

History Will Judge: A Look at Garland's Nomination in (<https://thepolitic.org/>) Polarized Washington



Ahmed Elbenni (<https://thepolitic.org/author/ahmed-elbenni/>) • February 22, 2017



(<https://thepolitic.org/wp-content/uploads/2017/02/160316131308-merrick-garland-barack-obama-joe-biden-march-16-full-169.jpg>)

In March 2016, following the death of Supreme Court Justice Scalia, Obama nominated Merrick Garland to the Supreme Court. What followed was a year-long battle for ideological dominance of the country's judicial branch.

Many considered Garland a relatively uncontroversial nominee; he was a well-known moderate and respected by liberals and conservatives (<http://www.cnn.com/2016/03/16/politics/merrick-garland-republicans-praise/>) alike. In 2010, when President Obama was considering who he should nominate to the Supreme Court to replace retired Justice John Paul Stevens, Senate Republicans and conservative legal scholars floated Garland's name as a viable option. Ed Whelan, a former official of Bush's Justice Department, called (<http://nymag.com/news/politics/powergrid/65620/>) him "the best nominee that Republicans could hope for." Senator Orrin Hatch, a member of the Senate Judiciary Committee, called (<http://www.reuters.com/article/us-usa-court-hatch-idUSTRE6456QY20100506>) Garland a "consensus nominee," and reiterated (<http://www.newsmax.com/Newsfront/john-gizzi-orrin-hatch-obama-will-nominate/2016/03/13/id/718871/>) his support for the Harvard-educated judge days before Obama announced his nomination. If there existed a candidate who could appeal to both sides in Washington's partisan environment, it was Garland.

However, not everyone agreed (<http://www.nationalreview.com/bench-memos/432716/moderates-are-not-so-moderate-merrick-garland>) that Garland was a moderate. Many conservative writers and scholars rejected such a characterization as one of liberal spin, intended to fool the Right into supporting a nominee that would not represent its views on the Supreme Court. Most of the conservative criticism (<http://www.usatoday.com/story/opinion/2016/05/01/merrick-garland-guns-supreme-court-second-amendment-column/83670044/>) directed at Garland, especially from the National Rifles Association, emphasized his alleged support for more stringent gun control. However, while Garland was certainly not a hardline conservative on the gun control issue, claims that he opposed Second Amendment rights because he once voted to uphold stringent Washington D.C. gun regulations were highly misleading (<http://www.politifact.com/virginia/statements/2016/apr/04/john-whitbeck/john-whitbeck-misfires-merrick-garlands-gun-record/>). Garland merely voted to reconsider *District of Columbia vs. Heller*, the landmark case that established the individual's right to bear arms beyond the militia, which is standard procedure for a case of such importance and not indicative of his personal stance on the issue.

Just as many conservatives felt that Garland was not conservative enough, many liberals felt that Garland was (<http://www.nydailynews.com/news/politics/king-merrick-garland-push-supreme-court-article-1.2566551>) not (<http://www.cnn.com/2016/03/16/politics/liberals-disappointment-merrick-garland-supreme-court/>) liberal (<http://reason.com/blog/2016/03/28/why-the-merrick-garland-nomination-is-a>) enough (<https://thinkprogress.org/merrick-garland-isnt-especially-liberal-here-s-what-that-means-for-how-he-ll-decide-cases-73aedcc1cd6e#.su2p3ltbj>), in part due to a right-leaning (http://www.salon.com/2016/03/17/inside_merrick_garlands_bleak_record_why_he_could_take_the_supreme_

criminal justice record that among other things were generally hostile to Guantanamo detainees. The fact that both sides of the aisle had serious points of disagreement with Garland highlights his moderate approach to judicial rulings; he has never leaned overwhelmingly in either direction.

This is not to suggest that Garland was an ideal candidate for conservatives. Despite his generally uncontroversial record, Garland was clearly a left-of-center candidate—someone who would almost certainly move the court leftward, if not as quickly or significantly as ardent progressives would have hoped. However, Mitch McConnell’s attempt to rewrite Garland’s moderate record by claiming he was a “worst case scenario” for conservatives was demonstrably false (https://www.washingtonpost.com/opinions/eight-is-not-enough/2016/06/05/8182e01e-283d-11e6-ae4a-3cdd5fe74204_story.html?utm_term=.bcbda59d63a1), especially as reputable (<http://www.usatoday.com/story/opinion/2016/03/16/obama-supreme-court-nominee-merrick-garland-senate-republicans-fight-column/81828300/>) right-wing (<http://www.baylor.edu/mediacommunications/news.php?action=story&story=166915>) lawyers (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/16/initial-thoughts-on-president-obamas-decision-to-nominate-judge-merrick-garland-to-the-supreme-court/?utm_term=.8f64d1740284) voiced (<http://mediamatters.org/video/2016/03/20/bush-judicial-nominee-miguel-estrada-judge-garl/209404>) support (<https://www.nytimes.com/2016/03/23/opinion/bush-would-have-nominated-garland.html>) for (<https://www.wsj.com/articles/a-supreme-court-challenge-for-democrats-1461885048>) Garland’s nomination (and confirmation). Obama had nominated as conservative a candidate as was feasible (<http://insider.foxnews.com/2016/03/16/judge-napolitano-merrick-garland-most-conservative-nominee-dem-modern-era>) for a liberal Democratic president, extending an olive branch to the Republicans.

Unfortunately, the olive branch went unaccepted by conservative politicians. Weeks before Obama announced Garland’s nomination, only hours after Scalia’s death, Republicans declared (https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/?utm_term=.97670f0ad3a0) that they would not hold hearings for the President’s eventual nominee. Senate Majority leader Mitch McConnell argued (<http://cnnpressroom.blogs.cnn.com/2016/03/20/mcconnell-rules-out-confirming-scotus-nominee-i-cant-imagine-that-a-republican-majority-congress-in-a-lame-duck-session-would-want-to-confirm-a-nominee/>) that Presidents in their election year should not nominate anybody to the Supreme Court. Instead, this should be left to the next president. However, historical precedent shows that there is nothing anomalous (<http://www.politifact.com/wisconsin/statements/2016/mar/04/paul-ryan/paul-ryan-wrong-saying-there-precedent-not-nominat/>) about Supreme Court justices being nominated and confirmed by Congress during an election year, even in cases where the executive and legislative branch were divided between two parties.

The reason behind the GOP's resistance to an Obama nomination was obvious: with the court split four and four between conservative and liberal judges, the next judge would have the power to tilt the ideological composition of the court in either direction for generations to come. The GOP, in insisting that the nomination be withheld until after the next presidential election, made a political gamble: that Obama's successor would be a Republican who would then nominate a conservative judge to the Supreme Court. Democrats decried this as an inappropriate politicization of Justice Scalia's death and naked partisanship. Senate Minority leader Harry Reid accused Republican politicians of holding the entire judicial branch hostage (<http://www.washingtonexaminer.com/reid-gop-wants-to-hold-hostage-entire-judicial-branch/article/2583903>).

Republicans justified their unwillingness to compromise with the following logic: the Senate had not confirmed the nomination of a President from an opposing party in an election year since 1888 (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/on-election-year-supreme-court-vacancies/?utm_term=.81ba6e62973b), an (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/on-election-year-supreme-court-vacancies/?utm_term=.81ba6e62973b)d in 1992, also an election year, then-senator Joe Biden encouraged (<https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html>) Democrats to delay a hearing for Republican President George H. W. Bush's nominee. Neither of these assertions, however, holds much water. No nominee from an opposing party had been confirmed in an election year since 1888 because of the rarity with which such a scenario transpired, not because of a time-honored tradition. Biden's words had been taken out of context and their meaning distorted, as highlighted by the man himself in a New York Times op-ed (<https://www.nytimes.com/2016/03/04/opinion/joe-biden-the-senates-duty-to-advise-and-consent.html>). He had not argued for an indefinite postponement of a nomination hearing in an election year; instead, he had urged his party to hold hearings only after the campaign season had ended, so as to avoid exacerbating political tensions in the country, and had encouraged President Bush to nominate a moderate that can achieve bipartisan approval. This all fed into Biden's broader project of de-escalating the political polarization that he saw seizing the country. This is quite a far cry from stalling the nomination process indefinitely by refusing to even hold a hearing.

The most potent anti-Obama nominee argument came from elsewhere. Many conservative political analysts argued (<http://www.washingtontimes.com/news/2016/mar/20/editorial-failed-robert-bork-nomination-looms-over/>) that the Republicans were justified in politicizing the nomination process because the Democrats had done exactly the same 30 years earlier. In 1987, President Ronald Reagan nominated Robert Bork to the Supreme Court. Democrats refused to confirm Bork and waged a successful scorched-earth campaign against him. The ugly politicization of this Supreme Court nomination embittered Republicans. In the

opinions of many in the GOP, the Democrats were first to treat the president's Supreme Court nomination as a partisan issue; thus, Republicans argue, they are responsible for the foundation upon which the GOP has built its obstruction.

This criticism distorts history and ascribes greater importance to the Bork showdown than is warranted. Contrary to myth, Bork was not the first Supreme Court nominee to be mired in a politicized confirmation process. Back in 1968, President Lyndon B. Johnson nominated a liberal judge, Abe Fortas, to the Supreme Court, only to face staunch resistance from Republicans and conservative Southern Democrats. The timing was key: Johnson was in his last year and the probability of a Republican successor (Richard Nixon) was high. Though Fortas would eventually be revealed to be a flawed candidate, much of the opposition against him stemmed from such partisan calculation. Republicans and southern Democrats filibustered (<http://historynewsnetwork.org/article/11753>) Fortas's nomination, sinking it via an aggressive campaign (<https://www.neh.gov/humanities/2009/septemberoctober/feature/supremely-contentious>). It was their defeat (<http://www.politico.com/magazine/story/2016/02/scalia-republicans-abe-fortas-precedent-beware-213640>) of Fortas, not the Democrat's rejection of Bork, that shifted the criterion of Supreme Court confirmations from one based on technical qualifications to one grounded in political ideology.

Even if one were to ignore this history, Bork's example does little to justify the current Republican blockade. Firstly, Democrats did not refuse to consider Reagan's nominee, only to confirm him—this is well within the bounds of standard protocol. Equating such behavior to the modern GOP's refusal to even hold hearings for the nominee is dishonest. Secondly, six Republican senators joined (http://articles.latimes.com/1987-10-23/news/mn-10814_1_senate-rejects-bork) the Democrats in voting against Bork, a different affair from the purely partisan gridlock that kept Merrick Garland out.

None of this is to suggest that the Democrats are historically blameless. While Republicans may have set off contentious nomination battles with the Fortas filibuster, the Democrats only escalated (<http://thefederalist.com/2016/02/16/10-times-democrats-vowed-to-block-republican-nominees/>) the politicization of the court throughout the Reagan and Bush years. Republicans retaliated in kind in the Clinton years, and then the Democrats responded in the second Bush's era, and so on—the two parties continue to push one another further into the arms of partisan obstructionism. But regardless of the blame that both sides share, the GOP's recent actions do not satisfy claims of moral equivalency. The GOP's obstruction of Garland was genuinely (http://www.huffingtonpost.com/geoffrey-r-stone/an-unprecedented-breach-o_b_9434010.html) unprecedented (<http://www.politifact.com/truth-o-meter/statements/2016/mar/20/harry-reid/harry-reid-says-unlike-gop-senate-democrats-never-/>) and a threat to the institutional integrity of the Supreme Court.

In some ways, the Republican Party's haste to shut down the nomination process was a tactical blunder. Party leaders announced their intentions to deny Obama's nominee a hearing even before he had named one, trapping themselves when Obama eventually nominated Merrick Garland, a "consensus" judge with a moderate track record who had been praised by conservatives for years. By nominating an uncontroversial judge amenable to both sides of the political spectrum, Obama cast any Republican resistance as partisan obstructionism. That's not to say that a hardline stance was totally unreasonable on their part; they may very well have anticipated Obama would nominate a moderate and so prevented a hearing, one which would almost certainly yield no justifiable grounds upon which to deny a confirmation, from taking place.

While the Republican strategy made political sense, it did nothing to change the fact that the Party was essentially holding the Supreme Court hostage for its own purposes. And yet incredibly, the GOP's bet paid off. The party won the White House in the 2016 election, and President Trump has since nominated Neil Gorsuch to the Court. Though he is respectable and well-qualified, his presence will tilt the balance of power in the Supreme Court rightward for generations to come. Some liberals found Obama's approach to the Supreme Court vacancy inexcusable, as he both failed to fill it with a more liberal nominee and to take more aggressive action against Republican roadblocks. After all, Obama could have forced (<https://newrepublic.com/article/138787/obama-can-put-merrick-garland-supreme-court>) Garland through via a recess appointment. One might argue that by not doing so, Obama allowed the Republicans to dictate the terms of the game—they forced him to take a bet on the 2016 election and he lost. Liberals now face a Supreme Court stacked against them.

Obama likely knew the GOP would refuse him. He played the political game as much as they did, exploiting the opportunity given to him by the nomination to set a trap for the Republicans. Obama probably hoped their refusal to confirm his nominee would hurt them in the 2016 elections. This plan represented a strategic error based upon a mistaken premise: that voters would actually care about the battle over the vacant Supreme Court seat. They did not (<http://www.outsidethebeltway.com/voters-dont-seem-to-care-about-the-political-fight-over-vacant-supreme-court-seat/>), despite their opposition (<http://thehill.com/blogs/floor-action/senate/273759-poll-majority-thinks-gop-playing-politics-on-scotus>) to the GOP's actions. This apathy facilitated the success of the GOP's gamble. Instead of settling for a moderate candidate picked by a President they opposed, they were able to secure a more directly conservative candidate that will keep the Supreme Court right for years to come.

Still, these reflections neglect to acknowledge the important symbolism Garland's denied court seat will hold in future evaluations of the Obama administration and of Obama himself. A popular narrative that has emerged over the past few years is that the political polarization plaguing Washington is the product of Obama's decisive governing. Many of the former President's critics claim that Obama divided the U.S. by

pursuing a radically left-wing agenda at the expense of compromise with the more conservative GOP. The partisan gridlock and political dysfunction marring the government, then, is the inevitable end result of a President uninterested in achieving bipartisan consensus for his policies. The Republicans were not at fault for blocking Obama's legislative proposals in Congress; rather, he was at fault for not properly negotiating with them.

Merrick Garland's nomination, and its subsequent dismissal by the GOP, stands as a towering rebuttal to this narrative. If Obama were indeed concerned only with establishing liberal government, then one would expect him to have nominated a more progressive judge than Garland. Indeed, Obama received much criticism (<http://lawnewz.com/high-profile/why-judge-garlands-nomination-is-a-disappointment-to-liberals/>) from the left precisely for his failure to do so. If he were determined to forcefully implement his agenda at all costs, he could have resorted to the aforementioned recess appointment, but did not. Most significantly, the Republican's refusal to consider even a moderate nominee exposed their resistance as nihilistic obstructionism rather than disciplined objection, anchored in partisan warfare rather than a genuine desire to serve the country's best interests. The narrative peddled by Obama's critics that lays all the blame for Washington's dysfunction on his feet simply does not square with the underhanded political tactics employed by the GOP. Obama attempted to compromise with the GOP by deliberately choosing an agreeable candidate that many in its own rank had previously praised. Their hostile rejection hardly casts them in a sympathetic light, especially as several of them suggested in the waning days of the 2016 campaign that they would also block (<https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/>) a Clinton nominee (https://www.washingtonpost.com/news/the-fix/wp/2016/11/02/senate-republicans-could-block-clinton-supreme-court-nominees-indefinitely-it-wouldnt-be-the-best-idea/?utm_term=.4ef00db206e0).

Obama, in his torturous consciousness (<https://www.thenation.com/article/obama-and-long-view/>) of history, probably knows this. The former President, for better or for worse, has always fancied himself above the sensationalism and mud-slinging of day-to-day politics. He may have lost the chance to leave a liberal Supreme Court legacy, but he symbolically indicted the party that opposed him tooth-and-nail throughout his time in office. Obama should hope that this indictment will be heard by future historians when they evaluate his Presidency. And in light of the facts, one is hard-pressed to believe that it won't be. History will judge.

Tags:

partisanship (<https://thepolitic.org/tag/partisanship/>) SCOTUS (<https://thepolitic.org/tag/scotus/>)
Supreme Court (<https://thepolitic.org/tag/supreme-court/>)

PREVIOUS ARTICLE

When Antibiotics Fail: Drug-Resistant Bacteria's Threat to Medicine (<https://thepolitic.org/when-antibiotics-fail-drug-resistant-bacterias-threat-to-medicine/>)

NEXT ARTICLE

A Guide to Local 33's Fight for Unionization (<https://thepolitic.org/a-guide-to-local-33s-fight-for-unionization/>)

Sponsored Links

Navy Man Hurries To Greet Wife, But Sees Her Pregnant Belly And Realizes What She's Been Hiding

DirectExpose

Nancy-Sinatra Has To Live Like This At 79

MisterStocks

Man Who Called NVIDIA's Rise Makes Bold 5G Prediction

The Legacy Report

With This New Tool Mac Users Aren't Panicking About Data Leaks

MacKeeper

She Knew Exactly Why The Crowd Will Look At Her

TieBreaker

Realtime GPS Tracking on Fleet Vehicles

GPS Fleet Tracking | Search Ads

0 Comments

The Politic

1 Login ▾

Recommend 1

Tweet

Share

Sort by Best ▾



Start the discussion...

LOG IN WITH

OR SIGN UP WITH DISQUS (?)



Name

Be the first to comment.

Sponsored Links

If Your Dog Eats Grass (Do This Every Day)

Ultimate Pet Nutrition Nutra Thrive Supplement

Doctor: “Doing This Every Morning Can Snap Back Sagging Skin (No Creams Needed)”

Beverly Hills MD

3 Warning Signs Your Dog Is Crying For Help

Dr. Marty

Navy Man Hurries To Greet Wife, But Sees Her Pregnant Belly And Realizes What She's Been Hiding

DirectExpose

Lift & Firm Sagging Skin for Face & Neck

City Beauty

Nancy-Sinatra Has To Live Like This At 79

MisterStocks

**The
Politic**

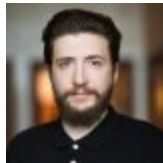
POPULAR POSTS



The Calculus of Retention: Why Are Yale Students Leaving STEM? (<https://thepolitic.org/the-calculus-of-retention-why-are-yale-students-leaving-stem/>)

Henry Reichard (<https://thepolitic.org/author/henry-reichard/>) • December 30, 2018

RECENT POSTS



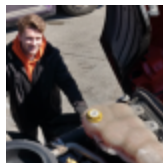
Sergey Baloyan (Yale Financial Markets Certificate 19), Co-founder of X10 Agency and Consultant on Security Token Offerings
(<https://thepolitic.org/sergey-baloyan-yale-financial-markets-certificate-19-co-founder-of-x10-agency-and-consultant-on-security-token-offerings/>)

CRYPTO/BLOCKCHAIN ([HTTPS://THEPOLITIC.ORG/CATEGORY/CRYPTO-BLOCKCHAIN/](https://thepolitic.org/category/crypto-blockchain/)), INTERVIEWS ([HTTPS://THEPOLITIC.ORG/CATEGORY/INTERVIEWS/](https://thepolitic.org/category/interviews/))



John Song (Yale SOM), Director of Special Situations Investments for Angel Capital and Advisor to LucyLabs Crypto Firm
(<https://thepolitic.org/john-song-yale-som-director-of-special-situations-investments-for-angel-capital-and-advisor-to-lucylabs-crypto-firm/>)

CRYPTO/BLOCKCHAIN ([HTTPS://THEPOLITIC.ORG/CATEGORY/CRYPTO-BLOCKCHAIN/](https://thepolitic.org/category/crypto-blockchain/)), INTERVIEWS ([HTTPS://THEPOLITIC.ORG/CATEGORY/INTERVIEWS/](https://thepolitic.org/category/interviews/))



An Interview with Joshua Collins, Truck Driver, Democratic Socialist, and Candidate for U.S. Congress (<https://thepolitic.org/an-interview-with-joshua-collins-truck-driver-democratic-socialist-and-candidate-for-u-s-congress/>)

INTERVIEWS ([HTTPS://THEPOLITIC.ORG/CATEGORY/INTERVIEWS/](https://thepolitic.org/category/interviews/))

FOLLOW THE POLITIC



([HTTPS://WWW.FACEBOOK.COM/THEYALEPOLITIC/](https://www.facebook.com/theYalePolitic/))



([HTTPS://TWITTER.COM/YALEPOLITIC?LANG=EN](https://twitter.com/YALEPOLITIC?LANG=EN))



([HTTPS://WWW.INSTAGRAM.COM/THEYALEPOLITIC/](https://www.instagram.com/theYALEPOLITIC/))

Made by ThePolitic ©All rights reservd.