



A STRANGE YEAR AT THE COURT

Brianne J. Gorod

AT THE START OF THIS Supreme Court Term, it looked like the Term would be defined by the Court's decisions on a host of high-profile issues – affirmative action, abortion, and unions, to name just a few. But instead this Term will be defined as much by what the Court did not decide as what it did. Indeed, Justice Antonin Scalia's sudden death on February 13, 2016 fundamentally changed not only the Court, but also the way this Term will be remembered. Now it will be the Term in which Justice Scalia passed away. It will be the Term in which the Court failed to decide some of its biggest cases. It will be the Term in which many of the Court's most notable opinions were not majorities, but separate opinions. And it will be the Term in which one of the biggest stories about the Court didn't take place at the Court.

JUSTICE SCALIA, RIP

When Justice Scalia passed away,¹ he was just months shy of marking his thirtieth anniversary on the Court.² It had been a long and wild

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¹ Gary Martin & Guillermo Contreras, *U.S. Supreme Court Justice Antonin Scalia Found Dead at West Texas Ranch*, SAN ANTONIO EXPRESS-NEWS, Feb. 16, 2016, www.mysanantonio.com/news/us-world/article/Senior-Associate-Justice-Antonin-Scalia-found-6828930.php.

² Over the course of nearly thirty years, Justice Scalia wrote so many opinions that even he could barely remember them all, as he made clear after he had trouble remembering the name of a case in which he wrote the Court's opinion. See Transcript of Oral Argument

ride, filled with lots of passionate opinions (particularly dissents), memorable language (“[p]ure applesauce,” anyone?³), and controversial statements. Since his passing, a tremendous amount has been written (including by me⁴) about his life and his legacy. Yet much less has been written about his last term on the Court. While it may have been cut short, many of the beliefs and attributes for which he is best known were nonetheless on full display.

Consider, for example, Scalia’s dissent in *Montgomery v. Louisiana*, in which the Court held that its 2012 decision in *Miller v. Alabama* (holding that juvenile offenders cannot be sentenced to mandatory life without parole) should be applied retroactively to cases on collateral review. The majority’s conclusion followed naturally from the Court’s own precedent – even Chief Justice John Roberts agreed with the result – but Justice Scalia didn’t, and his dissenting opinion was filled with typically scathing commentary on the Court’s opinion. “What provision of the Constitution could conceivably produce such a result?” he asked. “The Due Process Clause? . . . The Equal Protection Clause?”⁵ He went on, “This whole exercise, this whole distortion of *Miller*, is just a devious way of eliminating life without parole for juvenile offenders. The Court might have done that expressly (as we know, the Court can decree *anything*), but that would have been something of an embarrassment.”⁶

“Tr.”), at 9, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (“Justice Scalia: . . . as it did in *Lampf* or whatever the name – was it *Plaut*? I don’t think it was *Plaut*. Mr. Lamken: *Plaut* wrote it. Justice Scalia: I – I wrote it. I just don’t remember. . . . Do you know how many cases I’ve written?”).

³ *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

⁴ Elizabeth Wydra & Brianne Gorod, *Justice Scalia’s Liberal Legacy*, CONSTITUTION DAILY, Mar. 3, 2016, blog.constitutioncenter.org/2016/03/justice-scalias-liberal-legacy/.

⁵ 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting).

⁶ *Id.* at 744. Justice Scalia also managed to get a pop culture reference in at the end of this opinion, concluding: “And then, in Godfather fashion, the majority makes state legislatures an offer they can’t refuse: Avoid all the utterly impossible nonsense we have prescribed by simply ‘permitting juvenile homicide offenders to be considered for parole.’ Mission accomplished.” *Id.* (internal citation omitted). But it was Chief Justice John Roberts’s reference to a famous opera that might have been Scalia’s favorite pop culture reference of the Term: “In reality, the Court’s ‘plenty’ is plenty of nothing, and, apparently, nothing is plenty for the Court. See D. Heyward & I. Gershwin, *Porgy and Bess*: Libretto 28 (1958).” *Bank Markazi*, 136 S. Ct. at 1335 (Roberts, C.J., dissenting).

A Strange Year at the Court

Or consider oral argument in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, the case in which the Court didn't hold anything (more on that shortly⁷), but was asked to decide whether Indian tribal courts have jurisdiction to adjudicate tort claims against nonmembers who enter into consensual relationships with the tribe or its members. Justice Scalia didn't pass up an opportunity to display his well-known antipathy for legislative history. After an attorney relied on legislative history to make the point that Congress passed a law in response to Supreme Court cases, Scalia quickly interjected: "Do you think everybody who voted for that statute was aware of that, right? . . . They were aware of those cases, I'm sure. Everybody who voted for that language"⁸

In a different oral argument, Scalia sparred with Justice Stephen Breyer over the same topic: as soon as Breyer said "the legislative history helps," Scalia exclaimed, "I knew you were going to say that. . . . I knew it."⁹ Indeed, Scalia's strong preference for text over legislative history was a recurring theme this Term (as it was throughout his tenure on the Court), and in other arguments he implored counsel to focus on the words of the relevant statutes. In one he said, "Just read the language. Read the language. What . . . language produces that result?"¹⁰ In another, he asked, "What does the statute say? Can we look at the statute? . . . [W]hat does the statute say?"¹¹

Scalia's penchant for making news with inflammatory statements was also on display this Term. Consider oral argument in *Fisher v. University of Texas at Austin*, in which the Court considered (again¹²) the race-conscious

⁷ See *infra* note 19.

⁸ Tr. at 51, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam).

⁹ Tr. at 39, *Lockhart v. United States*, 136 S. Ct. 958 (2016). Of course, Breyer and Scalia were common sparring partners. At one point this Term, an advocate before the Court commented on "how exciting it is to get in the middle of a jurisprudential debate between you and Justice Scalia. . . . [M]y fingers are tingling at the prospect." Tr. at 38, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016). At another point, the Chief Justice had to admonish them that "[w]e need to involve counsel in the dialogue." Tr. at 42, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

¹⁰ Tr. at 38, *Bruce v. Samuels*, 136 S. Ct. 627 (2016).

¹¹ Tr. at 3, *Green v. Brennan*, 136 S. Ct. 1769 (2016).

¹² If hearing about *Fisher* gives you a sense of *déjà vu*, there's a reason why — this was the

admissions program used by the University of Texas at Austin. Scalia drew a lot of criticism when he suggested that African-Americans might be better off not going to top-tier schools: “[T]here are those who contend that it does not benefit African-Americans to -- to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, . . . a slower-track school where they do well.”¹³ It’s a reminder that even as many have rightly praised Scalia for his significant contributions to legal thinking and his undisputed talents as a writer, there are other aspects of his legacy that don’t merit such praise.

In sum, Justice Scalia’s final months on the Court were in many respects a microcosm for his tenure as whole. Justice Scalia was who he was right until the very end.

NON-DECISION DECISIONS

Justice Scalia’s absence wasn’t just felt by his colleagues; it was felt by the country as a whole, as a Term that seemed likely to produce a number of significant decisions actually produced as many non-decisions as decisions in its big cases. Indeed, although some Justices insisted that they could function basically just as well with eight Justices as with nine, Justice Ruth Bader Ginsburg was willing to call it like she saw it: “Eight, as you know, is not a good number for a multimember court.”¹⁴

case’s second trip to the Court in just three years. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

¹³ Tr. at 67, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

¹⁴ Tony Mauro, *Justices, For the Most Part, Don’t Complain About Eight-Member Court*, NAT’L L.J., May 26, 2016, www.nationallawjournal.com/id=1202758745375?keywords=Tony+Mauro. Indeed, Justice Ginsburg may be becoming more like her opera buddy every day, as this wasn’t the only context in which Justice Ginsburg’s frankness was on display this year. In end of Term interviews, she surprised many by weighing in on the upcoming presidential election, saying that she didn’t “want to think about th[e] possibility” of Donald Trump winning, and noting that “[i]t’s likely that the next president, whoever she will be, will have a few appointments to make.” Mark Sherman, *Ginsburg Doesn’t Want To Envision a Trump Win*, ASSOCIATED PRESS, July 8, 2016, bigstory.ap.org/article/0da3a641190742669cc0d01b90cd57fa/ap-interview-ginsburg-reflects-big-cases-scalias-death. In another interview, she commented on what her late husband would have said about the prospect of Donald Trump as president: “Now it’s time for us to move to New Zealand.” Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES, July

A Strange Year at the Court

The reason for that is obvious, as one law professor discussed in what is perhaps the most fortuitously timed law review article ever:¹⁵ when there is an even number of Justices, at least some ties are inevitable, and at the Supreme Court (unlike in some elections¹⁶), they don't flip a coin to resolve ties. Instead, they do the judicial equivalent of admitting defeat: issuing a one sentence order affirming the judgment of the court below by an equally divided vote.

Indeed, even though some of the Justices were unwilling to acknowledge the problems with having an eight Justice Court, their inability to decide a number of cases – including some of the Term's biggest – made that clear. Consider, for example, *United States v. Texas*, in which the Court was asked to consider a challenge to the Obama Administration's 2014 immigration initiatives. The Court was asked to answer three separate questions, and even added an additional one itself, but it ended up answering none of them. Instead, it split 4-4 in a result that was devastating to the millions of families who remain in limbo because of the Court's inability to decide the case.

Or consider *Friedrichs v. California Teachers Association*, in which the Court was asked to overrule *Abood v. Detroit Board of Education*, the nearly 40-year old precedent that upheld the constitutionality of public sector union fair share fees. The Court's conservative majority practically begged conservative activists to bring the case, repeatedly criticizing *Abood* in two prior cases. (In one of the cases, the criticism was so striking that Justice Kagan, in dissent, remarked that “[r]eaders of today's decision will know that *Abood*

10, 2016, www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?_r=0. Ginsburg ultimately expressed regret for her comments, promising to “be more circumspect” in the future. Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES, July 14, 2016, www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html?_r=0.

¹⁵ Justin R. Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. ____ (forthcoming 2016), papers.ssrn.com/sol3/papers.cfm?abstract_id=2732192. And the Chief Justice said law review articles can't be relevant! See Brianne J. Gorod, *A Big Year at the Supreme Court*, 18 GREEN BAG 2d 391, 395 & n.13 (Summer 2015).

¹⁶ Aviva Shen, *The Democratic Caucus In Iowa Is So Close That Precincts Are Resorting To A Literal Coin Toss*, THINKPROGRESS, Feb. 2, 2016, thinkprogress.org/politics/2016/02/02/3745150/iowa-coin-flip/.

does not rank on the majority's top-ten list of favorite precedents – and that the majority could not restrain itself from saying (and saying and saying) so.”¹⁷) But the Court could not decide the case, again splitting 4-4.¹⁸

A lot has already been written about the consequences of the Court's 4-4 ties,¹⁹ but less attention has been paid to how the Court's handling of those ties undermines transparency at the Court. As I wrote in this Journal last year, transparency (or the lack thereof) has been an ongoing concern when it comes to the Court, and “[w]hen it comes to transparency, the Justices often point to their written opinions as the best window into what they do and why they do it.”²⁰ Yet in these 4-4 cases, the Justices wrote no opinions at all, preferring to leave it to the public to speculate about how the Justices voted and why. Oddly enough, in an interview with the *New York Times*, Justice Ginsburg provided more insight into what may have happened in the *Texas* case than the Court did in its one-line order, telling Adam Liptak that it “would have been hard for [her]” to sign on to an opinion dismissing the case on standing grounds, as some (including me²¹) thought Roberts would want to do. As she explained, “I’ve been less rigid than some of my colleagues on questions of standing. There was a good argument to be made, but I would not have bought that argument because

¹⁷ *Harris v. Quinn*, 134 S. Ct. 2618, 2652-53 (2014) (Kagan, J., dissenting).

¹⁸ *Dollar General* was another case in which the Court split 4-4.

¹⁹ CONST. ACCOUNTABILITY CTR. & PEOPLE FOR THE AMERICAN WAY FOUND., MATERIAL HARM TO OUR SYSTEM OF JUSTICE: THE CONSEQUENCES OF AN EIGHT-MEMBER SUPREME COURT, May 21, 2016, theconstitution.org/sites/default/files/briefs/20160521%20-%20Issue%20Brief%20-%20CAC%20and%20PFAW%20-%20Material%20Harm%20to%20Our%20System%20of%20Justice--%20The%20Consequences%20of%20an%20Eight-Member%20Supreme%20Court.pdf. Even when the eight-member Court didn't split 4-4, it still wasn't always able to decide the case. In *Zubik v. Burwell*, in which the Court was asked to consider the legality of the accommodation to the Affordable Care Act contraception mandate established for religious non-profits, the Court sent the cases raising this issue back to the lower courts and encouraged them to adopt an approach that would balance the religious interests of non-profits against women's entitlement to health care under federal law – an odd suggestion given that that was exactly what the accommodation at issue in the cases set out to do.

²⁰ Gorod, *supra* note 15, at 393.

²¹ Brianne J. Gorod, *John Roberts's Past and Immigration's Future*, HUFFINGTON POST, Apr. 7, 2016, www.huffingtonpost.com/brianne-j-gorod/john-robertss-past-and-im_b_9636322.html.

A Strange Year at the Court

of the damage it could do' in other cases."²²

In some ways, it's odd that the Justices don't write in these cases. It's not like the Justices never write opinions unless that opinion is going to be controlling law – they do that all the time. With the Court's ever shrinking docket,²³ we know the Justices' inability to write isn't due to a lack of time. And, historically, the Justices would sometimes write dissenting opinions even when the Court split evenly.²⁴ If the Justices had written opinions in the 4-4 cases, it would at least have provided the lower courts and the public some guidance about the Justices' views on the issues – and thus what the Court might do when it gets a ninth Justice.²⁵

This recent practice of not writing in 4-4 cases probably won't change any time soon, but as the Justices enjoy their summer break, it might be worth thinking about. After all, there could be some additional split decisions before there's a ninth Justice on the Court.

THE YEAR OF THE SEPARATE OPINION

Some years at the Court are defined by significant majority opinions. While this year certainly saw some important majority opinions, it saw lots of significant separate opinions, as well. While Justice Clarence Thomas wins the prize for the most separate opinions (14 concurring and 18 dis-

²² Liptak, *supra* note 14.

²³ See, e.g., Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

²⁴ Adam Feldman, *Quick Note: Dissents from Equally Divided Court*, EMPIRICAL SCOTUS, June 23, 2016, empiricalsctus.com/2016/06/23/quick-note-dissents/. For those who are interested in running the numbers on all things Supreme Court, this relatively new blog – Empirical SCOTUS – provides a nice companion to the incomparable SCOTUSblog Stat Pack, see SCOTUSBLOG, STAT PACK ARCHIVE, www.scotusblog.com/reference/stat-pack/ (last visited July 14, 2016).

²⁵ It wasn't all bad news when it came to transparency and the Court this Term. For example, when the Solicitor General's office sent the Court a letter at the conclusion of the Term letting it know about an error in an opinion, the Court made the letter public, Tony Mauro, *Even the Supreme Court Makes Flubs – and Now It Is Letting the Public Know*, NAT'L L.J., July 6, 2016, www.nationallawjournal.com/supremecourtbrief/id=1202761858624/Even-the-Supreme-Court-Makes-Flubsmdashand-Now-it-is-Letting-the-Public-Know?slreturn=20160614102044 – a nice change from its prior practice of quietly making changes to its opinions, as I've previously discussed in these pages, see Brianne J. Gorod, *A Year of Contradictions*, 17 GREEN BAG 2d 405, 413-16 (Summer 2014).

senting),²⁶ some other Justices win the prize for making the most news with their separate opinions.

Consider, for example, Justice Sotomayor's dissent in *Utah v. Strieff*, in which the Court held that evidence that was seized pursuant to an unconstitutional stop can be admitted at trial where there was no flagrant police misconduct and the police discovered a pre-existing, valid warrant. None of the Court's female Justices bought that argument, but Justice Sotomayor in particular spoke truth to power, explaining why suspicionless stops – like the one at issue in the case – are so troubling. As she explained, “it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children ‘the talk’ – instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them.”²⁷

In conclusion, she admonished: “We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ . . . They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.”²⁸ Her words were powerful, but just as much as the words she used, one word that she did not use may indicate how strongly she felt: the final words of the dissent were “I dissent,” not “I respectfully dissent.” The implication is obvious: she felt no respect for the majority's decision.²⁹

Or consider Justice Alito's dissent in *Fisher*. In an opinion that was more than twice the length of the Court's majority opinion, Alito made clear just how strongly he disagreed with the Court's conclusion that the University's use of a race-conscious admissions policy was constitutional. Although his

²⁶ SCOTUSBLOG STAT PACK, TOTAL OPINION AUTHORSHIP, June 29, 2016, www.scotusblog.com/wp-content/uploads/2016/06/SB_opinionauthorship_OT15.pdf. It was a notable year for Justice Thomas in another respect, as well: he broke his ten-year silence at oral argument to ask about the Second Amendment implications of a federal law that prohibits individuals convicted of domestic violence from owning a gun. Tr. at 35-39, *Voisine v. United States*, 136 S. Ct. 2272 (2016).

²⁷ 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (internal citation omitted).

²⁸ *Id.* at 2071.

²⁹ For an interesting discussion of the history of the “respectful” dissent, see Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, 124 HARV. L. REV. 1305 (2011).

A Strange Year at the Court

opinion discussed at length why he concluded that the admissions program could not satisfy strict scrutiny, the most notable sentence in his opinion may have been the first: “Something strange has happened since our prior decision in this case.”³⁰ Of course, what happened may not really be so strange: events in the country have underscored the salient role race continues to play and the importance of policies like the University’s. It’s possible that Justice Kennedy – who also surprised many with his vote in the fair housing case the previous Term – has been paying attention to those events. Or at least to his colleague Justice Sotomayor, who’s not afraid to talk about them.

Consider also the Chief Justice’s dissent in *Bank Markazi v. Peterson*, in which the Court held that what it termed an “unusual statute” – one that “designates a particular set of assets and renders them available to satisfy the liability and damages judgments underlying a consolidated enforcement proceeding that the statute identifies by the District Court’s docket number”³¹ – does not violate the separation of powers. The Chief Justice disagreed, explaining that “[n]o less than if it had passed a law saying ‘respondents win,’ Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties’ specific legal disputes to guarantee respondents victory.” In conclusion, he noted that “[h]ereafter, with this Court’s seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases. Today’s decision will indeed become a ‘blueprint for extensive expansion of the legislative power’ at the Judiciary’s expense”³² It was a perhaps unsurprising opinion from the head of the federal judiciary, determined to defend against encroachment the scope of the judiciary’s power. Indeed, for a Chief Justice who has sometimes tried to paint his role in minimalist terms and has in many cases voted to limit access to the courts, he’s also zealously guarded the power of the courts to say what the law is when he wants them to.³³

³⁰ *Fisher*, 136 S. Ct. at 2215.

³¹ 136 S. Ct. 1310, 1317 (2016).

³² *Id.* at 1330, 1338 (Roberts, C.J., dissenting).

³³ *See, e.g., King*, 135 S. Ct. at 2489 (rejecting the application of *Chevron* deference because the question is one of “deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly”).

It wasn't only dissents that were memorable this Term. Consider, for example, Justice Ginsburg's concurrence in *Whole Women's Health v. Hellerstedt*, in which the Court held that two provisions of Texas law placing restrictions on abortion providers were unconstitutional. Justice Ginsburg joined Justice Breyer's opinion for the Court, but she also wrote a concurrence solely for herself in which she warned states that might think about adopting laws like Texas's that they should think again: "So long as this Court adheres to [*Roe*] and [*Casey*], Targeted Regulation of Abortion Providers laws like H. B. 2 that 'do little or nothing for health, but rather strew impediments to abortion,' cannot survive judicial inspection."³⁴ When asked why she wrote separately, Ginsburg explained: "I fully subscribed to everything Breyer said, but it was long [40 pages], and I wanted something pithy [2 pages]. . . . I wrote to say, 'Don't try this anymore.'"³⁵

In short, it was a year in which some of the most notable opinions were the ones that didn't make law – perhaps fitting for a year that was as much defined by its non-decisions as its decisions. It was also a fitting tribute to Justice Scalia, who was never shy about writing separately when he had something to say.³⁶

MEANWHILE, DOWN THE STREET . . .

One of the biggest stories about the Supreme Court this year didn't take place there; rather, it took place (or, perhaps better put, didn't take place) down the street in the halls of the Senate, as Republican Senators steadfastly refused to consider President Obama's nominee to replace Justice Scalia.

After years of obstruction of lower court nominees,³⁷ it perhaps wasn't surprising that Senate Republicans wasted no time before making it clear

³⁴ 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (internal citation omitted). Justice Alito wasn't too pleased with this decision either, again penning a dissent that was longer than the majority opinion. *Id.* at 2330 (Alito, J., dissenting).

³⁵ Sherman, *supra* note 14 (internal quotations omitted).

³⁶ Cf. Jerry de Jaeger, *Justice Scalia Comes Home to the Law School*, THE RECORD (ALUMNI MAGAZINE), Spring 2012, www.law.uchicago.edu/alumni/magazine/spring12/scalia (Scalia noting that he wrote dissents for the casebooks).

³⁷ See, e.g., Judith E. Schaeffer, *Senate Leaders on Target To Break Obstruction Record*, HUFFINGTON POST, Aug. 24, 2015, www.huffingtonpost.com/judith-e-schaeffer/senate-leaders-on-target_b_8031542.html.

A Strange Year at the Court

that they wouldn't move on any Supreme Court nominee put forward by President Obama. Indeed, almost as soon as Justice Scalia's death was confirmed, a prominent Senate staffer tweeted: "What is less than zero? The chances of Obama successfully appointing a Supreme Court Justice to replace Scalia."³⁸

It was almost as if a Senate known for its own inability to function wanted to make sure that the Supreme Court wouldn't function either. Indeed, when the lights went out during the middle of oral argument in *Nichols v. United States* (holding that the Sex Offender Registration and Notification Act did not require a convicted sex offender to tell anyone when he moved from Kansas to the Philippines), the Chief Justice quickly quipped, "I knew we should have paid that bill,"³⁹ but he might have been wondering whether this was just Congress's effort to shut down the Court completely.

Perhaps what was most astonishing about the Republicans' obstruction was not that they opposed the confirmation of President Obama's nominee, but that they wouldn't even give him a hearing and a vote. After all, Justice Scalia may not have wanted to be replaced by a Justice chosen by President Obama, but he could hardly have agreed with Senate Republicans' refusal to abide by the Constitution's requirement that the Senate at least *consider* the President's nominee. As others have written, the originalist methodology that Scalia loved leads to the conclusion that Senators have a responsibility to provide their advice even if not their consent.⁴⁰

To be sure, Senate Republicans offered a reason for their refusal to hold hearings: the American people should have a say in determining the next Justice through the presidential election, they argued.⁴¹ But it was an argument at odds with both simple math (President Obama was elected to

³⁸ Paul Singer, *Republicans Already Opposing Any Obama Supreme Court Nomination*, USA TODAY, Feb. 13, 2016, www.usatoday.com/story/news/politics/2016/02/13/senate-unlikely-confirm-obama-supreme-court-nominee/80351274/.

³⁹ Tr. at 50, *Nichols v. United States*, 136 S. Ct. 1113 (2016).

⁴⁰ David H. Gans, *Republicans Who Block Obama's Supreme Court Pick Are Violating the Constitution*, NEW REPUBLIC, Mar. 16, 2016, newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution.

⁴¹ Singer, *supra* note 38 (quoting Senator Chuck Grassley as saying that "it only makes sense that we defer to the American people who will elect a new president to select the next Supreme Court Justice").

a four-year term, and four years hadn't yet passed) and history (the President's nominee would hardly have been the first Justice to be confirmed in an election year⁴²).

Republicans' unwillingness to consider the President's nominee became, in some sense, even more bizarre when the President announced his nominee – D.C. Circuit Judge Merrick Garland – because many Republicans had praised him in the past. Indeed, before Garland was nominated, Senator Orrin Hatch had noted that “[Obama] could easily name Merrick Garland, who is a fine man. . . . He probably won't do that because this appointment is about the election. So I'm pretty sure he'll name someone the [liberal Democratic base] wants.”⁴³ It was as if the President was calling their bluff.

Of course, if the President thought Senate Republicans might blink in the face of his moderate appointment, he gave them too much credit. Republican Senators remained steadfast in their refusal to give Garland a hearing; the most some of them would do was explain to him in person why they wouldn't give him a vote. (Senator Lisa Murkowski also gave him a lesson about Alaska, noting that “[s]he found his knowledge of [the state] wanting.”⁴⁴)

And so the impasse continues – and almost certainly will continue until after the start of the next Supreme Court Term. In the meantime, Judge Garland, who stopped participating in D.C. Circuit cases while his nomination was pending, has had to find other ways to fill the time that should

⁴² Gregor Aisch et al., *Supreme Court Nominees Considered in Election Years Are Usually Confirmed*, N.Y. TIMES, Mar. 16, 2016, www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html.

⁴³ John Gizzi, *Gizzi: Orrin Hatch Says GOP Scotus Refusal Just 'The Chickens Coming Home To Roost'*, NEWSMAX, Mar. 13, 2016, www.newsmax.com/Newsfront/john-gizzi-orrin-hatch-obama-will-nominate/2016/03/13/id/718871/. The fact that some Republicans praised Garland also helps explain why some conservative activists urged that he be confirmed after Donald Trump won the Republican presidential nomination: “Garland is not a great choice but he's not a terrible one, either,” one wrote. Ted Barrett, *GOP Leaders Ignore Trump-Inspired Calls To Confirm Garland Now*, CNN.COM, May 5, 2016, www.cnn.com/2016/05/05/politics/merrick-garland-supreme-court-donald-trump/.

⁴⁴ Emmarie Huetteman, *Meeting with Merrick Garland, G.O.P. Senators Take Long Time To Say No*, N.Y. TIMES, Apr. 14, 2016, www.nytimes.com/2016/04/15/us/politics/meeting-with-merrick-garland-gopsenators-take-long-time-to-say-no.html?_r=0.

A Strange Year at the Court

have been spent at a confirmation hearing. One such activity was speaking at an elementary school commencement where “[h]e noted that the theme of the graduation was ‘If you can dream it, you can do it!’ But, he added, there is an important step in between: ‘Hard work.’”⁴⁵ Judge Garland has put in the hard work – among other things, he’s sat on the D.C. Circuit for nearly twenty years – but unfortunately for him, there’s one other thing that stands between him and his dream: Senate Republicans.

CONCLUSION

This was a surprising and strange year at the Court, one that may mark a major transition point in its history. For now only eight chairs sit behind the bench in the Supreme Court courtroom. What will happen when that ninth chair returns remains to be seen, but it means that next Term, even if it may not have as many blockbusters as the last few Terms,⁴⁶ will definitely be one worth watching.



⁴⁵ Nina Totenberg, *Supreme Court Nominee’s Advice To 5th-Graders: ‘Be the Brave One’*, NPR.ORG, June 15, 2016, www.npr.org/2016/06/15/482206242/merrick-garland-delivers-5th-grade-commencement-address.

⁴⁶ See, e.g., Mark Sherman & Sam Hananel, *How the Supreme Court Is Functioning Following Scalia’s Death*, PBS NEWSHOUR, Apr. 30, 2016, www.pbs.org/newshour/rundown/how-the-supreme-court-is-functioning-following-scalias-death/ (noting that “[t]here are fewer big cases in the pipeline for next term, almost certainly a product of the court’s desire to avoid controversial topics until the bench is once again full”).