

***The West Wing*, the Senate, and “The Supremes” (Redux)**

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“A conservative anchor just died. A . . . brilliant thinker who brought the right out of the closet and championed a whole conservative revival. You cannot replace [him] with a [liberal].”¹ “You can hate his positions, but he was a visionary. He blew the whole thing open. He changed the whole argument.”²

Or so said a talking head about Justice Antonin Scalia this spring, right? And then that pundit went on to say, “You go with [a real liberal] the Senate’s going to make the next year of your life a living hell.”³

You heard him quoted all over the place.

But, actually, these statements weren’t about the death of Scalia. Some folks in the executive branch said them twelve years ago.

A fictional White House, sure. Martin Sheen never took the oath of office, but he played a president on TV: a Democratic president who woke up one day to find out that the leading conservative on the Supreme Court had died suddenly, and who faced a hostile Republican Senate.⁴ And his dilemma? How to get *any* nominee confirmed.

Anyone who says *The West Wing* didn’t have its finger on the pulse of American politics is just in denial. OK, the episode of the

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¹ Evelyn Baker Lang, played by Glenn Close, in Television Broadcast, *The West Wing*, Season 5, Episode 17: “The Supremes” (NBC, Mar 24, 2004).

² Josh Lyman, played by Bradley Whitford, *The West Wing*, Season 5, Episode 17 (cited in note 1).

³ Lisa Wolfe, played by Deirdre Lovejoy, *The West Wing*, Season 5, Episode 17 (cited in note 1).

⁴ *The West Wing*, Season 5, Episode 17 (cited in note 1).

show titled “The Supremes” aired twelve years prematurely, but the writers knew what they were talking about.⁵

Now, you’re probably saying, the nice thing about a fictional president is that the writers could make him do anything they wanted. They could manipulate the chair of the Judiciary Committee, too. And they could create a world in which, yes, the White House could give the conservative members of the Committee the right to nominate one of their own to the empty associate justice seat in exchange for the president’s nomination of a liberal to fill a soon-to-be-vacated chief justice position.

A “swapadeedoo.”⁶ It worked on television, but it just isn’t going to wash in real-life 2016, even though the real-life situation President Barack Obama faces was played out—to the satisfaction of all—in the halls of President Jed Bartlet’s White House in 2004.

But if a swapadeedoo isn’t the answer to Obama’s current problem—a deceased conservative visionary of an associate justice, coupled with the “I can almost taste it” potential to change the ideological balance on the Court—what is?

Because a year or more—and don’t kid yourself, it will be more if no compromise is reached⁷—is a very long time in the tiny bubble of the world that is the Supreme Court. A year with no justice in that seat means a year in which justice may be denied, not only to Supreme Court litigants, but to all others in similar situations.⁸ A year with only eight justices on the Court removes an important voice from deliberations, from oral arguments, from seemingly casual but perhaps important hallway or lunchtime

⁵ One pretty amazing thing about the episode was that the writer, Debora Cahn, did not know anything about the Supreme Court or constitutional jurisprudence before beginning her research to write it. Some of the dialogue is remarkable, worthy of a Constitutional Law professor. See *Commentary by Alex Graves, Jessica Yu, and Debora Cahn on “The Supremes,”* included in *The West Wing: The Complete Series* (Warner Brothers Entertainment, 2006).

⁶ Toby Ziegler, played by Richard Schiff, *The West Wing*, Season 5, Episode 17 (cited in note 1).

⁷ According to Senate Republicans, the solution to the empty seat on the Supreme Court bench is to wait a year and allow the next president to make the nomination. But, in addition to the issue of leaving a seat open for over a year, that approach sets the executive branch up for a very slippery slope. Should the president refrain from appointing lower court judges? Declaring war? Pardoning felons?

⁸ Adam Liptak, *Scalia’s Absence Is Likely to Alter Court’s Major Decisions This Term* (NY Times, Feb 14, 2016), available at <http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html> (visited June 8, 2016) (Perma archive unavailable).

conversations.⁹ A year with no justice in that seat sets a precedent for leaving seats open that could make future nominations even more difficult. After all, if we could do it with eight, why not with seven? Do we really need all those folks in black robes?

A year with no appointment puts us into a constitutional crisis, in which both sides argue over power versus duty versus rights.

Instead of holding a stand off, Obama's West Wing and the Senate should be looking for ways to save face while getting Judge Merrick Garland—or someone else, if he's not the right guy—confirmed. Chief of Staff Leo McGarry said it first: "First one to find me a Supreme Court justice gets a free corned beef sandwich."¹⁰

⁹ We know that the justices take seriously the voice of each member of the conference. For example, in their weekly or semiweekly conferences, the justices take turns speaking about a case; no justice speaks twice before each has spoken once. See Melissa Harris, *Justice Elena Kagan Gives an Inside Look at the U.S. Supreme Court* (Chicago Tribune, Feb 3, 2015), archived at <http://perma.cc/Q3H8-T32N>. The literature on judicial decisionmaking examines in depth the effect of group dynamics, as well as the influence of each voice in an established group. See generally, for example, William M. Landes and Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J Legal Analysis 775 (2009). Oral arguments, it is often said, are more of an opportunity for the justices to have a conversation—that is, signal their views—with each other rather than for a real examination of the issues with an advocate. See Timothy R. Johnson, Ryan C. Black, and Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior during Oral Arguments*, 55 Loyola L Rev 331, 350 (2009). And the hallway and mealtime conversations? There is no empirical method for looking at their importance, but common sense tells us that they must matter among colleagues who have worked together for so many years, often decades.

Of course, there are easily visible and officially tabulated consequences of an eight-Justice Supreme Court. Take, for example, the eventual outcome of *Friedrichs v California Teachers Association*, 136 S Ct 1083 (2016). In the days immediately following the oral argument in the case, Supreme Court observers called the case for the petitioner, saying it would be a disaster for unions. But after the death of Scalia, these same observers were quick to note that the petitioner had likely just lost his fifth vote—and they were right. Compare Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback* (NY Times, Jan 11, 2016), online at <http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html> (visited June 16, 2016) (Perma archive unavailable), with Adam Liptak, *Scalia's Absence Is Likely to Alter Court's Major Decisions This Term* (NY Times, Feb 14, 2016), available at <http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html> (visited June 8, 2016) (Perma archive unavailable). On March 29, 2016, the Supreme Court affirmed the Ninth Circuit with a 4–4 vote. The union—and perhaps many others, at least in the Ninth Circuit—won by default—almost certainly because of one vote, taken weeks before in the justices' conference, that could no longer be counted. Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4* (NY Times, March 29, 2016), available at <http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html> (visited June 8, 2016) (Perma archive unavailable).

¹⁰ Leo McGarry, played by John Spencer, in *The West Wing*, Season 5, Episode 17 (cited in note 1).

This Essay will discuss some choices for Obama—or the next President, if faced with the same Senate stand off. How can he sit down with his chief of staff and actually come up with a Reuben slathered in Thousand Island dressing (in other words, a confirmable nominee)? Should he accept the conventional wisdom that all Supreme Court nominees, as the conservative judge character in the episode suggests, will be “[moderates] from here on in”?¹¹ Or does the standoff seesaw the current Democratic trend to nominate moderates in the opposite direction—because if a president can’t get a moderate confirmed, perhaps he should ditch the whole moderate thing and go for broke?

I. THE CONVENTIONAL WISDOM: NOMINATE A MODERATE

President Bartlet: There are 4,000 protestors outside this building worried about who’s going to land in that seat. We can’t afford to alienate all of them.

Christopher Mulready: We all have our roles to play, sir. Yours is to nominate someone who doesn’t alienate people.¹²

Early on, before February turned into March (and, oh, yes, March came in like a lion, but it did not leave like a lamb), many proposed that President Obama nominate a mutually acceptable moderate, an independent thinker who would bridge the ideological gap.¹³ The White House must seek a palliative answer, one that makes both sides feel like they’ve won some major point, conventional wisdom said.

But—as we’ve seen with the nomination of Judge Garland—that solution requires the two sides to agree on just what qualifies as moderate thinking. It forces the debate to focus on ideology rather than on judicial philosophy and temperament. It requires both parties to acknowledge that, yes, the Supreme Court is a political institution, and yes, nominating someone to a Supreme Court seat is possibly the greatest legacy a president may have. In the words of Bartlet, “Filling another seat on the Court may be the only lasting thing I do in this office.”¹⁴

¹¹ Judge Christopher Mulready, played by William Fitchner, *The West Wing*, Season 5, Episode 17 (cited in note 1).

¹² Bartlet, played by Sheen, and Mulready, played by Fitchner, in *The West Wing*, Season 5, Episode 17 (cited in note 1).

¹³ Jonathan Martin and Patrick Healy, *Obama’s Options for a Supreme Court Nominee, and the Potential Fallout* (NY Times, Feb 16, 2016), archived at <http://perma.cc/X4C8-H4QX>.

¹⁴ Bartlet, played by Sheen, *The West Wing*, Season 5, Episode 17 (cited in note 1).

Certainly, this nomination has resulted in complete transparency as to a president's motives in nominating a justice and the Senate's in confirming one. It's all politics, plain and simple. And, of course, many believe that Obama's rationale for picking Garland was to play a political game of poker, forcing the Republicans to reveal whether or not they are bluffing.¹⁵ With a true moderate like Garland on the table—one that their own leaders have acknowledged to be qualified and temperamentally appropriate¹⁶—those who oppose confirmation hearings must explain themselves¹⁷ in a way that they perhaps would not have to had Obama chosen a more overt liberal.¹⁸

Even if the Garland nomination is not ultimately a success in confirmation terms, it may well be a success in terms of political discourse. What, exactly, is a moderate? Again, *The West Wing* seems to offer insight into this issue in a particularly cogent way. When the president meets with Judge E. Bradford Shelton, a moderate jurist, to discuss a possible nomination to the Supreme Court, Shelton says,

I don't position myself on issues and I don't know what I think about a case until I hear it. There are moderates who are called that because they're not activists. And there are moderates who are called that because sometimes they wind up on the left and sometimes the right. . . . [M]y allegiance to the eccentricities of a case will reliably outweigh my allegiance to any position you might wish I held.¹⁹

And then, the hallway fight between White House Communications Director Toby Ziegler and White House Deputy Chief of Staff Josh Lyman over their disagreement about whether the president should play it safe by nominating a moderate—thus

¹⁵ Michael D. Shear, *Strategy on Garland: Act as though He'll Get Senate Hearing* (NY Times, Apr 3, 2016), available at <http://www.nytimes.com/2016/04/04/us/politics/supreme-court-nominee-pushes-ahead-despite-fracas.html> (visited June 8, 2016) (Perma archive unavailable).

¹⁶ *Id.*

¹⁷ This discussion also relies on the premise that the "it's the last year of the president's term" argument is a straw man. If Obama still had three years to go, would the Republicans have blocked the nomination? I think so, although they would have had to find a less convenient reason to do so.

¹⁸ I say "overt" because many argue that Garland is actually a liberal in moderate's clothing. Steve Chabot, *Replacing Justice Scalia Will Take Time* (Cincinnati Enquirer, Apr 4, 2016), archived at <http://perma.cc/9FQ6-YRUU>.

¹⁹ Brad Shelton, played by Robert Picardo, in *The West Wing*, Season 5, Episode 17 (cited in note 1).

achieving the ultimate goal of Senate confirmation—or try to get a true liberal onto the Court:

Josh Lyman: Moderates. . . . Not moderate, mediocre. . . . If we had a bench full of moderates in ‘54 “separate but equal” would still be on the books, this place would still have two sets of drinking fountains.

Toby Ziegler: Moderate means temperate. It means responsible. It means thoughtful.

Josh Lyman: It means cautious. It means unimaginative.

Toby Ziegler: It means being more concerned about making decisions than making history. . . .

Josh Lyman: Is that really the biggest tragedy in the world? That we nominated somebody who makes an impression instead of some second-rate crowd pleaser?

Toby Ziegler: The ability to see two sides of an argument is not the hallmark of an inferior intellect.²⁰

That last line by Toby? Remarkably on point. Because the Republicans currently refuse to see both sides of the argument. They’re all in. Is their vociferous opposition to holding confirmation hearings the “hallmark of an inferior intellect”? Depends on whom you ask.

II. BUCKING CONVENTIONAL WISDOM: NOMINATING A TRUE LIBERAL

Ever since the failed nomination of Judge Robert Bork, the political understanding has been that the president—a Democratic one, at least²¹—should avoid serious controversy in nominating a justice. Justice Clarence Thomas’s confirmation hearings only served to reinforce that notion. But even after Bork, several

²⁰ Ziegler, played by Richard Schiff, and Lyman, played by Bradley Whitford, *The West Wing*, Season 5, Episode 17 (cited in note 1).

²¹ I say “Democratic” because Republican presidents have not seemed to buy into the moderate strategy. No one claimed that Chief Justice John Roberts and Justice Samuel Alito were moderates. The last “true” liberal to be nominated, though—one who was perceived at the time of nomination to be firmly on the left—was probably Justice Thurgood Marshall in 1967. Peter Baker, *Kagan Nomination Leaves Longing on the Left*, (NY Times, May 10, 2010), available at <http://www.nytimes.com/2010/05/11/us/politics/11nominees.html> (visited May 16, 2016) (Perma archive unavailable) (“[N]o Democratic nominee since Thurgood Marshall in 1967 has been the sort of outspoken liberal champion that the left craves.”). See also Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* *34–46 (William & Mary Law School Research Paper No 09-276), archived at <http://perma.cc/DF9Y-DUFT>.

ideological nominees were nominated and confirmed.²² The reason, of course, was a political one: the same party controlled the White House and the Senate.²³

But more relevant to this discussion are the nominations of Sonia Sotomayor and Elena Kagan in 2009 and 2010, respectively. During the 111th Congress, President Obama was in the White House, and Democrats controlled the Senate 57–41. Among true liberals, an outcry broke: These women are terrific, they said, but seriously, Obama? They aren't Justice Ruth Bader Ginsburg. Why the heck are you declining to seize the chance to nominate a real ideologue to the bench?²⁴

The answer, obviously, was the filibuster, and the Republicans' willingness to use it to block Obama's liberal nominees.²⁵ The only way through the Senate, it seemed, was to nominate someone palatable to liberals and not infuriating to conservatives. And it worked. Republicans, while able to flex their filibuster muscles, decided not to do so. Why? Perhaps because of optics—rejecting two eminently qualified women just wouldn't look good, politically. Perhaps because of the fear of the unknown—if they blocked nominees who were borderline reasonable, who knew whom the President might put up next?

But in 2016, the calculus changed. Now, with an empty seat on the Supreme Court, Obama still in the White House, and the Republicans controlling the Senate 54–46,²⁶ the Republicans can play a whole new poker game, with jokers wild and a huge advantage to the house. The Republicans don't need the filibuster in this scenario. They can use an even more powerful tool: they can refuse to let any nominee even get to a vote.

²² Take Justice Ruth Bader Ginsburg, for example, or Roberts and Alito. While at the time, Ginsburg was seen as a moderate, in today's political world she probably would not be. See Oliver Roeder, *Supreme Court Justices Get More Liberal as They Get Older* (FiveThirtyEight, Oct 5, 2015), archived at <http://perma.cc/WE9D-DLJ5>.

²³ In 2005, when President George W. Bush nominated Roberts and Alito, the Republicans held a Senate majority of 55–45. In 1993, when President Bill Clinton nominated Ginsburg, the Democrats held a Senate majority of 57–43. See *Party Division in the Senate, 1789-Present* (US Senate), archived at <http://perma.cc/S97W-FBGR>.

²⁴ Baker, *Kagan Nomination Leaves Longing on the Left* (cited in note 18); Peter Baker, *Favorites of Left Don't Make Obama's Court List* (NY Times, May 25, 2009), available at <http://www.nytimes.com/2009/05/26/us/politics/26court.html> (visited May 16, 2016) (Perma archive unavailable) (stating that neither Kagan nor Sotomayor were “the outspoken leaders of the left that advocates crave[d]”).

²⁵ Senate Democrats have been less interested in using the filibuster power. See Elliott Slotnick, Sarah Schiavoni, and Sheldon Goldman, *Writing the Book of Judges: Part 2; Confirmation Politics in the 113th Congress*, 4 J L & Courts 187, 191 (2016).

²⁶ See *Party Division in the Senate, 1789-Present* (cited in note 23). Note that the Senate currently includes two independents, but they caucus with the Democrats.

At first glance, the Republicans’ strong-arming is frustrating to a fault. Indeed, many commentators have called for conservatives to “do their constitutional duty” and at least allow Garland’s nomination to reach the floor for a vote.²⁷

But I believe we can see it another way. Perhaps, recalling Christopher Mulready, it is not “[moderates] from here on in.”²⁸ Perhaps, instead, this very situation is what it will take to wake up future Democratic presidents, to tell them, “Why bother with the moderate?”

Why bother? If we’re going to lose anyway, go for broke. Nominate the most devoted liberal who’s qualified for the job.

Many have speculated that Obama, in choosing a nominee, had to consider two different goals: getting a nominee confirmed or rallying the base. But if he had known for certain that his moderate nominee would not be confirmed, perhaps the better path would be for him to rally the base—but in a different way than most people have talked about it.

Most people, in discussing rallying the base, have talked about shaming the Republicans into accepting a liberal nominee. In turning down, say, the African-American female²⁹ or Hindu nominee,³⁰ the Republicans would look prejudiced and discriminatory. They might have to hold hearings, just to show they weren’t.

But there might have been a hidden benefit in nominating a true liberal. Sure, we now know that the Senate Republicans probably would not have cared about perception. Given that they’ve blocked a moderate like Garland, they could have made a case that it wasn’t about the nominee—it was about Obama.³¹

²⁷ See, for example, Laurence H. Tribe, *The Scalia Myth* (New York Review of Books, Feb 27, 2016), archived at <http://perma.cc/4DDY-LLFR>; Dahlia Lithwick, *Supreme Court Nihilism: The GOP’s Treatment of Merrick Garland Is Disgraceful*. (Slate, Mar 17, 2016), archived at <http://perma.cc/FVT4-X9CB>; Michael D. Shear, *Strategy on Garland: Act as though He’ll Get Senate Hearing* (cited in note 18).

²⁸ Mulready, played by Fitchner, *The West Wing*, Season 5, Episode 17 (cited in note 1).

²⁹ In this case, she was widely speculated to have been Judge Ketanji Brown Jackson, a US District Court judge with an impressive pedigree. Julie Hirschfeld Davis, *Three More Judges Said to Be Vetted for Supreme Court* (NY Times, Mar 4, 2016), available at <http://www.nytimes.com/2016/03/05/us/politics/three-more-judges-said-to-be-vetted-for-supreme-court.html> (visited June 11, 2016) (Perma archive unavailable).

³⁰ In this case, he almost certainly would have been Judge Sri Srinivasan, a judge on the US Court of Appeals for the District of Columbia and a former Deputy Solicitor General, widely respected and acknowledged to be supremely qualified. *Id.*

³¹ Again, their excuse would have been that the vacancy arose in the last year of his presidency; certainly, however, the Senate Republicans have opposed Obama’s judicial

But perhaps nominating a liberal would be a true history lesson. The way through Senate confirmation in recent years, this argument would go, has been to nominate a moderate. But now that doesn't work.

So, if we're going down, why not go down fighting? Why not rally the base by finding the sacrificial lamb (probably a federal judge who already has life tenure), allowing him or her to be blocked, and generating a change going forward in nomination strategy?

Where would this approach take Democrats? It would guide them away from the "acceptable to everyone but exciting to no one" theory of nominating Supreme Court justices. It would open the door for the politics of the appointment power to be what they used to be, pre-Sotomayor and Kagan. It would subscribe to the theory that part of the privilege of being president is picking exactly whom you'd want for an empty seat on the Supreme Court. And that's true whether the president is a Democrat or a Republican.

Certainly, viewing the appointment power as a right and not a privilege³² could raise problems as well as provide a solution. Nominating a true liberal might solidify the recalcitrance of the Senate Judiciary Committee in refusing to meet with a nominee or hold hearings. But it might also provide a path forward: either actually getting a true liberal on the bench, or at least opening the door to another Sotomayor or Kagan (or, perhaps, a future Justice Sri Srinivasan). And it might redirect the conversation into one in which each party accepts that part of the presidency is the right to put someone in that seat who might be there for the next forty years.

But does that seesaw, that pendulum swing, get us anywhere in terms of jurisprudence? The senior staffers in President Bartlet's White House sure thought so. As Josh Lyman put it, you get more finely tuned, more nuanced, and more thoughtful law with "[t]wo voices articulating the debate at either end of the spectrum."³³ And in the words of Mulready, "Who writes the extraordinary dissent? The one-man minority opinion whose time hasn't come but twenty years later some circuit court clerk digs it up at

nominations for his entire presidency. See *Supreme Court Nominations, Present-1789* (US Senate), archived at <http://perma.cc/NUD6-696D>.

³² This is a distinction in this conversation, but not in the Constitution. See Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation* *542-43 (2004), archived at <http://perma.cc/NU3R-B5RB>.

³³ Lyman, played by Whitford, *The West Wing*, Season 5, Episode 17 (cited in note 1).

three in the morning. Brennan railing against censorship. Harlan’s jeremiad on Jim Crow.”³⁴ Those dissents? Valuable discourse, important to shaping the law by forcing the majority to respond.

And now, in 2016? The voice of the most vociferous dissenter in modern times is missing from that discourse. And there is no one—liberal, conservative, or moderate—to replace him.

But it doesn’t seem like Garland is going to replace Justice Scalia. And if the nomination goes down in flames, then what?

Then it’s this: Show the Democratic base that liberals can be just as tough as conservatives. Put up a true liberal.

Give Democrats a chance to say, “I love her. I love her mind. I love her shoes.”³⁵

³⁴ Mulready, played by Fichtner, *The West Wing*, Season 5, Episode 17 (cited in note 1). See also *Federal Communications Commission v Pacifica Foundation*, 438 US 726, 762–777 (1978) (Brennan dissenting); *Plessy v Ferguson*, 163 US 537, 552–63 (1896) (Harlan dissenting).

³⁵ Lyman, played by Whitford, *The West Wing*, Season 5, Episode 17 (cited in note 1) (referring to Lang).