

Statement of Constitutional Law Scholars on the Supreme Court Vacancy

February 24, 2016

We write as constitutional law scholars to urge President Obama and the United States Senate to fulfill their constitutional duties with regard to the vacancy that exists on the Supreme Court because of the death of Justice Antonin Scalia. We do not write in support of or in opposition to any specific candidate. Rather, our position is simply that the President has the duty to nominate a candidate to fill the current Supreme Court vacancy and the Senate has the duty to “advise and consent,” which means to hold hearings and to vote on the nominee.

Article II of the Constitution is explicit that the president “shall nominate . . . judges of the Supreme Court.” There is no exception to this provision for election years. Throughout American history, presidents have nominated individuals to fill vacancies during the last year of their terms.

Likewise, the Senate’s constitutional duty to “advise and consent” – the process that has come to include hearings, committee votes, and floor votes – has no exception for election years. In fact, over the course of American history, there have been 24 instances in which presidents in the last year of a term have nominated individuals for the Supreme Court and the Senate confirmed 21 of these nominees.

The Senate, of course, has discretion in the method of carrying out its constitutional duty to “advise and consent,” but for the Senate not to consider a nominee until after the next president is inaugurated would be unprecedented and would leave a vacancy that would undermine the ability of the Supreme Court to carry out its constitutional duties. It would mean that the Court would have to function with eight justices for the remainder of this term and virtually all of the next. This inevitably would mean 4-4 splits in a significant number of cases. During the October Term 2014 there were 66 decisions of which 19 were 5-4. A vacancy on the Court for a year and a half likely would mean many instances where the Court could not resolve a split among the circuits. There would be the very undesirable result that the same federal law would differ in meaning in various parts of the country.

We urge the President to nominate as soon as reasonably possible an individual to fill the vacancy existing on the Court and the Senate to hold hearings and vote on the nominee.

Signed,

Kate Andrias

Assistant Professor of Law
University of Michigan Law School

Joseph Blocher

Professor of Law
Duke University School of Law

Erwin Chemerinsky

Founding Dean and Distinguished Professor of Law
and Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

Joshua Douglas

Robert G. Lawson & William H. Fortune
Associate Professor of Law
University of Kentucky College of Law

Edward Fallon

Associate Professor of Law
Marquette University Law School

Dmitry Bam

Associate Professor
University of Maine School of Law

Elise Boddie

Professor of Law
Rutgers Law School–Newark

Caroline Mala Corbin

Professor of Law
University of Miami School of Law

Peter Edelman

Carmack Waterhouse Professor of Law and Public Policy
and Faculty Director, Center on Poverty and Inequality
Georgetown University Law Center

Ruben Garcia

Professor of Law
UNLV William S. Boyd School of Law

Frederick Mark Gedicks

Guy Anderson Chair and Professor of Law
Brigham Young University Law School

Jamal Greene

Professor of Law
Columbia Law School

Ariela Gross

John B. and Alice R. Sharp Professor of Law and History
University of Southern California Gould School of Law

Melissa Hart

Professor of Law, Director of the Byron R. White Center
University of Colorado Law School

Nicole Huberfeld

Associate Dean of Academic Affairs and
Ashland-Spears Distinguished Research Professor of Law
University of Kentucky College of Law

William Marshall

William Rand Kenan, Jr. Distinguished Professor of Law
University of North Carolina School of Law

Gene Nichol

Boyd Tinsley Distinguished Professor
University of North Carolina School of Law

Steve Sanders

Associate Professor of Law
Indiana University Maurer School of Law

Peter Shane

Jacob E. Davis and Jacob E. Davis II Chair in Law
Ohio State University Moritz College of Law

Neil Siegel

David W. Ichel Professor of Law
Professor of Political Science
Co-Director, Program in Public Law
Director, DC Summer Institute on Law & Policy
Duke Law School

Verna Williams

Judge Joseph P. Kinneary Professor of Law
University of Cincinnati College of Law

Rebecca E. Zietlow

Charles W. Fornoff Professor of Law and Values
University of Toledo College of Law

Abner Greene

Leonard F. Manning Professor
Fordham Law School

Kent Greenfield

Professor of Law and Dean's Research Scholar
Boston College Law School

Pratheepan Gulasekaram

Associate Professor of Law
Santa Clara University School of Law

B. Jessie Hill

Associate Dean for Academic Affairs and
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law

Mark Kende

Professor of Law, James Madison Chair in Constitutional
Law, and Director of the Drake Constitutional Law Center
Drake Law School

Alan Morrison

Lerner Family Associate Dean for Public Interest &
Public Service Law
George Washington Law School

Kermit Roosevelt

Professor of Law
University of Pennsylvania Law School

Steven Schwinn

Associate Professor of Law
John Marshall Law School

Theodore Shaw

Julius L. Chambers Distinguished Professor of Law and
Director of the Center for Civil Rights
University of North Carolina School of Law

Barry Sullivan

Professor of Law and Cooney &
Conway Chair in Advocacy
Loyola University Chicago School of Law

Adam Winkler

Professor of Law
UCLA School of Law

University affiliation provided for identification purposes only.