomination and confirmation of judges of lower federal courts differ markedly from those that apply to the appointment of Justices of the Supreme Court" and identifying, among other difference in longstanding practices, the key role of home-state Senators in selecting lower court judges).

168 An Act to establish the Judicial Courts of the United States, 1 Stat. 73, ch. 20 (1789); An Act to provide for the more convenient organization of the Courts of the United States, 2 Stat. 89, ch. 4 (1801); An Act to repeal certain acts respecting the organization of the Courts of the United States; and for other purposes, 2 Stat. 132, ch. 8 (1802); An Act establishing Circuit Courts, and abridging the jurisdiction of the district courts in the districts of Kentucky, Tennessee and Ohio, 2 Stat. 420, ch. 16 (1807); An Act supplementary to the act entitled. "An act to amend the judicial system of the United States, 5 Stat. 176, ch. 34 (1837); An Act to provide Circuit Courts for the Districts of California and Oregon, and for other Purposes, 12 Stat. 794, ch. 100 (1863); An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits, 14 Stat. 209, Ch. 210 (1866); An Act to amend the Judicial System of the United States, 16 Stat. 44, ch. 22 (1869).

implicitly consent to any long-standing senatorial traditions that allow for the deliberate transfer of one President's Supreme Court appointment powers to a successor. Here, however, we return to historical practices. Unlike in the case of lower federal courts, there is simply no long-standing tradition of implied consent to such transfers when it comes to Supreme Court appointments.[169] This is because, as earlier sections have shown, the Senate has never before deliberately transferred an elected President's Supreme Court appointment powers to an unknown successor when an actual vacancy on the Supreme Court existed.[170] Hence, there are no historical cases of such implied consent: all of the history suggests a contrary rule. In this particular case, it is thus historical precedent, rather than constitutional text, that generates the relevant distinction.

For similar reasons, it is no objection that presidential powers sometimes work differently outside of the context of appointments. For example, the President has "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[171] Still, that the Senate may refuse to act on a treaty the President supports toward the end of his term need not be understood as presenting a constitutional problem in the same way as a refusal with respect to Supreme Court nominees. The historical gloss with respect to Supreme Court appointments need not extend to other circumstances in which presidential action depends upon senatorial cooperation. In addition, treaties—which can be repealed by the next Congress—are easily distinguishable from Supreme Court appointments—which endure well beyond a President's term. Once again, it is therefore the long-standing and special historical rules that have traditionally governed the specific case of Supreme Court appointments that give the present constitutional argument

169 There are several historical cases where the Senate has postponed action on a particular Supreme Court nomination while Congress debated legislative changes in the number of Justices on the Court. This happened, for example, in the case of the initial nomination of Roger B. Taney in 1835. *See* ABRAHAM, *supra* note 74, at 858 (entry for "Roger Brooke Taney"); UROFSKY, *supra* note 110, at 466 (entry for "Roger B. Taney"); Ellis, *supra* note 110. This also happened with respect to the nomination of Henry Stanbery, whose nomination was stalled while Congress considered and then passed legislation that removed his seat and rendered his appointment moot. *See* COMPLETE HISTORICAL RECORD OF SUPREME COURT VACANCIES AND NOMINATIONS, *infra*, Appendix, at 111. *See also* Judicial Circuits Act ch. 210, 14 Stat. 209 (1866). Importantly, however, no such legislative changes are at issue here.

170 For more recent evidence of how the Senate treats Supreme Court appointments as distinct from lower federal court appointments, it should be noted that Democrats' so-called "nuclear option," which changed the filibuster rules for lower court appointments, specifically excepted any such change for Supreme Court appointments. *See, e.g.*, Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option' Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/69K7-WYMH].

171 U.S. Const. art. II, § 2.

its principal force.

But what about the few cases where the Senate *has* deliberately transferred a President's Supreme Court appointments powers to a successor? As earlier sections have shown, this has only occurred when there were contemporaneous questions about the status of the nominating President as the most recently elected President. Hence, these are all cases where the very same separation-of-powers considerations may equally favor allowing an incoming President to appoint the Supreme Court Justice. The same separation-of-powers concerns can, in other words, be used to explain why deliberate transfers have been permitted in these (but only these) circumstances.

Because there is nothing in the constitutional text that explicitly gives the Senate the power to divest a President of his Supreme Court appointment powers, that power must—if it exists—ultimately arise from the Senate's power to provide "advice and consent" with respect to particular Supreme Court nominees. The Senate has wide discretion to determine its own rules and procedures in this regard. Still, the history we have uncovered can help specify some features of how "advice and consent" should be interpreted in relation to Supreme Court appointments.

An initial question, which has become the subject of much recent debate, is whether the Senate has a general constitutional duty to provide "advice and consent" on every Supreme Court nominee by confirming or rejecting the nomination.[172] In our view, it would be difficult to contend that a general duty of this kind exists because claims of such a duty have been historically contested in the two relevant sets of circumstances we have described.

For example, in the case of John Crittenden—nominated to the Court by President John Quincy Adam only *after* the election of Adams's successor—the Senate debated an amendment that proposed a general duty to confirm or reject all Supreme Court nominations by vote. The resolution read:

> *That the duty of the Senate to confirm or reject the nominations of the President, is as imperative as his duty to nominate; that such has*

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172 This is a contentious issue among constitutional scholars. *Compare, e.g.*, David H. Gans, *Republicans Who Block Obama's Supreme Court Pick Are Violation the Constitution*: *The Originalist Case for the Senate to Do Its Job*, THE NEW REPUBLIC (Mar. 16, 2016), https://newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution [https://perma.cc/9PU4-43DZ] (arguing for a constitutional duty to provide advice and consent), *with* Jonathan H. Adler, *Again on the Erroneous Argument That the Senate Has a 'Constitutional Duty' To Consider a Supreme Court Nominee*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/26/again-on-the-erroneous-argument-that-the-senate-has-a-constitutional-duty-to-consider-a-supreme-court-nominee/ [https://perma.cc/3EYE-2HYG] (arguing that no such duty exists).

> *heretofore been the settled practice of the government; and that it is not now expedient or proper to alter it.*

The Senate ultimately rejected this amendment by voice vote and resolved instead that it was "not expedient" to confirm or reject Crittenden.[173]

Some commentators understand these events as evidence that "the early Senate declined to endorse the principle that proper practice required it to consider and proceed to a final vote on every nomination."[174] Properly construed, however, this precedent is more complex. The Senate's decision not to proceed to a vote on Crittenden was issued in response to arguments that the Senate had a general constitutional obligation to proceed to a full vote even in the unusual case where a new President had already been elected. The Senate rejected that claim, but only in the context of Crittenden's nomination. The fact that a new President had been elected President also played a major role in the floor debates leading to the Senate's ultimate decision in the Crittenden case.[175] Hence, these events are just as indicative of a perceived *exception* to a general obligation to confirm or reject Supreme Court nominees in the limited circumstance where a new President has already been elected. We have already discussed how these circumstances may properly change the separation-of-powers analysis.

Further, as we previously described, *only* in situations where there have been questions about the status of a President as the most recently-elected President has the Senate acted as though permitted to transfer outright one President's Supreme Court appointment powers to a successor. Hence, a full and fair reading of the history of Supreme Court appointments, and a commitment to the rule that emerges from it, suggest that the Senate may have a more limited duty to provide advice and consent with respect to Supreme Court nominations when made by elected Presidents who begin the nomination process and seek to fill an actual vacancy prior to the election of a successor. That duty—more specific than any generalized obligation with respect to every nominee—would arise from the historical gloss that more than two centuries of past practices give to constitutional text and structure in the special context of Supreme Court appointments. The duty would also apply to the present controversy.

In any event, even if there is no such limited duty, the historical rule suggests that there is an important distinction between acting in constitutionally permissible ways that may have the *effect* of transferring one President's Supreme Court appointments powers to a successor and acting in ways that are *deliberately designed* to transfer those powers

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173 5 CONG. DEB. 80 at 81 (Jan. 26, 1829) (remarks of Sen. Chambers).

174 *See* BETH & PALMER, *supra* note 27, at 5 (emphasis added).

175 *See* 5 CONG. DEB. 90 (1829); 5 REG. DEB. 90 (1829).

regardless of the timing of a nomination and the merits of any particular nominee. Although the Senate has broad discretion to determine its procedures for evaluating nominees and wide latitude to vote down particular nominees,[176] history strongly suggests that an outright refusal to do anything at all in order to deliberately transfer one President's appointment power to an unknown successor is a different matter. By announcing in advance that they will not consider any nominee from the current President, Senate Republicans may have therefore taken the one position that is most clearly contradicted by the entire history of Supreme Court appointment processes. Their current plan therefore raises unprecedented constitutional questions relating to separation of powers, which can only be fully appreciated once constitutional text and structure are given the right historical gloss that we provide here.

We find it especially notable, finally, that there is no prior case in U.S. history in which an actual vacancy on the Supreme Court has arisen and an elected President has begun a nomination process prior to the election of a successor but has failed to *fill* the vacancy. This is true regardless of the senatorial rules that have been in place. (Such rules include, for example, those allowing for filibuster, motions to postpone, motions to table, cloture votes, the use of voice or roll call votes for final determinations, or the use (or lack thereof) of subcommittees to vet Supreme Court candidates prior to full Senate consideration.) Hence, despite the Senate's broad powers to determine its own procedural rules,[177] it would be historically unprecedented if the Senate were to use these powers to make it literally impossible for President Obama to fill the vacancy left by Justice Scalia, regardless of the nominees the President chooses and their particular characteristics and qualities. As Chief Justice Roberts has recently explained, "sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action."[178] Here, precedent for the Senate Republicans' plan is entirely lacking.

Of course, a Senate majority might still vote against each of Obama's nominees. If that outcome were to follow the Senate's full consideration of

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176 *See, e.g.*, PAUL M. COLLINS & LORI RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 14 (2013) ("[C]onfirmation hearings are valuable because they act as a democratic forum for the discussion and ratification of constitutional change."); CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 33 (2016) ("Partisan wrangling has always been a part of the Supreme Court confirmation process.").

177 *Senate Legislative Process*, SENATE.GOV http://www.senate.gov/legislative/common/briefing/Senate_legislative _process.htm [https://perma.cc/88TB-HYUM] (last visited May 16, 2016).

178 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (concluding that Congress lacked the authority to enact the Affordable Care Act under the Commerce Clause).

nominees in good faith and a timely manner, the constitutional analysis would be different. The result would still be unprecedented because no prior President has failed to fill an actual Supreme Court vacancy in similar circumstances even if the process took more than one round. The Senate has, however, rejected some nominees on the merits and has used its "advice and consent" powers to shape some past Presidents' choices of nominees. Hence, procedures and motives matter a great deal. If President Obama were to fail to fill the vacancy because he is unable or unwilling to find a candidate who can make it through a full Senate vote, then that would be one thing. It would be quite another if he were to fail because the Senate simply refuses to consider *any* nominee from a particular President.

In sum, in all past Supreme Court appointment episodes like the current one, sitting Presidents have acted as if they have the power to both nominate *and* appoint someone to fill Supreme Court vacancies—conditional only on identifying a particular candidate who can pass a full Senate vote. The Senate has always acquiesced in this interpretation of separation of powers. It has, in particular, never once completely divested a sitting President of his constitutionally-designated powers to fill Supreme Court vacancies absent contemporaneous questions about the status of the President as the most recently-elected President. By construing its "advice and consent" powers to give it this new divestment power, Senate Republicans are therefore asserting, in effect, a new constitutional power, which has never before been exercised in U.S. history. If the historical tradition that we have uncovered has ripened into a constitutional rule, then Senate Republicans lacks this asserted power.

B. Potential Limitations of the Constitutional Argument

Thus far, we have set out what we believe to be the most plausible argument that the Senate Republicans' current plan violates the Constitution. The crux of the argument is that long-standing tradition has ripened into a constitutional rule that allows the Senate to reject or resist particular Supreme Court nominees on the merits but bars it from deliberately divesting President Obama of his constitutionally-designated power to appoint a replacement for Justice Scalia. We recognize, however, that this argument raises a constitutional issue of first impression on a topic that is likely to be politically divisive. There are also some significant obstacles to the argument, discussed in this Section, which make a definitive conclusion on the constitutional issue difficult. In what follows, we therefore suggest that the question presents a paradigmatic "hard case"—or a case in which the legal and other relevant historical sources underdetermine a clear answer. We also discuss the implications of that conclusion.

The concept of a "hard case" was first introduced by Ronald Dworkin to refer to cases that are not clearly settled by the available legal precedent and constitutional and statutory materials.[179] Hard cases can, however, still have correct answers.[180] Figuring out what these answers are requires reliance on other more complex and contestable factors—such as those principles that best fit and justify the available legal materials (along with the concepts and distinctions found therein)[181] or historical evidence that can help settle constitutional meaning.[182]

Whether the Senate Republicans' plan violates the Constitution presents a hard case because the constitutional argument against the plan relies heavily not just on historical tradition but also on the claim that this tradition has ripened into a constitutional rule that informs the best interpretation of constitutional text and structure. There is no doubt that ripening of this kind is possible, both in the Appointments Clause context (as cases like *NLRB v. Noel Canning* suggest) and beyond.[183] Because there is, however, "a first time for everything,"[184] the absence of a historical event cannot ever definitively establish its constitutional impermissibility.[185] There are also ongoing methodological disputes—including among current members of the Supreme Court—as to when precisely historical traditions ripen into constitutional rules.[186] Hence, ripening arguments always depend on something more than mere deduction from precedent and the available constitutional and statutory materials. All ripening arguments—including those that have proven successful in the past—initially present hard cases.

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179 *See* Dworkin, *Hard Cases*, *supra* note 147 (defining "hard cases" as those "in which the result is not clearly dictated by statute or precedent").

180 Dworkin argued that *all* hard cases have unique answers, *see generally id.*, but one need not follow him that far to think (more plausibly) that *some* do.

181 This was Dworkin's view. *See generally id.* It is important to recognize that Dworkin's view is not necessarily inconsistent with other interpretive methodologies like originalism—if originalism is either part of the settled legal practices that that require interpretation or offers part of the best justification for constitutional provisions. For an argument that originalism is best understood as an aspect of positive constitution practice in the United States, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

182 One might think historical evidence is relevant either because one is an originalist, or because one views historical evidence as merely one factor relevant to constitutional meaning.

183 NLRB v. Noel Canning, 134 S. Ct. 2550 (2014); *see also* Bradley & Siegel, *After Recess*, *supra* note 25, at 68 (2014) ("The significance of *Noel Canning* extends well beyond its resolution of important questions about the scope of the President's recess appointment power.").

184 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

185 *See, e.g.*, *id.* at 2586 (2012) (observing that "novelty [of an act] is not necessarily fatal" to claims concerning its constitutional permissibility).

186 Bradley & Siegel, *After Recess*, *supra* note 25, at 18–68 (discussing methodological disputes concerning historical gloss approach—some of which arise from deeper methodological disputes over originalism, whether a practice must go back to the earliest days of the Republic, whether constitutional ambiguity is required, whether expectation interests should play a role).

Still, not all ripening arguments are equally plausible. As a general matter, ripening should be more plausible if there are enough instances for a tradition to constitute a rule and not just a series of coincidences.[187] In addition, the ripening argument developed in the previous Section should gain plausibility to the extent that the relevant government officials acted with an accompanying sense of acquiescence to a particular way of dividing power between the President and the Senate in relation to Supreme Court appointments.[188] Acquiescence may not be absolutely necessary, however, because some of the case law emphasizes the settled expectations that can arise from long-standing historical traditions.[189] Settled expectations are especially important where, as here, settled constitutional norms can help avoid the range of pragmatic and democratic risks discussed in Part II. The current ripening argument should, finally, gain plausibility to the extent that it offers a coherent account of factors that might not only explain but also justify in plausible constitutional terms limiting the deliberate transfer of a President's Supreme Court appointment powers to the narrow circumstances we have identified.[190] These are circumstances where there have been contemporaneous questions about the status of the nominating President as the most recently-elected President,

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187 *Id*. at 20–27 (noting that despite methodological disputes, longevity of practice is important for all relevant disputants—with some originalists arguing that the practice should go back to the Founding while others allow for less extensive practices to provide evidence relevant to constitutional interpretation); *see also* United States v. Curtiss-Wright Export Co., 299 U.S. 304, 327–28 (1936) ("[A] legislative practice such as we have here, evidenced not only by occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."). *See* Pocket Veto Case, 279 U.S. 655, 690 (U.S. 1929) ("A practice of at least twenty years' duration 'on the part of the executive department, acquiesced in by the legislative department, which not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (citation omitted)); Dames & Moore v. Regan, 453 U.S. 654 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915))).

188 *See, e.g.*, Bradley & Siegel, *After Recess*, *supra* note 25, at 21 ("[I]t suffices to note the basic idea of historical gloss, which is that long-standing practices by one political branch that are acquiesced in by the other political branch should be given weight in discerning whether governmental conduct is consistent with the separation of powers.").

189 *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (indicating "reluctan[ce] to upset [a] traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long"); Bradley & Siegel, *After Recess*, *supra* note 25, at 19 (noting relevance to some Justices of concerns about "disturbing expectation interests surrounding [a] historical practice").

190 For classic arguments that legal interpretation always involves some inference to the best combined explanation and justification, see Dworkin, *Hard Cases*, *supra* note 147. *See also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2013).

and where one might therefore reasonably think that a distinct separation-of-powers analysis applies.

With respect to the first of these questions, we have at least identified an extraordinarily well-evidenced and long-standing historical tradition relating to Supreme Court appointments. We have identified 103 prior cases, going all the way back to the earliest days of the Republic, where an elected President faced an actual Supreme Court vacancy and began the nomination process prior to the election of a successor. These cases are all directly on point with respect to Obama's nomination of Garland and in all 103 cases—*without exception*—the President was able both to nominate and appoint a replacement Justice by and with the advice and consent of the Senate. As Justice Frankfurter once observed, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by [the Constitution]."[191]

In addition, we have shown that the specific factors that we identify as governing the permissibility of an outright transfer were specifically cited and debated in the handful of Supreme Court appointment cases where deliberate transfers occurred.[192] The historical record similarly contains floor debates that are indicative of a sense of obligation to proceed to a full Senate vote except in the unusual circumstances where the status of the President as the most recently-elected President was in doubt.[193] Except in these unusual circumstances, the Senate has always acquiesced to the view that the sitting President has the constitutional power to not only nominate but also appoint *some* replacement for any actual Supreme Court vacancy—so long as the President nominates someone who can pass a full Senate vote. The Senate has, in other words, always construed its powers to provide "advice and consent" with respect to these Supreme Court appointments as limited to shaping Presidents' particular choices of nominees—and never as allowing it to completely divest the President of his constitutionally-designated appointment power.

That all of these facts can be rendered coherent with a reasonable reading of the constitutional text, and with long-standing recognition of Supreme Court appointments as raising special separation-of-powers concerns,[194] suggests that such considerations plausibly account for the unbroken historical tradition that we have described. In other words, factors relating to the status of past nominating Presidents can be used both to

191 Youngstown Sheet & Tube Co. v. Sawyer, 353 U.S. 579, 610–11 (1952) (Frankfurther, J., concurring).

192 *Supra* Part IA, IB & III.A.

193 *Supra* Part III.A.

194 *Id*.

explain and justify in plausible constitutional terms the Senate's past behavior and views on the permissibility of deliberate transfers of one President's Supreme Court appointment powers to another. As the most coherent explanation of the history of Supreme Court appointments, the account we offer points to a plausible argument of tradition ripening into a constitutional rule.

Nonetheless, we recognize that there are hazards in identifying from floor debates (or similar historical materials) the attitudes of all of the relevant constitutional actors. As noted, there are also methodological disputes over the precise conditions under which historical traditions can plausibly ripen into constitutional rules, and ripening arguments always involve some judgment that goes beyond mere deduction from precedent and the available constitutional and statutory materials. In these circumstances, it would thus be irresponsible to conclude that the Senate Republicans' current plan definitively violates the Constitution. But—and this is key—it would be equally irresponsible to conclude that the plan definitively does *not* violate the Constitution, given the evidence and arguments presented.

Instead of proposing a clear answer to a hard question, we suggest a more cautious conclusion. At the very least, the Senate Republican's current plan generates a category of constitutional risk that is unprecedented and could not have been fully appreciated without the history we uncover in this Article. Given the hard nature of this legal question and familiar facts about human psychology,[195] those who politically favor the plan are likely to underestimate the associated constitutional risks. Those who politically oppose the plan are likely to exaggerate the constitutional risks. The truth most likely lies somewhere in between. Still, because "[t]he significance of gloss is not limited to judicial reasoning,"[196] Senate Republicans, who are sworn to uphold the Constitution, cannot simply ignore the constitutional risks we have now described. They should, at minimum, "'pause to consider the implications . . .' [of] . . . new conceptions of federal power."[197] They should revisit their plan in light of the unprecedented constitutional risks that it generates and either refrain from continuing forward with the plan or

195 There is ample evidence from political scientists that political ideology can affect judicial decision-making—especially in hard cases. For a summary of some of this evidence, see, for example, Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005). There is also psychological evidence that ideology can affect peoples' understanding of purely factual matters relevant to constitutional interpretation. *See, e.g.*, Dan Kahan, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

196 Bradley & Siegel, *After Recess*, *supra* note 25.

197 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (quoting United States v. Lopez, 514 U.S. 549, 563 (1995)).

publicly explain why they believe it avoids the identified risks.

Still, because the constitutional issue in question presents a hard case, it is not likely to be settled definitively and to every reasonable person's satisfaction. It is therefore important to recognize that the identified constitutional risks also exacerbate the pragmatic risks associated with the plan—as highlighted in the previous Part. If, for example, some reasonable observers are left with lingering doubts about the constitutional propriety of the plan, then that fact will surely make the pragmatic risks of retaliation and further breakdown of inter-party cooperation all the more severe. Part of the point of the Constitution's separation of powers is, moreover, to allow the government to function through its system of checks and balances, despite political differences among actors. When settled practices concerning the relationships among the branches help settle constitutional ambiguities in ways that help avoid pragmatic risks to our constitutional system, those practices should therefore ripen more easily into constitutional rules. In cases like the current one, pragmatic and constitutional concerns thus merge and become reciprocally reinforcing. The risks of each make the risks of the other that much greater.

Fortunately, there remains an easy way to avoid the pragmatic and constitutional risks that loom large. The Senate can simply follow the path that its predecessors have taken in every analogous situation in the past and proceed to full Senate consideration of President Obama's nominee (or nominees) to fill the Scalia vacancy. The Senate can similarly exercise its undisputed power to confirm, reject, or resist Obama's particular Supreme Court nominees on the merits. Any further efforts to deliberately and completely divest President Obama of his constitutionally-designated power to appoint Justices to the Supreme Court should, however, be abandoned.

CONCLUSION

Virtually everyone who has weighed in on the process for filling the seat left vacant by Justice Scalia's death considers historical practice relevant to how the President and the Senate should interact and cooperate to fill the Scalia vacancy. To date, however, many invocations of the historical record have been either incomplete or inaccurate. The record is, in fact, much more complex than many have recognized, but we have now presented a complete and thorough examination of the entire history of Supreme Court appointments. In the process, we have uncovered an underappreciated guiding principle: Except in rare instances where the status of the President is in doubt, a sitting President who—like President Obama—has sought to fill an actual Supreme Court vacancy before the election of a successor has always been able to fill that vacancy, by and

with the advice and consent of the Senate. Whether as matters of tradition and fair play or because this historical practice has ripened into a constitutional rule, the Senate Republicans' current plan to deny Obama the Supreme Court appointment powers enjoyed by all his similarly-situated predecessors thus marks a much greater departure from the usual rules of the game than has thus far been recognized. At minimum, such a break from long-standing senatorial traditions and practices of fair dealing threatens to damage the appointments processes in the future and risks significant harm to the Court. The costs of mischief are all the greater where, as here, there is also a plausible argument that the plan violates the Constitution.

APPENDIX

COMPLETE HISTORICAL RECORD OF ALL PRIOR SUPREME COURT VACANCIES, PROPOSED VACANCIES, AND NOMINATIONS IN U.S. HISTORY

President (Instance)[198]	**Vacancy Created By**	**Reason for Vacancy**	**Obtained Confirmation?**	***Notes***[199]	**Nominees**	**Result**[200]	**Nomination Date**	**Result Date**	**Election Date for Next President**	**Inauguration Date for Next President**[201]	**Vacancy Date**
Barack Obama											
(1)	Stevens	Retirement	☑		Elena Kagan	C	5/10/2010	8/5/2010	11/6/2012	1/21/2013	6/29/2010
(2)	Souter	Retirement	☑		Sonia Sotomayor	C	6/1/2009	8/6/2009	11/6/2012	1/21/2013	6/29/2009
George W. Bush											
(3)	Rehnquist	Death	☑		John Roberts, Jr.	C	9/6/2005	9/29/2005	11/4/2008	1/20/2009	9/3/2005

198 The "**President/(Instance)**" column tallies every case—from (1) to (103)—of a Supreme Court vacancy that falls within the scope of the historical rule described in Part I of this Article. The general rule is:

> *Whenever a Supreme Court vacancy has existed during an elected President's term and this President has acted prior to the election of a successor, the sitting President has been able to both nominate and appoint someone to fill the relevant vacancy—by and with the advice and consent of the Senate.*

This rule is supported by the fact that in all 103 numbered instances, the nominating President was able to both nominate and appoint a Justice who was ultimately confirmed by the Senate. These 103 confirmations are marked in a subsequent column ("**Obtained Confirmation?**") with the symbol "☑" and in the "**Result**" column with at least one nominee marked "C" for "Confirmed." Note, however, that the "☑" symbol is also used to identify instances where confirmations were obtained by Presidents even in other circumstances that do not fall into the scope of the general rule under discussion.

The "**President/(Instance)**" column uses the "—" symbol, in turn, to identify every case where a vacancy or proposed vacancy arose during a President's term, but the President was either a President-by-succession or submitted the first nomination after the election of a presidential successor; or the proposed vacancy never actualized. These cases do not fall within the scope of the general rule just stated. Hence, the Senate's actions in these circumstances cannot either support or conflict with this general rule. Still, even in these circumstances, the nominating President was able to obtain confirmation in thirteen cases of actual vacancies—as marked by the by the symbol "☑" in the "**Obtained Confirmation?**" column. The Senate has prevented a President from filling an actual vacancy, by postponing, rejecting, or taking no action on his nominees, in only six cases. These six failures to obtain confirmation are marked by the symbol "☐" in the "**Obtained Confirmation?**" column. The symbol "☐" also appears in this column in the two cases where nominations were made in relation to vacancies that never actualized.

199 In the "***Notes***" column, "*E*" = *Election-Year Nomination*; "*PE*" = *Post-Election (of Presidential Successor) Nomination*; "*PR*" = *Post-Reelection (of Same President) Nomination*; "*S*" = *President-by-Succession*; and "*NV*" = *Never Actually Vacated*.

200 In the "**Result**" column, "C" = Confirmed and Served; "R" = Rejected by the Senate; "D" = Declined by Nominee; "N" = No Action Taken by the Senate; "P" = Postponed by the Senate; and "W" = Withdrawn by the Nominating President.

201 This is the date on which the public inauguration ceremony was held.

(4)	O'Connor	Retirement	☑		John Roberts, Jr.	W	7/29/2005	9/6/2005	11/4/2008	1/20/2009	1/31/2006
					Harriet Miers	W	10/7/2005	10/28/2005	11/4/2008	1/20/2009	
					Samuel Alito, Jr.	C	11/10/2005	1/31/2006	11/4/2008	1/20/2009	
Bill Clinton											
(5)	Blackmun	Retirement	☑		Stephen Breyer	C	5/17/1994	7/29/1994	11/5/1996	1/20/1997	1994
(6)	White	Retirement	☑		Ruth Bader Ginsburg	C	6/14/1993	8/3/1993	11/5/1996	1/20/1997	1/9/1993
George H.W. Bush											
(7)	Marshall	Retirement	☑		Clarence Thomas	C	7/8/1991	10/15/1991	11/3/1992	1/20/1993	10/1/1991
(8)	Brennan	Retirement	☑		David Souter	C	7/25/1990	10/2/1990	11/3/1992	1/20/1993	7/20/1990
Ronald Reagan											
(9)	Powell	Retirement	☑		Robert Bork	R	7/7/1987	10/23/1987	11/8/1988	1/20/1989	6/26/1987
				E	Anthony Kennedy	C	11/30/1987	2/3/1988	11/8/1988	1/20/1989	
(10)	Rehnquist	Elevation to CJ	☑		Antonin Scalia	C	6/24/1986	9/17/1986	11/8/1988	1/20/1989	9/17/1987
(11)	Burger	Retirement	☑		William Rehnquist	C	6/20/1986	9/17/1986	11/8/1988	1/20/1989	9/26/1986
(12)	Stewart	Retirement	☑		Sandra Day O'Connor	C	8/19/1981	9/21/1981	11/6/1984	1/21/1985	7/3/1981
Gerald Ford (by Succession)											
—	Douglas	Retirement	☑	*S*	John Paul Stevens	C	11/28/1975	12/17/1975	11/2/1976	1/20/1977	11/12/1975
Richard Nixon (resigned August 9, 1974)											
(13)	Harlan	Retirement	☑		William Rehnquist	C	10/22/1971	12/10/1971	11/7/1972	1/20/1973	9/23/1971
(14)	Black	Retirement	☑		Lewis Powell, Jr.	C	10/22/1971	12/6/1971	11/7/1972	1/20/1973	9/17/1971
(15)	Fortas	Resignation	☑		Clement Haynsworth, Jr.	R	8/21/1969	11/21/1969	11/7/1972	1/20/1973	5/14/1969
					G. Harrold Carswell	R	1/19/1970	4/8/1970	11/7/1972	1/20/1973	
					Harry Blackmun	C	4/15/1970	5/12/1970	11/7/1972	1/20/1973	
(16)	Warren	Retirement	☑		Warren Burger	C	5/23/1969	6/9/1969	11/7/1972	1/20/1973	6/23/1969
Lyndon Johnson (by Election, after Succession)											
—	(Proposed) Fortas	N/A	☐	*NV*	Homer Thornberry	W	6/26/1968	10/4/1968	11/5/1968	1/20/1969	
—	(Proposed) Warren	N/A	☐	*NV*	Abe Fortas	W	6/26/1968	10/4/1968	11/5/1968	1/20/1969	
(17)	Clark	Retirement	☑		Thurgood Marshall	C	6/13/1967	8/30/1967	11/5/1968	1/20/1969	6/12/1967
(18)	Goldberg	Retirement	☑		Abe Fortas	C	7/28/1965	8/11/1965	11/5/1968	1/20/1969	7/25/1965
John Kennedy (assassinated on Nov. 22, 1963)											
(19)	Frankfurter	Retirement	☑		Arthur Goldberg	C	8/31/1962	9/25/1962	11/3/1964	1/20/1965	8/28/1962
(20)	Whittaker	Resignation	☑		Byron White	C	4/3/1962	4/11/1962	11/3/1964	1/20/1965	3/31/1962
Dwight Eisenhower											

(21)	Burton	Retirement	☑		Potter Stewart	C	1/17/1959	5/5/1959	11/8/1960	1/20/1961	10/13/1958
(22)	Reed	Retirement	☑		Charles Whittaker	C	3/2/1957	3/19/1957	11/8/1960	1/20/1961	2/25/1957
(23)	Minton	Retirement	☑		William Brennan, Jr.	C	1/14/1957	3/19/1957	11/8/1960	1/20/1961	10/15/1956
(24)	Jackson	Death	☑		John Harlan	N	11/9/1954		11/6/1956	1/21/1957	10/9/1954
					John Harlan	C	1/10/1955	3/16/1955	11/6/1956	1/21/1957	
(25)	Vinson	Death	☑		Earl Warren	C	1/11/1954	3/1/1954	11/6/1956	1/21/1957	9/8/1953
Harry Truman (by Election)											
(26)	Rutledge	Death	☑		Sherman Minton	C	9/15/1949	10/4/1949	11/4/1952	1/20/1953	9/10/1949
(27)	Murphy	Death	☑		Tom Clark	C	8/2/1949	8/18/1949	11/4/1952	1/20/1953	7/19/1949
Harry Truman (by Succession)											
—	Stone	Death	☑	*S*	Fred Vinson	C	6/6/1946	6/20/1946	11/2/1948	1/20/1949	4/22/1946
—	Roberts	Resignation	☑	*S*	Harold Burton	C	9/19/1945	9/19/1945	11/2/1948	1/20/1949	7/31/1945
Franklin Roosevelt (died of cerebral hemorrhage on Apr. 12, 1945)											
(28)	Byrnes	Resignation	☑		Wiley Rutledge	C	1/11/1943	2/8/1943	11/7/1944	1/20/1945	10/3/1942
(29)	Stone	Elevation to CJ	☑		Robert Jackson	C	6/12/1941	7/7/1941	11/7/1944	1/20/1945	6/27/1941
(30)	McReynolds	Retirement	☑		James Byrnes	C	6/12/1941	6/12/1941	11/7/1944	1/20/1945	1/31/1941
(31)	Hughes	Retirement	☑		Harlan Stone	C	6/12/1941	6/27/1941	11/7/1944	1/20/1945	7/1/1941
(32)	Butler	Death	☑		Frank Murphy	C	1/4/1940	1/16/1940	11/5/1940	1/20/1941	11/16/1939
(33)	Brandeis	Retirement	☑		William Douglas	C	3/20/1939	4/4/1939	11/5/1940	1/20/1941	2/13/1939
(34)	Cardozo	Death	☑		Felix Frankfurter	C	1/5/1939	1/17/1939	11/5/1940	1/20/1941	7/9/1938
(35)	Sutherland	Retirement	☑		Stanley Reed	C	1/15/1938	1/25/1938	11/5/1940	1/20/1941	1/17/1938
(36)	Van Devanter	Retirement	☑		Hugo Black	C	8/12/1937	8/17/1937	11/5/1940	1/20/1941	6/2/1937
Herbert Hoover											
(37)	Holmes	Retirement	☑	*E*	Benjamin Cardozo	C	2/15/1932	2/24/1932	11/8/1932	3/4/1933	1/12/1932
(38)	Sanford	Death	☑		John Parker	R	3/21/1930	5/7/1930	11/8/1932	3/4/1933	
					Owen Roberts	C	5/9/1930	5/20/1930	11/8/1932	3/4/1933	
(39)	Taft	Resignation	☑		Charles Hughes	C	2/3/1930	2/13/1930	11/8/1932	3/4/1933	2/3/1930
Calvin Coolidge (by Election, after Succession)											
(40)	McKenna	Retirement	☑		Harlan Stone	C	1/5/1925	2/5/1925	11/6/1928	3/4/1929	1/5/1925
Warren Harding (died of heart attack on Aug. 2, 1923)											
(41)	Pitney	Resignation	☑		Edward Sanford	C	1/24/1923	1/29/1923	11/4/1924	3/4/1925	12/31/1922
(42)	Day	Retirement	☑		Pierce Butler	N	11/21/1922		11/4/1924	3/4/1925	11/13/1922
					Pierce Butler	C	12/5/1922	12/21/1922			

(43)	Clarke	Resignation	☑		George Sutherland	C	9/5/1922	9/5/1922	11/4/1924	3/4/1925	9/18/1922
(44)	White	Death	☑		William Howard Taft	C	6/30/1921	6/30/1921	11/4/1924	3/4/1925	5/19/1921
Woodrow Wilson											
(45)	Hughes	Resignation	☑	*E*	John Clarke	C	7/14/1916	7/24/1916	11/7/1916	3/5/1917	1916
(46)	Lamar	Death	☑	*E*	Louis Brandeis	C	1/28/1916	6/1/1916	11/7/1916	3/5/1917	1/2/1916
(47)	Lurton	Death	☑		James McReynolds	C	8/19/1914	8/29/1914	11/7/1916	3/5/1917	7/12/1914
William Howard Taft											
(48)	Harlan	Death	☑	*E*	Mahlon Pitney	C	2/19/1912	3/13/1912	11/5/1912	3/4/1913	10/14/1911
(49)	Moody	Retirement	☑		Joseph Lamar	C	12/12/1910	12/15/1910	11/5/1912	3/4/1913	11/20/1910
(50)	White	Elevation to CJ	☑		Willis Van Devanter	C	12/12/1910	12/15/1910	11/5/1912	3/4/1913	12/12/1910
(51)	Fuller	Death	☑		Edward White	C	12/12/1910	12/12/1910	11/5/1912	3/4/1913	7/4/1910
(52)	Brewer	Death	☑		Charles Hughes	C	4/25/1910	5/2/1910	11/5/1912	3/4/1913	3/28/1910
(53)	Peckham	Death	☑		Horace Lurton	C	12/13/1909	12/20/1909	11/5/1912	3/4/1913	10/24/1909
Theodore Roosevelt (by Election)											
(54)	Brown	Retirement	☑		William Moody	C	12/3/1906	12/12/1906	11/3/1908	3/4/1909	5/28/1906
Theodore Roosevelt (by Succession)											
—	Shiras	Retirement	☑	*S*	William Day	C	2/19/1903	2/23/1903	11/8/1904	3/4/1905	2/23/1903
—	Gray	Death	☑	*S*	Oliver Holmes	C	12/2/1902	12/4/1902	11/8/1904	3/4/1905	12/4/1902
William McKinley (assassinated Sep. 14, 1901)											
(55)	Field	Retirement	☑		Joseph McKenna	C	12/16/1897	1/21/1898	11/6/1900	3/4/1901	12/1/1897
Grover Cleveland											
(56)	Jackson	Death	☑		Rufus Peckham	C	12/3/1895	12/9/1895	11/3/1896	3/4/1897	8/8/1895
(57)	Blatchford	Death	☑		William Hornblower	N	9/19/1893		11/3/1896	3/4/1897	7/7/1893
					William Hornblower	R	12/5/1893	1/15/1894	11/3/1896	3/4/1897	
					Wheeler Peckham	R	1/22/1894	2/16/1894	11/3/1896	3/4/1897	
					Edward White	C	2/19/1894	2/19/1894	11/3/1896	3/4/1897	
Benjamin Harrison											
—	Lamar	Death	☑	*PE*	Howell Jackson	C	2/2/1893	2/18/1893	11/8/1892	3/4/1893	1/23/1893
(58)	Bradley	Death	☑	*E*	George Shiras, Jr.	C	7/19/1892	7/26/1892	11/8/1892	3/4/1893	1/22/1892
(59)	Miller	Death	☑		Henry Brown	C	12/23/1890	12/29/1890	11/8/1892	3/4/1893	10/13/1890
(60)	Matthews	Death	☑		David Brewer	C	12/4/1889	12/18/1889	11/8/1892	3/4/1893	3/22/1889
Grover Cleveland											
(61)	Waite	Death	☑	*E*	Melville Fuller	C	4/31/1888	7/20/1888	11/6/1888	3/4/1889	3/23/1888

(62)	Woods	Death	☑		Lucius Lamar	C	12/6/1887	1/16/1888	11/6/1888	3/4/1889	5/14/1887
Chester Arthur (by Succession)											
—	Hunt	Retirement	☑	*S*	Roscoe Conkling	D	2/24/1882	3/2/1882	11/4/1884	3/4/1885	1882
					Samuel Blatchford	C	3/13/1882	3/22/1882	11/4/1884	3/4/1885	
—	Clifford	Death	☑	*S*	Horace Gray	C	12/19/1881	12/20/1881	11/4/1884	3/4/1885	7/25/1881
James Garfield (assassinated Sep. 19, 1881)											
(63)	Swayne	Retirement	☑		Stanley Matthews	C	3/14/1881	5/12/1881	11/4/1884	3/4/1885	1/24/1881
Rutherford Hayes											
—	Swayne	Retirement	☐	*PE*	Stanley Matthews	N	1/26/1881		11/2/1880	3/4/1881	1/24/1881
—	Strong	Retirement	☑	*PE*	William Woods	C	12/15/1880	12/21/1880	11/2/1880	3/4/1881	12/14/1880
(64)	Davis	Resignation	☑		John Harlan	C	10/16/1877	11/29/1877	11/2/1880	3/4/1881	1876
Ulysses Grant											
(65)	Chase	Death	☑		George Williams	W	12/1/1873	1/8/1874	11/7/1876	3/5/1877	5/7/1873
					Caleb Cushing	W	1/9/1874	1/13/1874	11/7/1876	3/5/1877	
					Morrison Waite	C	1/19/1874	1/21/1874	11/7/1876	3/5/1877	
(66)	Nelson	Retirement	☑	*PR*	Ward Hunt	C	12/3/1872	12/11/1872	11/5/1872	3/4/1873	11/28/1872
(67)	Grier	Retirement	☑		Edwin Stanton	C[202]	12/20/1869	12/20/1869	11/5/1872	3/4/1873	1/31/1870
			☑		William Strong	C	2/7/1870	2/18/1870	11/5/1872	3/4/1873	
(68)	(new seat)		☑		Ebenezer Hoar	R	12/14/1869	2/3/1870	11/5/1872	3/4/1873	
					Joseph Bradley	C	2/7/1870	3/21/1870	11/5/1872	3/4/1873	
Andrew Johnson (by Succession)											
—	Catron	Death		*S*	Henry Stanbery	N	4/16/1866		11/3/1868	3/4/1869	5/30/1865
Abraham Lincoln (assassinated April 15, 1865)											
(69)	Taney	Death	☑	*PR*	Salmon Chase	C	12/6/1864	12/6/1864	11/8/1864	3/4/1865	10/12/1864
(70)	(new seat)		☑		Stephen Field	C	3/6/1863	3/10/1863	11/8/1864	3/4/1865	
(71)	Campbell	Resignation	☑		David Davis	C	12/1/1862	12/8/1862	11/8/1864	3/4/1865	4/30/1861
(72)	McLean	Death	☑		Noah Swayne	C	1/21/1862	1/24/1862	11/8/1864	3/4/1865	4/4/1861
(73)	Daniel	Death	☑		Samuel Miller	C	6/16/1862	7/16/1862	11/8/1864	3/4/1865	5/31/1860
James Buchanan											

[202] Although Edward Stanton was confirmed, he died before taking office. Hence, President Ulysses S. Grant subsequently nominated William Strong to that seat.

—	Daniel	Death	☐	*PE*	Jeremiah Black	R	2/5/1861	2/21/1861	11/6/1860	3/4/1861	5/31/1860
(74)	Curtis	Resignation	☑		Nathan Clifford	C	12/9/1857	1/12/1858	11/6/1860	3/4/1861	9/15/1874
Franklin Pierce											
(75)	McKinley	Death	☑		John Campbell	C	3/21/1853	3/22/1853	11/4/1856	3/4/1857	7/19/1852
Millard Fillmore (by Succession)											
—	McKinley	Death	☐	*S*	Edward Bradford	N	8/16/1852		11/2/1852	3/4/1853	7/19/1852
				PE; S	George Badger	W	1/3/1853	2/14/1853	11/2/1852	3/4/1853	
				PE; S	William Micou	N	2/14/1853		11/2/1852	3/4/1853	
—	Woodbury	Death	☑	*S*	Benjamin Curtis	C	12/11/1851	12/20/1851	11/2/1852	3/4/1853	9/4/1851
James Polk											
(76)	Story	Death	☑		Levi Woodbury	C	12/23/1845	1/31/1846	11/7/1848	3/5/1849	9/10/1845
(77)	Baldwin	Death	☑		George Woodward	R	12/23/1845	1/22/1846	11/7/1848	3/5/1849	4/21/1844
					Robert Grier	C	8/3/1846	8/4/1846	11/7/1848	3/5/1849	
John Tyler (by Succession)											
—	Baldwin	Death	☐	*S; E*	Edward King	P	6/5/1844	6/15/1844	11/1/1844	3/4/1845	4/21/1844
				PE; S	Edward King	W	12/4/1844	2/7/1845	11/1/1844	3/4/1845	
				PE; S	John Read	N	2/7/1845		11/1/1844	3/4/1845	
—	Thompson	Death	☑	*S*	John Spencer	R	1/9/1844	1/31/1844	11/1/1844	3/4/1845	12/18/1843
				S	Reuben Walworth	W	3/13/1844	6/17/1844	11/1/1844	3/4/1845	
				S	John Spencer	W	6/17/1844	6/17/1844	11/1/1844	3/4/1845	
				S	Reuben Walworth	N	6/17/1844	6/17/1844	11/1/1844	3/4/1845	
				PE; S	Reuben Walworth	W	12/4/1844	2/4/1845	11/1/1844	3/4/1845	
				PE; S	Samuel Nelson	C	2/4/1845	2/14/1845	11/1/1844	3/4/1845	
Martin Van Buren											
(78)	Barbour	Death	☑		Peter Daniel	C	2/26/1841	3/2/1841	11/1/1844	3/4/1845	2/25/1841
(79)	(new seat)		☑		John McKinley	C	9/18/1837	9/25/1837	10/30/1840	3/4/1841	
Andrew Jackson											
—	(new seat)		☑	*PE*	William Smith	D	3/3/1837	3/8/1837	11/4/1836	3/4/1837	
—	(new seat)		☑	*PE*	John Catron	C	3/3/1837	3/8/1837	11/4/1836	3/4/1837	
(80)	Marshall	Death	☑		Roger Taney	C	12/28/1835	3/15/1836	11/4/1836	3/4/1837	7/6/1835
(81)	Duvall	Resignation	☑		Roger Taney	P	1/15/1835	3/3/1835	11/4/1836	3/4/1837	1/14/1835
					Philip Barbour	C	12/28/1835	3/15/1836	11/4/1836	3/4/1837	

(82)	Johnson	Death	☑		James Wayne	C	1/6/1835	1/9/1835	11/4/1836	3/4/1837	8/4/1834
(83)	Washington	Death	☑		Henry Baldwin	C	1/4/1830	1/6/1830	11/2/1832	3/4/1833	11/26/1829
(84)	Trimble	Death	☑		John McLean	C	3/6/1829	3/7/1829	11/2/1832	3/4/1833	8/25/1828
John Quincy Adams											
—	Trimble	Death	☐	*PE*	John Crittenden	P	12/18/1828	2/12/1829	10/31/1828	3/4/1829	8/25/1828
(85)	Todd	Death	☑		Robert Trimble	C	4/11/1826	5/9/1826	10/31/1828	3/4/1829	2/7/1826
James Monroe											
(86)	Livingston	Death	☑		Smith Thompson	C	12/5/1823	12/9/1823	10/29/1824	3/4/1825	3/18/1823
James Madison											
(87)	Chase	Death	☑		Gabriel Duvall	C	11/15/1811	11/18/1811	10/30/1812	3/4/1813	6/19/1811
(88)	Cushing	Death	☑		Levi Lincoln	D	1/2/1811	1/3/1811	10/30/1812	3/4/1813	9/13/1810
					Alexander Wolcott	R	2/4/1811	2/13/1811	10/30/1812	3/4/1813	
					John Quincy Adams	D	2/21/1811	2/22/1811	10/30/1812	3/4/1813	
					Joseph Story	C	11/15/1811	11/18/1811	10/30/1812	3/4/1813	
Thomas Jefferson											
(89)	(newseat)		☑		Thomas Todd	C	2/28/1807	3/2/1807	11/4/1808	3/4/1809	
(90)	Paterson	Death	☑		H. Brockholst Livingston	C	12/13/1806	12/17/1806	11/4/1808	3/4/1809	9/9/1806
(91)	Moore	Resignation	☑	*E*	William Johnson	C	3/22/1804	3/24/1804	11/2/1804	3/4/1805	1/26/1804
John Adams											
—	Ellsworth	Resignation	☑	*PE*	John Jay	D	12/18/1800	12/19/1800	10/31/1800	3/4/1801	9/30/1800
				PE	John Marshall	C	1/20/1801	1/27/1801	10/31/1800	3/4/1801	
(92)	Iredell	Death	☑		Alfred Moore	C	12/4/1799	12/10/1799	10/31/1800	3/4/1801	10/20/1799
(93)	Wilson	Death	☑		Bushrod Washington	C	12/19/1798	12/20/1798	10/31/1800	3/4/1801	8/21/1798
George Washington											
(94)	Blair	Resignation	☑	*E*	Samuel Chase	C	1/26/1796	1/27/1796	11/4/1796	3/4/1797	1/27/1796
(95)	Jay	Resignation	☑		John Rutledge	R	12/10/1795	12/15/1795	11/4/1796	3/4/1797	6/29/1795
				E	William Cushing	D	1/26/1796	1/27/1796	11/4/1796	3/4/1797	
				E	Oliver Ellsworth	C	3/3/1796	3/4/1796	11/4/1796	3/4/1797	
(96)	Johnson	Resignation	☑		William Paterson	W	2/27/1793	2/28/1793	11/4/1796	3/4/1797	1/16/1793
					William Paterson	C	3/4/1793	3/4/1793	11/4/1796	3/4/1797	
(97)	Rutledge	Resignation	☑		Thomas Johnson	C	11/1/1791	11/7/1791	11/2/1792	3/4/1793	1791
(98)	(new seat)	Founding	☑		John Blair	C	9/24/1789	9/26/1789	11/2/1792	3/4/1793	
(99)	(new seat)	Founding	☑		James Wilson	C	9/24/1789	9/26/1789	11/2/1792	3/4/1793	

(100)	(new seat)	Founding	☑	William Cushing	C	9/24/1789	9/26/1789	11/2/1792	3/4/1793
(101)	(new seat)	Founding	☑	Robert Harrison	D	9/24/1789	9/26/1789	11/2/1792	3/4/1793
				James Iredell	C	2/8/1790	2/10/1790	11/2/1792	3/4/1793
(102)	(new seat)	Founding	☑	John Rutledge	C	9/24/1789	9/26/1789	11/2/1792	3/4/1793
(103)	(new seat)	Founding	☑	John Jay	C	9/24/1789	9/26/1789	11/2/1792	3/4/1793