No. 16-5340

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVEN S. MICHEL, *pro se*
Plaintiff - Appellant,

v.

ADDISON MITCHELL MCCONNELL, JR.,
CHARLES ERNEST GRASSLEY, and
UNITED STATES SENATE,
Defendants - Appellees.

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION AND REQUESTED RELIEF

This *Emergency Motion for Injunction Pending Appeal* (*Motion*) is submitted in an appeal from district court Case No.16-cv-1729, filed on August 25, 2016, and concerning the nomination of Judge Merrick Garland to the United States Supreme Court. Judge Garland's nomination has been pending without Senate action since March 16, 2016. In the district court case I asked the court to declare that the full Senate must determine whether to provide advice and consent to Judge Garland's nomination and appointment. I also asked the court to require the Senate to make that determination.

On October 19, 2016 I moved for a preliminary injunction to require the Senate to determine *whether or not* it would provide advice and consent to Judge Garland's nomination. On November 17, 2016 the district court denied my motion for preliminary injunction and dismissed the case, finding that I lacked standing to bring my claims. On November 18, 2016 I filed a *Notice of Appeal*.

By this *Motion* I seek an emergency injunction requiring the full Senate to decide whether to provide advice and consent to Judge Garland's nomination. This *Motion* is made pursuant to Fed. R. App. P. 8 and D.C. Cir. R. 8 and 27(f). Without the requested injunction, on December, 16, 2016 the 114th Congress is scheduled to adjourn, and I will be forever deprived of my 17th Amendment right to have my elected senators exercise their "one vote" on whether to provide advice and

consent to the nomination of Judge Garland. My specific request is that the Court issue an injunction pending appeal requiring:

1) Defendant McConnell to schedule a vote of the full Senate, before the 114th Congress adjourns, on whether to provide advice and consent for the nomination of Judge Merrick Garland to the United States Supreme Court,

2) Defendant Grassley to hold any necessary Judiciary Committee hearings prior to the vote of the full Senate,

3) Defendant U.S. Senate, as a body, to vote before the 114th Congress adjourns on whether it will provide its advice and consent to the nomination of Judge Garland to the United States Supreme Court, and

4) Defendants to promptly provide the Court and Appellant with its schedule to accomplish the above three requirements.

Because of the urgency of this situation, I ask that this injunction be issued within seven (7) days of the filing of this *Motion* (D.C. Cir. R. 27(f)). An injunction by that date will allow almost 3 weeks for the Senate to act on Judge Garland's nomination before its scheduled adjournment. This should be sufficient time. Prior to Judge Garland, the average time for a Supreme Court nominee to be vetted and confirmed, rejected or withdrawn has been 25 days (Exhibit 2 at p. 4).

I have not requested the district court to issue an injunction pending appeal because it is impracticable given the short time remaining before the Senate adjourns, and the district court's determination that it lacked subject matter jurisdiction to consider my lawsuit (Exhibit 6). Fed. R. App. P. 8.

On November 21, 2016 I notified opposing counsel and the Clerk's Office of my intent to file this *Motion* on November, 22, 2016.

For the Court's convenience, I have attached as Exhibits to this *Motion* four substantive pleadings from the district court proceeding that bear on the issues raised by this *Motion*, as well as the district court's *Order* and *Memorandum Opinion* from which this appeal is taken. The exhibits are listed in the Table of Contents. While this *Motion* explains why the injunctive relief I request satisfies necessary criteria, I urge the Court to also review the more detailed arguments made to the district court in my original *Petition* and in support of, and opposition to, my district court *Motion for Preliminary Injunction* and Defendants' *Motion to Dismiss* (Exhibits 1, 2, 3 and 4).

FACTUAL BACKGROUND

Supreme Court Justice Antonin Scalia died on February 13, 2016, creating a vacancy on the 9 member U.S. Supreme Court. On that same day Senate Majority Leader McConnell issued a statement saying: "this vacancy should not be filled until we have a new President."[1]

On February 23, 2016, an 11 member majority of the Senate Judiciary Committee signed a letter to Leader McConnell stating that "this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017" (Exhibit 1 exhibit). By Senate rules, the Judiciary

[1] https://www.facebook.com/mitchmcconnell/posts/10211485812571166

Committee provides recommendations to the full Senate on judicial nominees before those nominees are considered and voted upon by the Senate (Rule XXXI, *Standing Rules of the Senate*, Rev. 2013). So, unless reversed, the February 23rd letter precludes Senate action, ever, on President Obama's nominee, and divests the President of his appointment power for nearly one-fourth of his four-year term.

On March 16, 2016, pursuant to Article II Section 2 of the U.S. Constitution, President Barack Obama nominated Merrick Garland, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, to fill the Supreme Court vacancy caused by Justice Scalia's death.

On June 21, 2016, the American Bar Association Standing Committee on the Federal Judiciary, after a months-long investigation, unanimously gave Judge Garland its highest rating of "Well-Qualified."[2]

As of November 20, 2016, Judge Garland's nomination had awaited Senate action for 250 days – by far the longest time for such a nomination in U.S. history. Prior to Judge Garland, the average time for a Supreme Court nominee to be either confirmed, rejected or withdrawn was 25 days, and the longest confirmation process was 125 days, in 1916.[3]

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[2] http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2016/june/garland.html

[3] "Supreme Court Nominees Considered in Election Years Are Usually Confirmed," *New York Times,* by Aisch, Keller, Lai and Yourish, 3/16/16

ARGUMENT

The Senate's refusal to undertake its advice and consent role is unprecedented and results from Defendant McConnell and 11 members of the Senate Judiciary Committee (including Defendant Grassley) procedurally blocking committee or Senate consideration of, or action on, Judge Garland's nomination.

By this *Motion* I ask the Court to provide emergency injunctive relief pursuant to Fed. R. App. P. 8. No other means of adequate relief exists, and my claims satisfy the four factors for injunctive relief, which are: (1) there is a likelihood of success on the merits of my claims, (2) in the absence of an injunction I will suffer irreparable harm for which there is no adequate legal remedy, (3) the injunction will not substantially harm other parties, and (4) the injunction serves the public interest (Cir. Rule 8).

1) PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

The facts and law governing this action indicate that I should succeed on the merits. I have standing. In addition, proper constitutional interpretation requires that when the President nominates a person to fill a Supreme Court vacancy, the Senate as a body has a non-discretionary duty, under Article II Section 2 of the Constitution, to determine within a reasonable time whether to provide its advice and consent. By its refusal to consider Judge Garland's nomination, the Senate has breached that duty and should be required to promptly undertake that

determination. This case is justiciable, and my claims do not impinge on the U.S. Constitution's "Speech or Debate Clause" or the "Political Question Doctrine."

a) Plaintiff has Standing:

On November 17, 2016, the district court denied my preliminary injunction motion and dismissed my *Petition*. The basis for that denial and dismissal was that I lacked standing because my "alleged injuries are not sufficiently individualized." In its analysis, the district court correctly described the standing requirement that there be a "particularized injury" that is "not conjectural or hypothetical," and that the injury not be of "general interest common to all members of the public." The district court also found that in order to establish an injury of "'derivative' dilution of voting power," which is what I have claimed, the voter must "show some form of actual structural denial of their representative's right to vote" (See Exhibit 6 at 1, 3, 4). I generally agree with these standards.

However, the district court concluded that my injury is not "individualized" and the vote diminution I allege "is the type of undifferentiated harm common to all citizens that is appropriate for redress in the political sphere." The district court has misconstrued both the type of injury needed to establish standing, and the particular nature of my injury. Importantly, the district court failed to recognize that my standing cannot be determined absent a decision on the merits of my claim that the full Senate must participate in the nomination process and vote on whether

to provide advice and consent. If the Senate must vote, then the derivative effectiveness of my vote for senators has been diminished. If the Senate has discretion to not participate, then my injury may be too speculative to satisfy standing requirements. The district court did not evaluate the Senate's role.

Rather, the district court's dismissal and denial appears to be based on its determination that I am not a "uniquely injured individual" (Exhibit 6 at 3). The notion that my injury must be "unique," however, is an almost impossible standard found no-where in law. The correct standard is that while the claimed injury should not be generalized or common to <u>all</u> citizens, it may be common to <u>many</u> citizens. In *Federal Elections Commission v. Akins,* 524 U.S. 11, 24 (1998) the Court held that "an injury…. widely shared … does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'" Similarly, *Pye v. United States*, 269 F.3rd 459, 469 (4th Cir. 2001) held that "[s]o long as the plaintiff… has a concrete and particularized injury, it does not matter that legions of other persons have the same injury." The fact that my injury is shared by other citizens, which I do not contest, does not defeat standing. See *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

Contrary to the district court's findings, the injury I have sustained is of a particularized nature long recognized as sufficient to establish standing. I am a registered voter in New Mexico that has voted for the current U.S. senators

representing New Mexico (Udall and Heinrich). The effectiveness of my vote for these senators has been diminished as a result of the actions of Defendants. Those actions denied New Mexico senators their constitutionally assigned "one vote" in the Senate with respect to the nomination of Judge Garland. The 17th Amendment of the United States Constitution provides:

> The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof,* for six years; and *each Senator shall have one vote*….

(Emphasis added). This constitutional provision vests citizens with the right to vote for and elect senators who are each to have one vote on Senate actions. A deprivation of that right, either by refusing citizens a vote or diminishing the "one-vote" power of their elected senators, is a specific injury-in-fact of a nature recognized as sufficient to establish standing. In *Dept. of Commerce et al. v. U.S. House of Representatives et al.*, 525 U.S. 316, 331-2 (1999) the Supreme Court held:

> Appellee Hoffmeister's expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'"

It is important to recognize that the harm I am claiming is different from the harm that has precluded voter standing in situations where the Senate declines to consider legislation. I understand that my voting power is not necessarily diminished when the Senate refuses to consider legislation and other things that are

within its discretion to act (or not act) upon. A diminished voting power in those situations might be considered too speculative to establish standing. The effectiveness of my vote is *absolutely* diminished, however, when my senators are procedurally blocked by other senators, who possess disproportionate power to control Senate action, from voting on items that the Senate, as a body, *must* vote on – such as whether to provide advice and consent for a Supreme Court nominee. In other words, when the entire Senate votes, my Senators must be provided "one vote." And in the specific case of U.S. Supreme Court nominations, the Constitution requires that the entire Senate must vote.

This is not a diminution of voting power shared equally by *all* citizens, but is a disproportionate impairment to those citizens, such as me, who are not represented by the senators blocking Senate action. Because my senators have been prevented from voting, I have effectively lost my senate representation on the question of Judge Garland's nomination, just as if I had no senator at all representing me in the Supreme Court nomination process.

Put another way, 12 senators (11 Judiciary Committee members and Senator McConnell) have procedurally assumed the voting power to reject a Supreme Court nominee that should require the vote of 51 senators to accomplish. My two senators from New Mexico have been provided zero votes in that process. At the same time, citizens from Utah and Texas, each with both of their senators sitting

on the Judiciary Committee (See Exhibit 1 exhibit), have a voter effectiveness far more than the "one vote" power which each senator is allotted by the 17th Amendment. Defendants McConnell and Grassley have also been provided enhanced voting power by virtue of their respective leadership and chairmanship.

The procedural obstruction of this group of 12 senators is exactly the same as if the Senate enacted a rule that New Mexico's senators are to have no vote in judicial confirmations. It is unconstitutional.

The framers of the Constitution intended the *entire* Senate to vote on Supreme Court nominees. This is supported by historical practice, as will be discussed, and by the writings in the contemporaneous *Federalist Papers.* Alexander Hamilton authored No. 76, which explains why the *entire* Senate is to participate in the appointment process. It basically says that while "some individuals" in the Senate might be improperly influenced, if the entire "body" is acting there will always be a "large proportion" of "independent and public-spirited" senators to preserve the integrity of the process.

It is also important that the Senate's refusal to consider Judge Garland's nomination adversely and impermissibly impacts all three branches of the federal government: divesting the President of his constitutional power to appoint justices to the Supreme Court, divesting individual senators and their constituents of each

senator's vote on whether to confirm a Supreme Court nominee, and compromising the viability and strength of the judiciary.

b) When the President nominates a person to fill a Supreme Court vacancy, the Senate has a non-discretionary duty, under Article II Section 2 of the Constitution, to determine within a reasonable time whether it will provide its advice and consent.

The President and the Senate share the power and duty to fill vacancies on the Supreme Court. The U.S. Constitution, Article II Section 2, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court…." To the extent there is ambiguity as to what the "advice and consent" role of the Senate requires, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

The Senate's role is a requirement to determine, as a body, whether to provide or withhold the "advice and consent" necessary for the President to appoint a Supreme Court nominee. The Senate cannot ignore a nomination. As Alexander Hamilton noted: "[the Senate] can only ratify or reject the choice [the President] may have made." *The Federalist* No. 66 (emphasis added). Any fair reading of *The Federalist Papers* recognizes that *inaction* was not an option ever even contemplated by the Framers.

The Constitution's Article II Section 2 establishes the inter-dependent roles of the President and Senate in filling Supreme Court vacancies. The President shall

nominate, *and by and with* the Senate's advice and consent, shall appoint. "The ordinary power of appointment is confided to the President and Senate *jointly*…." *The Federalist* No. 67. When the Senate refuses to participate, the constitutional process breaks down and the President is divested of his power to appoint. Extrapolating, if the Senate entirely neglected its advice and consent role, it could procedurally dismantle the judiciary. That does not make sense.

The recent Supreme Court case of *NLRB v. Canning*, 134 S. Ct. 2550 (2014), supports my position that the Senate must participate and decide whether to provide advice and consent. In *NLRB* the Court was tasked with interpreting the Recess Appointments Clause of the Constitution, which is part of the same Nominations and Appointments section at issue in this case. A question before the Court was: When does a Senate adjournment becomes a "recess" that triggers the President's power to temporarily appoint officials without Senate advice and consent? The Constitutional language surrounding recess appointments was sparse and ambiguous. In its decision, the Court explained that "*in interpreting the Clause, we put significant weight upon historical practice* (emphasis in original)." *NLRB* at 2559. The Court

> confirmed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" regulating the relationship between Congress and the President. *The Pocket Veto Case,* 279 U.S. 655, 689 (1929).

NLRB at 2559. The Court then looked to the history of use of the Recess Appointments Clause, from 1789 to the present, to determine when an absence would became a "recess":

> . . . the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case,* 279 U.S., at 689.

This same type of historical analysis demonstrates that the Nominations and Appointments Clause (U.S. Const. Art. II, Sec. 2) requires full Senate participation that either confirms or rejects a nominee within a relatively short period of time.

The U.S. Senate's compilation of the disposition of every Supreme Court nomination from 1789 until the present shows that during that time there were 161 nominations (Exhibit 4 exhibit). Of those, only 9 nominations received "no action," and of those, four nominees were nevertheless confirmed or refused within months. Of the remaining five, one vacancy in 1866 was eliminated because the seat was abolished and the other four occurred in the short period between 1844 and 1853. In sum, but for a short *ante bellum* period in the mid-1800s, the practice of the Senate has always been to consider and act expeditiously to confirm or reject a Supreme Court nominee. This history is at least as consistent and compelling as the history relied upon by the *NLRB* Court, and demonstrates that considering and

acting on Supreme Court nominations within a reasonable time is constitutionally required. In 1998, in response to the slowing of the judicial confirmation process, former Chief Justice Rehnquist noted, "[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down."[4]

c) By its refusal to consider the nomination of Judge Garland, the Senate has neglected its duty and should be required to promptly undertake that determination.

This Court can and should issue both a declaratory judgment and injunctive relief in the nature of mandamus to remedy Defendants' failure to fulfill their constitutional advice and consent role for a Supreme Court nominee.

This Court has the power to provide *declaratory* relief in situations involving the other branches of government. In *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) the Court declared that the President had a constitutional duty to comply with a particular law. Similarly, in *Powell v McCormack*, 395 U.S. 486, 499 (1969), the Supreme Court determined that a federal "court may grant declaratory relief even though it chooses not to issue an injunction or mandamus…. A declaratory judgment can then be used as a predicate to further relief, including an injunction."

[4] "Senate Imperils Judicial System, Rehnquist Says," by John H. Cushman, Jr., *New York Times,* January 1, 1998, A1

While the issue of whether a court may issue a *writ of mandamus* against Congress is unsettled, the current situation warrants that form of extraordinary relief. 28 U.S.C. §1651(a) provides that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Protecting the viability of the judiciary from Senate inaction could certainly be considered "in aid of" a court's jurisdiction. The plain language of this statute encompasses such a broad reading. See, §45:2 *Sutherland Statutory Construction*. The injunction I seek by this *Motion* would have the same effect, with respect to the nomination of Judge Garland, as a writ of mandamus.

In *Marbury v. Madison,* Justice Marshall described the history and use of writs of mandamus, and wrote:

> [T]he case of *The King v. Baker et al.* states with much precision and explicitness the cases in which the writ may be used…. "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

Marbury v. Madison, 5 U.S. 137, 168-9 (1803). The circumstances described in Justice Marshall's opinion apply to the current situation and weigh in favor of the Court exercising its authority to provide a remedy to preserve "justice and good government." In extraordinary cases federal courts have issued writs of mandamus against other branches of government that neglected a clear statutory duty. See, *In re Aiken County, et al.*, 725 F.3rd 255, 259 and 266-7 (D.C. Cir. 2013).

Unlike other situations, where mandamus, or in the case of this *Motion* an injunction pending appeal, could be viewed as compromising the separation of power, injunctive relief here would *restore* the separation of power. Justice Kennedy has said that "It remains one of the most vital functions of this Court to police with care the separation of the governing powers." *Public Citizen v. United States Department of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J. concurring). In his dissent in *Morrison v. Olson*, 487 U.S. 654, 704-5 (1988), Justice Scalia said that, in the context of a separation of powers challenge to an action of Congress, the Court does *not* owe Congress the same level of deference that would be afforded when reviewing legislation.

d) <u>This case is justiciable, and the claims made do not impinge on either the "Speech or Debate Clause" of the U.S. Constitution or the "Political Question Doctrine."</u>

Justiciability: In deciding whether a claim is justiciable, two findings must be made: 1) that "the duty asserted can be judicially identified and its breach determined," and 2) that an effective remedy can be fashioned. *Baker v. Carr*, 369 U.S. 186, 198 (1962). I have asked this Court to determine that the Senate has a non-discretionary duty to determine whether it will provide advice and consent to the Supreme Court nomination of Judge Garland, and that the Senate has breached that duty. I have also requested that the Court grant both declaratory and mandamus relief to remedy that breach of duty. Granting that relief in a timely

manner would cause the Senate to consider Judge Garland's nomination and would effectively remedy the situation. In *Powell,* the Court determined that declaratory relief satisfied the justiciability requirement. *Powell* at 516-518.

Speech or Debate Clause: The "Speech or Debate Clause" of the U.S. Constitution, Art. I, Sec. 6, provides that "for any Speech or Debate in either House, [senators or representatives] shall not be questioned in any other Place." The "Speech or Debate Clause" is not a bar to this action against Defendants Senator McConnell and Senator Grassley. That clause only provides protection from lawsuits against legislators resulting from "words spoken in debate… [c]ommittee reports, resolutions, and the act of voting… [and] things done generally in a session of the House by one of its members in relation to business before it." *Powell* at 502. The *refusal to act* by a handful of senators, in order to procedurally prevent the Senate from performing its duty to participate in the judicial appointment process, is not an activity "done generally" by senators "in relation to business before" them.

In addition, "it is clear from the language of the Clause that protection extends only to an act that has already been performed." *U. S. v. Helstoski*, 442 U.S. 477, 490 (1979). Here, the issue relates to Senate inaction. And regardless, the Speech or Debate Clause would not apply to actions against the Senate.

Notably, the Supreme Court explained in *Gravel v. United States*, 408 U.S. 606, 625 (1972), that the Speech or Debate Clause protections are limited:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House…. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech and debate in either House, but "only when necessary to prevent indirect impairment of such deliberations.

Political Question Doctrine: The premise underlying the Political Question Doctrine is the desire to prevent federal courts from deciding policy issues. This doctrine "helps to preserve the separation of powers by ensuring that courts do not overstep their bounds." *Baker* at 210. The political question doctrine is a "narrow exception" to the rule that the judiciary has a responsibility to decide cases properly before it. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). This case has only asked the court to interpret the Article II, Section 2, of the Constitution and enforce that interpretation to the extent needed.

While the resolution of issues involving a coordinate branch of government will sometimes have political implications, the judicial branch must not neglect its duty to "say what the law is" merely because its decision may have "significant political overtones." *Marbury* at 177; *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230 (1986). In *United States v. Ballin,* the Court found that the "[C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

In determining that there was no political question barring the courts from deciding the *Powell* case, the court defended its established role (at 549):

> Our system of government requires the federal courts on occasion to interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility…. [I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.

(2) ABSENT AN INJUNCTION, PLAINTIFF WILL SUFFER IRREPARABLE HARM FOR WHICH THERE IS NO ADEQUATE LEGAL REMEDY

It is important that this matter be resolved in a time frame that permits any remedy to be meaningful and useful. The Senate must, as a body, consider and determine whether to provide advice and consent for Judge Garland's Supreme Court nomination before it adjourns in December. Otherwise, my voting rights and representation with respect to Judge Garland's nomination will have been permanently lost. Therefore, unless the Court causes or directs the full Senate to determine whether to provide advice and consent for the Garland nomination by the end of December, the harm to me will be irreparable.

(3) AN INJUNCTION WILL NOT HARM OTHER PARTIES

While an injunction is necessary to protect my rights, causing the Senate to perform its Constitutionally-required role in the Supreme Court nomination process will not harm Defendants. As I have stated throughout this action, I am not asking for a particular outcome of the confirmation process, only that the process

be undertaken in a meaningful time-frame. The Senate may decide not to provide advice and consent for the Garland nomination. Fulfilling its constitutional role can hardly be construed as a harm to any Defendants.

(4) AN INJUNCTION WILL SERVE THE PUBLIC INTEREST

An injunction would only cause the Senate to consider and determine *whether* to provide its advice and consent for the Garland nomination. This does not harm the public interest - it serves the public interest. The Supreme Court nomination and appointment process is broken in the Senate. This is a threat to our democracy. Assuring that dysfunction in the Senate does not impair the powers and duties of the executive and judicial branches, can only serve the public interest.

In addition, if the Senate votes on Judge Garland's nomination, citizens will be provided a voting record on a very important issue. Providing a voting record of senators serves the public interest because that record enables citizens to exercise their role as informed electors in a representative government.[5]

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff prays for a Court order granting his request for an injunction pending appeal as described herein, and for such other and further relief as the Court deems just and proper.

[5] "Advice, Consent, and Senate Inaction - Is Judicial Resolution Possible?" Lee Renzin, N.Y.U. Law Review, Vol.73:1739, Nov.1998 at 1747-8

Dated: November 22, 2016

Respectfully submitted,

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E X H I B I T - 1

E X H I B I T – 2

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2016, I served the foregoing *Emergency Motion for Injunction Pending Appeal* by filing it electronically with the Court's CM/ECF system and by emailing pdf versions to counsel, as follows:

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