

Of TARDS and the Appointments Clause

“NOTHING SHOULD COME AS A SURPRISE”

by [Joseph DeMaio](#), ©2016



(Nov. 17, 2016) — Soooo... Barbra (“I’m-moving-to-Australia-or-Canada-if-Trump-is-elected”) Streisand is now [spearheading](#) a petition drive to get the current Usurper at 1600 Pennsylvania Avenue to again bypass the U.S. Senate and unilaterally “appoint” Judge Merrick Garland to the U.S. Supreme Court to fill the vacancy left following the passing of Justice Antonin Scalia.

BTW, Streisand’s [departure](#) for a foreign land – along with Cher, Whoopi Goldberg, Miley Cyrus, Samuel Jackson, Al Sharpton, Ruth Bader Ginsberg, *et al.* – would be seen by many as our gain, the other nations’ loss.

Coming from a leftist “[Funny Girl](#)” like Streisand, the unilateral appointment suggestion is not only goofy, it underscores the leftist psychosis now infecting patrons of internet cafés in soon-to-be extinct “sanctuary” cities across the land: Trump Acceptance Resistance Disorder: [TARD](#). Odd..., I do not recall, when the Usurper at 1600 was first elected, seeing hordes of disappointed Republicans storming the streets, burning cars and looting businesses because they didn’t like the result of the election. One is tempted to conclude that such is the defining distinction between adults and snowflake juvenile delinquents, regardless of their chronological age.

The suggestion, however, that the Usurper bypass the “advice and consent” power of the Senate to approve, or withhold approval, of a Supreme Court nominee did not originate with Streisand. Too much elevated thought is required. Instead, it appears to have originated last April in the cranium of a lawyer and articulated in an op-ed published in... wait for it... wait for it... The Washington Post. In a piece entitled “Obama can appoint Merrick Garland to the Supreme Court if the Senate does nothing,” attorney Gregory L. Diskant [posits](#) that if the Senate refuses to act on the nomination of Garland, it can be treated as a “... waiver of its right to provide advice and consent.”

The article then lapses into a discussion of the principles of “waiver” of constitutional “rights,” even citing a Supreme Court decision holding that constitutional rights can be forfeited and waived by a failure to timely assert them to a tribunal with jurisdiction to entertain such claims. Leaping to the next conclusion, the author asserts that “[i]t is in full accord with traditional notions of waiver to say that the Senate, having been given a reasonable opportunity to provide advice and consent to the president with respect to the nomination of Garland, and having failed to do so, can fairly be deemed to have waived its right.” Really?

As even a first-year law school grasshopper could see, the problem with the argument is that a constitutional “right” possessed by a person is not the same thing a constitutional “power” invested in the U.S. Senate by Art. 2, Sec. 2, Cl. 2 of the Constitution (the “Appointments Clause”). A “power” to do something includes, by definition, the contemporaneous ability to refrain from doing that “something.” See *Black’s Law Dictionary* 1288 (9th ed. 2009) (defining “power” as “[t]he legal right or authorization to act *or not act.*”) (Emphasis added). See also, *id.* at 580, defining “duty” as a “legal obligation.”

Moreover, even if the Senate’s “power” to act, or to *not* act, were to be characterized as a “duty” or “obligation” as opposed to what it actually is – a constitutional power to act or to refrain from acting, consistent with the genius principle of the separation and balance of powers – then perhaps the author of the article would be better advised to argue that the Senate is committing “nonfeasance” in office. That would make more intellectual sense than to contend that the Senate can be “deemed” to have “waived” a nonexistent personal constitutional “right” it never had. One cannot waive or relinquish something one never possessed.

The remedy for such purported “nonfeasance” would be an action in *mandamus* to compel the Senate to act. Good luck with getting a court ruling on that prior to January 17, 2017. Hence, the panicked, unilateral “end-around-run” proposal marketed by The Washington Post, Mr. Diskant and “Babs” Streisand. Oh, and thousands of disheartened, panicked snowflakes.



Stated otherwise, the Washington Post op-ed piece engages in the same species of disingenuous linguistic conflation of the terms “power” and “right” to arrive at its predetermined conclusion as did the [Congressional Research Service](#) (and [others](#)) when conflating the general terms “native born citizen,” “citizen by birth,” “natural born citizenship” and “citizen” with the distinctly different term “natural-born Citizen” defining eligibility to the presidency under Art. 2, Sec. 1, Cl. 5 of the Constitution. This current conflation attempt is merely symptomatic of the malady noted above: TARD.

It will be interesting to see if The Usurper, in a final attack on the Constitution, will take the bait offered up by Mr. Diskant and Ms. Streisand, despite the clear violation of the Constitution being proposed. Then again, after shredding the words and principles of the Founding Document in so many ways over the past eight long years, nothing should come as a surprise in the next sixty days. Stay tuned.