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MITCH MCCONNELL: HOIST WITH HIS OWN PETARD

Let us begin with a bit of history and etymology:

In *Hamlet* (act III, scene IV), Shakespeare gives his title character the line *For tis the sport to have the enginer Hoist with his owne petar*. What in the hell is a *petar* that



the *enginer* (that's how Willie S. spelled it) should be hoist with it? Well, in the Middle Ages, a *petar* - or *petard* - was a small engine of war used to blow breaches in gates or walls. They were originally metallic and bell-shaped but later cubical wooden boxes. Whatever the shape, the significant feature was that they were full of gunpowder; today we'd call it a bomb. To be *hoist with one's own petard* meant to be blown up with the very device one created in order to destroy one's enemy. Ouch! Today, the phrase has the figurative meaning of having one's plans blow up in their face.

Even if Senate Majority Leader Mitch McConnell has never read *Hamlet*, he certain knows the phrase - if not intellectually, than at least viscerally. For with this weeks 4-4 unsigned [per curiam](#) Supreme Court vote in the [Friedrichs v. California Teachers Association](#) case, Senator McConnell's strategy of denying President Obama his constitutionally mandated right to nominate a qualified judge to fill a court vacancy has come back to bite him in his hide-bound *tuchus*.

The Friedrichs case threatened to cripple the ability of public unions (teachers, police, firefighters, etc.) to collect fees from workers who chose not to join and did not want to pay for the unions' collective bargaining activities. The case was brought by 10 California public schoolteachers who claimed that it was a violation of their 1st Amendment rights to force them to pay fees against their wishes. A ruling in their favor would have affected millions of government workers and weakened public-sector unions, which stood to lose fees both from workers who objected to the positions the unions take and from those who simply chose not to join while benefiting from the unions' efforts on their behalf. Limiting the power of public unions has long been a goal of conservative and libertarian groups. Despite their best efforts on behalf of their clients, the libertarian "[Center for Individual Rights](#)" came up short; The 9th Circuit Court in San Francisco upheld the requirement that the objecting teachers pay fees. However, the plaintiffs' legal team quickly appealed the 9th Circuit decision to the SCOTUS, firmly believing that the then 5-4 conservative court would decide in their favor, thus striking a mortal blow against public sector unions. At the time the case was heard this past January, their belief was reasonably justified; unless the sky fell, Justices Roberts, Alito, Thomas, Kennedy and Scalia would come to their rescue and overturn the 9th Circuit ruling.

Well, the sky did fall: Justice Scalia died, and with his untimely demise, the Supreme Court became equally divided between 4 liberals and 4 conservatives. It should be noted that whenever the court fails to reach a majority decision, it means the lower court's ruling stands. Score a big (though likely provisional) victory for labor unions. It is likely that the Center for Individual Rights will refile the case in the future - if the next president is a Republican who nominates a dependable conservative to replace the late Justice Scalia. According to Washington University law professor [Lee Epstein](#), *"On eight-person courts, justices reach far fewer 4-4 decisions than we would expect. They seem to work hard to minimize them because they're so inefficient. They can hold over cases, cast strategic votes to avoid a decision down the road that may be even worse ideologically, write narrowly, and dump cases on procedural grounds."* Then too, as in the Friedrichs case, they can do precisely what the Republican-controlled senate most fears: make an equally divided court work for their ideological opposites.

And it is here we return to Senator McConnell being hoist (or hoisted) with (or on) his own petard. Within hours of Antonin Scalia's death - even before his body had been flown back from Texas - McConnell insisted that the Senate would not confirm any Obama nominee in an



election year, let alone hold hearings. He even ruled out meeting the president's pick, a standard courtesy. As is well known, McConnell and the conservative marching and chowder society bent the historic record, proclaiming that there had not been a "lame duck" court nominee approved in the last 2,000 years. And now, in the face of the 4-4 non-decision in the Friedrich case, [McConnell](#) has stuck his feet even deeper into the hardened concrete of rejection: *"I can't imagine that a Republican majority Senate, even if it were soon to be a minority, would want to confirm a judge that would move the court dramatically to the left. That's not going to happen."*

McConnell knows full well that a deadlocked court cannot overturn a lower court decision. He knows that no one's crystal ball is capable of predicting whether the next POTUS - or Senate - will be Republican or Democrat. He also knows that if, say, Hillary Clinton is elected president and there is still an empty seat on the Supreme Court at the time she takes the oath of office, she will likely nominate someone to the left of the decidedly moderate Merrick Garland. One hopes he understands that Republican intransigence on the Garland nomination is increasingly becoming a weighty anchor for all those Republican senators currently up for reelection - not to mention whoever their party's standard bearer turns out to be. Voters from Maine to California are disgusted to the max over the puerile "my way or the highway" attitude of McConnell & Company. To deny a few moments of face time - let alone a committee hearing or floor vote - on Judge Garland is but one more proof that partisan politics and case-hardened ideology eclipse (a synonym for "trump") one's duty every time. If McConnell were smart - which, believe it or not, he is - he would press for a vote on Garland; better the devil you know than the devil you don't know.

There are a couple of cracks beginning to appear in McConnell's monolithic block of ice. Illinois Senator Mark Kirk - who is likely the most vulnerable Republican incumbent - did meet with Judge Garland the other day and has called for an up-down vote. Similarly, Arizona Senator Jeff Flake and Maine's Susan Collins have said they are willing to meet with the judge. Not exactly earth-shattering, but a crack in the ice. One wonders how well Mitch McConnell is sleeping these days; if he realizes that in hearkening to the siren song of his party's farthest right ideologues and contributors, he is setting the stage for an even greater string of Republican defeats in November.

For if the scenario of defeat described above does come to pass, and both the White House and Senate will be in Democratic hands, it won't just be a 5-4 moderate-to-liberal court they have to worry about; it will be a question of whether the G.O.P. will ever rise from the ashes of self-immolation. If the Republicans do go down to ignominious defeat in 2016, there will be plenty of blame to go around. A goodly share will undoubtedly be laid at the feet of

Senator McConnell who, when all is said and done, was hoist with his own petard.

Then too, one could say, in the words of McConnell's Scottish *lanhtsman* Robert Burns,

*The best laid schemes o' Mice an' Men
Gang aft agley (often go awry).
An'lea'e us nought but grief an' pain,
For promis'd joy!*

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