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Does the 'McConnell Principle' make sense?

By Jeffrey Bellin

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Mitch McConnell responds to Supreme Court nomination01:16

Story highlights

- Mitch McConnell doesn't plan hearings or a vote on Merrick Garland for Supreme Court
- Jeffrey Bellin: Strangely, Garland's qualifications have become irrelevant

"Jeffrey Bellin is a professor at William & Mary Law School and a former law clerk to Merrick Garland. The opinions expressed in this commentary are his."

(CNN)For weeks, Republican Senate leaders have refused to act on President Barack Obama's nomination of Judge Merrick Garland to the Supreme Court. Meanwhile, [voices](#) from across the political spectrum are urging those senators to reverse course. Influential conservative Ken Starr's [statement](#) is typical, calling Garland "a brilliant jurist who believes in and upholds the rule of law undergirding our constitutional republic." As someone who has worked with and for the judge, I [agree](#); his confirmation would be good for the court and the country.

Strangely, however, Garland's qualifications have become irrelevant. [Senate Majority Leader Mitch](#)

[McConnell says](#) blocking the nomination is "about a principle, not a person."



Jeffrey Bellin

While [77% of Americans](#) "think the GOP leadership is just playing politics," the principle McConnell is asserting is important to understand even if disingenuous. It will be front and center in confirmation battles for years to come.

So what is "the McConnell principle"? Public statements from McConnell and the Republicans on the Senate Judiciary Committee vary, but the idea can be summarized as follows: At a certain point in a president's term, the Senate must postpone action on a Supreme Court nominee.

The Republican leaders' general pronouncements leave much to be clarified. One question is, what exactly are they waiting for? The answer is consistent if perplexing: Senate inaction is intended to ["give the people a voice."](#) But the people's preference is already apparent. Polling [suggests](#) that almost 70% of Americans want the Senate to hold hearings, including 56% of Republicans. A poll is admittedly not as good a sample of popular will as an election, but an election will not solely be about the Supreme Court. [Gallup](#), for example, reports that the top issues for the upcoming election are the economy, terrorism and health care. Less than 1% of Americans identify appointments to the Supreme Court as their most important issue. (Interestingly, 15% cite "dysfunctional government.")

Accepting that the McConnell principle requires the people to speak through a presidential election, other questions remain. What happens after November 8? Will McConnell and his colleagues defer to the vote? For example, Hillary Clinton [strongly supports](#) confirmation. If she is elected, Republicans such as Sen. Chuck Grassley, who are blocking the nomination to give the American people ["an opportunity to weigh in,"](#) presumably will promptly vote to confirm Garland, regardless of their personal views. This would be in line with statements of Sens. [Richard Shelby](#) and [Orrin Hatch](#), who suggest they will be free to act after the upcoming election.

McConnell and Sen. [Ted Cruz](#) take a different position, seeking to effectuate the popular will by waiting "until the next president is sworn into office." Here, the deference principle becomes especially strong. They will apparently block Obama's choice even after the November election and even if it means confirming a younger, more liberal nominee in 2017. Indeed, by publicly insisting that "the people will decide," Cruz has seemingly all but promised to vote for the next president's nominee. But this principle would have to hold even if the next president nominates someone Cruz doesn't like at all, such as Barack Obama. That would be a bitter pill to swallow for what Cruz calls a "crucial lifetime appointment," but principles can be dangerous, especially when not fully thought through.

For future confirmation battles, there is also a timing question. When exactly did the President's power to appoint justices lapse? For some senators the triggering event is "a presidential election year." Other senators point to the "[election cycle](#)" or "[political season](#)." Yet choosing the date that [Clinton announced her candidacy](#) (April 2015) would give presidents only about half their term to appoint Supreme Court justices. If that's the McConnell principle, vacancies that arise during the ever-expanding "political season" will now remain unfilled for years.

As Senate Republicans work out the details of the McConnell principle over the next year, they might consider an alternative. I suggest that presidents of either party be allowed to nominate Supreme Court justices at any point in their four-year term. So long as time permits, the senators would hold a hearing and vote, exercising their own judgment, without waiting for the next election.

Feel free to call it the "Bellin Rule," but it's not really my idea. [It's in the Constitution](#), Article 2, Section 2, Clause 2: The president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court."