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Garland's High Court Nomination Battle Likely To Drag On



By [Daniel Wilson](#)

Law360, Washington (March 16, 2016, 10:39 PM EDT) -- U.S. Supreme Court nominee Judge Merrick B. Garland may be the most palatable nominee for the vacancy opened by Justice Antonin Scalia's death, but he still faces an uphill, slow Senate battle as Republicans stand firm on their refusal to consider any nominee until after the presidential election.

Judge Garland, [nominated Wednesday](#) by President Barack Obama, has had an extensive legal career and has spent the past 19 years as a judge on the D.C. Circuit — the last several of those as its chief judge. He is widely perceived as ideologically and judicially moderate, according to experts on the federal judicial nomination process.



President Barack Obama, left, shakes hands with his nominee for the U.S. Supreme Court, D.C. Circuit Chief Judge Merrick B. Garland. (Credit: AP)

Typically, his confirmation would follow a well-established process — from vetting by the White House, to nomination, to a hearing before the Senate Judiciary Committee and then a confirmation vote in the Senate, experts said.

But Judge Garland's confirmation process is unlikely to be typical, as Senate Republican leaders announced shortly after [Justice Scalia's death](#) on Feb. 13 that they would not consider any nominee put forward by Obama or give any nominee a hearing, citing the upcoming presidential election in November and the need for "the American people" to have a say in the process.

They have since held firm on that position, with Senate Majority Leader Mitch McConnell, R-Ky., saying Wednesday he would not meet with Judge Garland. Judiciary Committee Chairman Chuck Grassley, R-Iowa, congratulated Judge Garland on his nomination but also reiterated the Republican position, which has touched off a heated debate over the exact parameters of senators' constitutional requirement to provide "advice and consent" on nominees.

Now that the experienced and respected Judge Garland has been put forward by the president, pressure may come to bear on some Republican senators, experts said.

"He's enormously well-qualified," said Michael Gerhardt, professor of constitutional law at the University of North Carolina School of Law. "Almost anybody could describe [him] as a merit-based appointment, so to the extent that it makes it harder for people to look the other way, or act on the basis of partisanship, then they're going to feel some pressure."

Carl Tobias, professor at the University of Richmond School of Law, noted that Judge Garland has several qualities that comport with the type of judicial nominees Republican presidents often choose, which may make Republican senators more open to considering him.

"For me, he has a lot of the qualities that you see in Republican presidents' nominees — former prosecutor, very experienced judge — so that may be part of the White House's thinking," Tobias said.

Another factor that could work in Judge Garland's favor is his age, experts noted. At 63, he is the oldest high court nominee since Justice Lewis Powell in 1971 and at least a decade older than others rumored to have been on Obama's shortlist, including his D.C. Circuit colleagues Judges Patricia A. Millett and Sri Srinivasan.

This not only speaks to his experience but also may assuage concerns raised by Senate Republicans about a nominee changing the ideological direction of the high court "for a generation." It also makes him more likely to be perceived as a merit choice, not a political choice, experts said.

"In practical terms ... those [additional] years, some people might think, are very important," Gerhardt said. "It's hard to say how much difference it will make, but I think part of the calculation might be that this might make it easier for some Republicans to think, 'I'd be better off with Garland than ... running the risk of a President [Hillary] Clinton nominating someone 20 years younger.'"

Although Garland is a Democratic nominee, his established judicial record shows he won't necessarily be uniformly left-leaning in his votes if confirmed to the Supreme Court, according to University of Illinois College of Law Dean Vikram Amar, who pointed to Garland's tough streak on criminal cases, which befits his former prosecutorial role. This may show his nomination to be an olive branch to the Senate, Amar said.

But if Judge Garland's professional and personal qualities are to be considered by Senate Republicans at all, they likely won't come into play until after this year's elections, when control of both the Senate and White House are up for grabs, experts said.

A Republican sweep, retaining the Senate and retaking the White House, would see Judge Garland's nomination continue to languish, they claimed. But if Democrats retain the presidency — and especially if they also retake the Senate — Republican senators may take the known quantity of Judge Garland rather than the unknown quantity of whomever the next president may choose.

"If [Republicans] lose both, I think they have to deal [with those losses] in a pragmatic way and realize that they may prefer Garland to anybody whom, say, Hillary Clinton might nominate," Tobias said.

Obama also has the option of appointing Judge Garland to the high court temporarily in a recess appointment if his nomination process continues to drag — but this is extremely unlikely, according to several experts.

The president has made no recess appointments since the Supreme Court's 2014 [National Labor Relations Board v. Noel Canning](#) decision, which unanimously overturned several such appointments made to the NLRB, and he has never made a judicial recess appointment, Tobias said.

Meanwhile, Senate Republicans have claimed they won't let the Senate go out of session for long enough to enable a recess appointment, with Sen. James Lankford, R-Okla., [recently saying](#) they would ensure that perfunctory "pro forma" sessions continue even during recess periods.

Though Judge Garland's nomination is expected to remain in limbo for some time, at least some aspects of the typical nomination process should play out, including the White House setting up meet-and-greets with as many senators as possible, experts claimed.

Judge Garland won't directly lobby on his own behalf, according to Amar, who said that given his continuing role as a judge, outright lobbying would be "unseemly and inappropriate."

But outside of those meetings, he may discreetly tap the White House to enlist people who could help push for his confirmation, Gerhardt said.

In the meantime, Judge Garland is likely to carry out his judicial work on the D.C. Circuit as close to normally as possible, though he did step out of several oral arguments scheduled for the remainder of March on Wednesday. But he may look to hand off some of the administrative responsibilities that come with his position as chief judge, experts said.

Although it is "inherently a little awkward" whenever a sitting judge is effectively auditioning for a higher role, it is neither an uncommon nor a new problem, according to Amar. Several experts noted as an example that Chief Justice John Roberts and Justice Ruth Bader Ginsburg had made the same journey from the D.C. Circuit to the high court — as had the late Justice Scalia.

"Part of [Judge Garland's] appeal as a nominee is that he is, by all accounts, a pretty straight shooter and a pretty professional person," Amar said. "So I expect that he will maintain that level of professionalism by continuing to do everything as business as usual, unless and until he gets confirmed."

--Editing by Christine Chun and Kat Laskowski.

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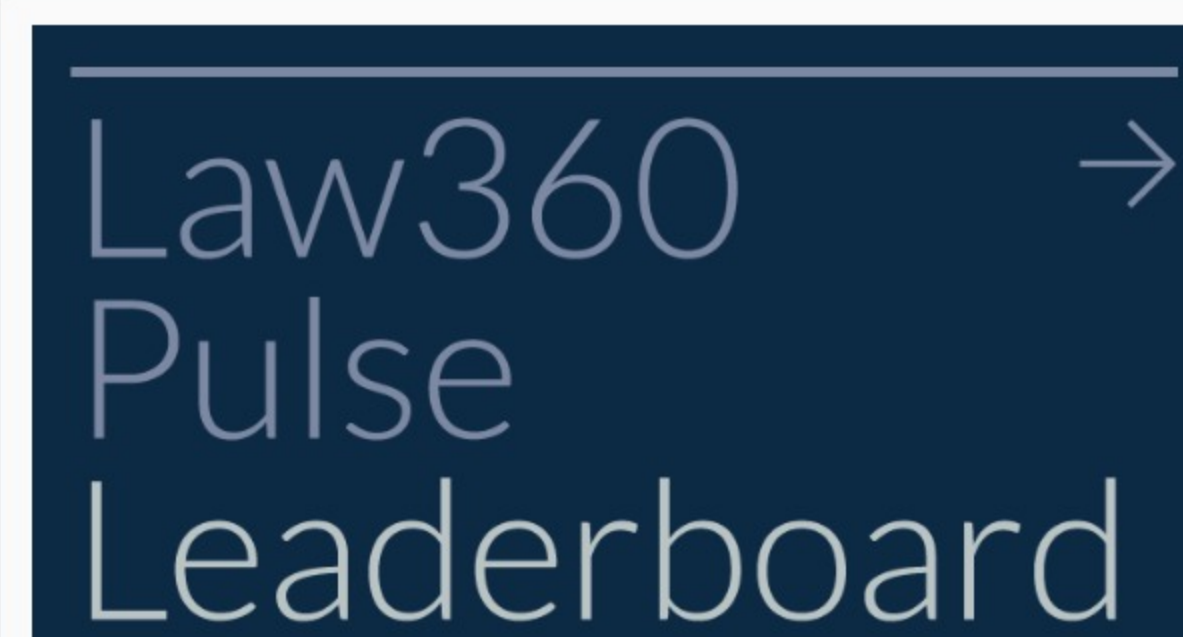
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