

The Senate can *withhold* action — silence isn't written into the *Constitution* as a process

One mechanism of federal lawmaking, examined in depth — what the Constitution's advice-and-consent clause requires, and what's just Senate custom.

BEFORE YOU BEGIN

How This Guide Works

This is part of **Incognati Civics**, applying the field-guide format to the mechanics of federal lawmaking — the parliamentary process most people never see explained. Each specimen goes deep on one mechanism, with the heavier sourcing a legal or procedural claim actually requires: official records, primary-source rules, and peer-reviewed or nonpartisan scholarship, listed in full on the references page.

INCOGNATI CIVICS — HOW FEDERAL LAWS ACTUALLY GET CREATED

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“Advice and Consent” / Judicial Confirmation Mechanics

Consilium et Consensus

Governing precedent / case 2016 **Status** Widely covered as unprecedented at the time

OBSERVED SPECIMEN

MERRICK GARLAND SUPREME COURT NOMINATION, 2016

*President Obama nominated **Merrick Garland** to the Supreme Court in March 2016, following Justice Scalia's death. The Senate Judiciary Committee, controlled by the opposing party, held no hearing and took no committee vote; the full Senate never voted on the nomination before it expired at the end of the year. It was, per multiple nonpartisan trackers, the first time since the 1860s a Senate majority had refused to act at all on a sitting president's Supreme Court nominee.*

THE HOOK

A nomination sitting untouched for months looks like part of a defined process running its course, when in fact no floor action, no committee vote, and no hearing were ever held at all.

THE MECHANISM

The Constitution's Article II advice-and-consent clause doesn't specify hearings, committee votes, or timelines — those are Senate customs, not constitutional requirements, which means the Senate majority can decline to act without violating the text of the Constitution itself.

Field mark: when a nomination stalls, check whether it received a hearing and a vote at any stage — a nomination can be constitutionally left to expire with no vote at all, which is different from being formally rejected.

See the full references page for complete citations.

References

every source checkable at the link provided; DOIs given where the source has one

PRIMARY SOURCE · CONSTITUTIONAL TEXT

U.S. Const. art. II, § 2, cl. 2 (the Appointments Clause).

<https://constitution.congress.gov/constitution/article-2/>

Official Congress.gov annotated Constitution.

REFERENCE SOURCE

McMillion, Barry J. "Supreme Court Nominations, 1789 to 2020: Actions by the Senate, the Judiciary Committee, and the President." Congressional Research Service.

<https://crsreports.congress.gov/>

Search the CRS Reports database for this report tracking every historical nomination's procedural history.

CONTEMPORANEOUS REPORTING

"What Happened With Merrick Garland In 2016 And Why It Matters Now," NPR, June 29, 2018.

<https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>

Timeline of the Judiciary Committee's decision not to hold a hearing.

Reading This Mechanism: A Gut Check

four questions before a headline changes what you think happened in Congress

1 Check for a hearing

Did the nominee receive a Judiciary Committee hearing? That's a customary step, not a constitutional one.

2 Check for a committee vote

A committee can vote to advance, reject, or never vote on a nomination at all.

3 Check for a floor vote

The full chamber's vote (or lack of one) is the final procedural fact, regardless of the debate's tone.

4 Separate custom from requirement

Many confirmation norms are traditions the Senate can and does depart from.

INCOGNATI CIVICS

The Series Continues

This is Specimen No. 11 of Incognati Civics. The full queue of twelve specimens on federal lawmaking is listed on the cover, and four further Civics subprojects — local government, elections, official data reporting, and institutional communications — are planned beyond this one. The Incognati Atlas catalogs the underlying patterns across all of it.

Civics Field Edition · Specimen No. 11

All specimens independently sourced