



Judicial Nominations in Crisis

I. Introduction

With the unexpected death of Justice Scalia in February, the judicial nominations battles have made headlines once again. President Obama's nomination of D.C. Circuit Chief Judge Merrick Garland to the Supreme Court in March was met with complete obstruction by Republican leaders, leaving the Court understaffed for the end of the 2015-2016 Term and the foreseeable future.

Unfortunately, the nominations crisis at the Supreme Court mirrors what is happening in the lower federal courts, where most of the nation's pressing legal questions are resolved. As of August 1, there were 100 current and known future vacancies on the federal bench, which consists of 870 total judgeships. Of those vacancies, 30 are considered judicial emergencies and 52 nominees are pending in the Senate.¹

ACS encourages its chapters to plan programming in the fall of 2016 on issues related to the federal nominations crisis and the direction of the courts. Events can examine the history and nature of the federal judicial nomination process, discuss the impact of having an incomplete bench on the Supreme Court and lower federal courts, and how the composition of the courts affects substantive law. ACS also encourages its members to take action. At the end of this Guide you will find concrete suggestions, sample materials, and a Speakers List to facilitate your engagement.

II. U.S. Supreme Court Vacancy

As of July 20, 2016, Merrick Garland became the longest standing nominee to the Supreme Court, surpassing Justice Louis Brandeis who waited 125 days to be confirmed by the Senate. Without a full bench for most of the spring and, in particular, for the critical time at the end of the Term during which the Supreme Court typically renders decisions in some of the most important and controversial cases, the Court was clearly hampered. In some cases, such as [Zubik v. Burwell](#), in which the question of whether employers can be required to provide access to insurance coverage for contraception was again challenged, the Court punted back to the lower courts after having heard oral argument and ordered supplemental briefing. Other cases resulted in ties, with a Texas district court's nation-wide injunction on the DAPA immigration program left in place in [US v. Texas](#) because the Court could not come to a resolution.

Key Questions to Consider

- What is the relationship between the executive and legislative branches in nominating and confirming judges? Does the Senate have a constitutional obligation to consider a nominee to the Supreme Court and what should such consideration entail?

¹ For a definition of what constitutes a judicial emergency, see <http://judicialnominations.org/judicial-vacancies>.

- What are the qualifications that are or should be relevant for Supreme Court nominees?
- What are the benefits of holding public confirmation hearings?
- What is the impact of having only eight justices on the Supreme Court?
- Should we consider imposing term limits for Supreme Court justices?

Resources

[Supreme Court Appointment Process: President's Selection of a Nominee](#) Barry J. McMillion, Congressional Research Service (4.1.2016)
[Full court pressure: How long do Supreme Court nominees usually wait?](#) *Reuters*
[Statement of Constitutional Law Scholars on the Supreme Court Vacancy](#) (2.24.2016)
[The Constitution as a Code of Honor](#) Peter Shane (4.4.2016)
[The Senate Republicans' Assault on the Supreme Court](#) Geoffrey R. Stone, *Time Magazine* (6.27.2016)
[The Supreme Court Is Not Doing Its Job](#) Dahlia Lithwick, *Slate* (5.19.2016)
[Could Term Limits Ease Fights Over Supreme Court Nominees?](#) *The New York Times* Room for Debate (3.19.2016)
[Material Harm to Our System of Justice](#), Constitutional Accountability Center and People for the American Way Foundation (5.21.2016)
[Is a Deadlocked Supreme Court Such a Bad Thing?](#) *The New York Times* Room for Debate (5.18.2016)
[Sen. Amy Klobuchar: 9 Questions for the Next Justice](#) *Time Magazine* (3.23.2016)

Video:

[Senator Elizabeth Warren \(D-Mass.\) Featured Remarks at 2016 ACS National Convention](#) (6.9.2016)
[The U.S. Supreme Court Vacancy](#) ACS Iowa Lawyer Chapter Event (6.1.2016)
Speakers: Nicholas A. Klinefeldt, Gregory B. Craig, Richard Painter, Mark Kende, Rachel Caufield
[Supreme Court Confirmation Hearings: Engaging the American People in the Process](#) (3.15.2016)
Speakers: Senators Elizabeth Warren (D-Mass.) and Amy Klobuchar (D-Minn.), Norm Ornstein, Kimberly Atkins, Garrett Epps, and Dahlia Lithwick

III. Article III Judicial Vacancies

Even with the usual number of cert grants, the Supreme Court reviews only a tiny fraction of the nation's disputes each year. The lower federal courts therefore have a tremendous impact on a wide variety of issues that matter a great deal to all Americans. However, they are woefully understaffed and the confirmation process has ground to a halt, with only 11 judges having been confirmed in 2016.

Key Questions to Consider

- What are the consequences of judicial vacancies in the lower federal courts?
- Why is the pace of judicial confirmations so slow? What procedural obstacles, including blue slips, anonymous holds, and the refusal to hold a hearing, are preventing prompt confirmation of judges? What is the so-called "Thurmond Rule" and is it real? What possibilities may there be for considering judicial nominees during the lame duck?
- How can we reform the nominations process so that our federal judiciary is fully staffed and able to do its job?

Resources

www.judicialnominations.org
[Going to Extremes: The Supreme Court and Senate Republicans' Unprecedented Record of Obstruction on President Obama's Nominees](#), Office of the Honorable Elizabeth Warren (6.6.2016)

[Final Senate Action on U.S. Circuit and District Court Nominations During a President's Eighth Year in Office](#) Barry J. McMillion, Congressional Research Service (1.27.2016)

[Is a 112 percent increase in judicial vacancies par for the course?](#) Russell Wheeler, Brookings Institute (6.6.2016)

[The "Thurmond Rule" and other advice and consent myths](#), Russell Wheeler, Brookings Institute (5.26.2016)

People for the American Way Fact Sheet [Overloaded Courts, Not Enough Judges: The Impact on Real People](#)

[The Need for a Reflective Judiciary Demands a Return to Normal Order](#) Danyelle Solomon and Michele Jawando (7.15.2016)

[Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?](#) Russell Wheeler, ACS 's *Toward a More Perfect Union: A Progressive Blueprint for the Second Term* (January 2013)

["EXTRAORDINARY CIRCUMSTANCES:" The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform](#) ACS Issue Brief by Michael Gerhardt & Richard Painter (November 2011)

Video:

[Is there a Better Way to Appoint Federal Judges?](#) ACS Convention Panel (6.21.2014)

Speakers: James Lindgren, Honorable Theodore McKee (3d Cir.), Alfreda Robinson, Ryan Scott, Russell Wheeler

IV. Direction of the Courts

With more than one vacancy possible on the Supreme Court in the near future, there is a heightened sense that much is at stake for constitutional law and other law and policy issues. The conservative legal movement had a keen sense of how important the courts were when in 1988, the Department of Justice under the leadership of Attorney General Edwin Meese published a document entitled *The Constitution in 2000* that raised a series of questions about the future of constitutional law. With the future of the Supreme Court hanging in the balance, it is critical to explore progressive priorities and, since the lower courts will continue to play a large role, we must continue working to ensure that the judiciary reflects America in all its diversity.

Key Questions to Consider

- How has the federal judiciary changed in recent decades? How has substantive law changed in a variety of issue areas?
- What is the proper role of a judge?
- What direction is the Court headed in regarding issues including workers' rights, the environment, reproductive rights, access to the courts, the Second Amendment, voting rights, and criminal justice?
- How can we continue to increase diversity of all kinds on the federal bench?

Resources

[ACS Justice in the Balance Infographic](#)

[Abandoning Defensive Crouch Liberal Constitutionalism](#) Mark Tushnet, *Balkinization* (5.6.2016)

[ACSBlog Symposium on the 2015-2016 Supreme Court Term](#)

[The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation](#), A Report to the Attorney General (10.11.1988)

[The Constitution in 2020 sample chapters](#) (2009)

[How Obama Transformed the Federal Judiciary](#) Jeffrey Toobin, *The New Yorker* (10.27.2014)

Video:

[The Constitution at a Crossroads](#) ACS 2016 Convention Panel (6.11.2016)

Speakers: Joan Biskupic, Michael McConnell, Rachel Moran, Melissa Murray, Ilya Shapiro, Steven Shapiro, and David Strauss

[Judicial Activism Then and Now](#) ACS 2014 Convention Panel (6.20.2014)

Speakers: Walter Dellinger, Linda Greenhouse, Sherrilyn Ifill, Dawn Johnsen, Clark Neilly, Geoffrey Stone, Laurence Tribe

V. Take Action

We encourage you to do any and all of the following to keep the judiciary front and center in public debate. Please consult the Speakers List below and, as always, feel free to contact the ACS national staff for assistance in identifying local speakers for events, helping with the placement of op-eds, and with any questions. Don't forget to check the ACS website regularly for new and updated materials. Sample materials and a guide for writing op-eds and letters to the editor can be found [here](#).

1. **Host an event** on the U.S. Supreme Court and other judicial vacancies with your local ACS Chapter and/or your local civic organizations, e.g. Rotary Club.
2. **Submit an op-ed or letter to the editor** to your local paper on the U.S. Supreme Court and lower court vacancies.
3. **Attend your senators' events** during Senate recesses and let them know why courts matter to you.
4. **Visit, call, and/or email your senators' offices** to tell them courts matter to you and ask them what they're doing to fill judicial vacancies.
5. **Tweet** at your senators and members of the Senate Judiciary Committee using the hashtags #WeNeedNine and #DoYourJob.
6. **Attend [ACS events near you](#)** on judicial vacancies.
7. **Retweet and repost social media** from [@ACSLaw](#) and [ACS's Facebook page](#).
8. **Talk to your friends and family** about judicial vacancies and the importance of the courts.

Judicial Nominations in Crisis Speakers List

Name	Title	Organization	Location
Kate Andrias	Assistant Professor of Law	University of Michigan School of Law	MI
Sarah Binder	Senior Fellow, Governance Studies	Brookings Institution	DC
Rebecca Brown	The Rader Family Trustee Chair in Law	USC Gould School of Law	CA
Erwin Chemerinsky	Dean of the School of Law	UC Irvine School of Law	CA
Walter Dellinger	Partner	O'Melveny & Myers	DC
Joshua Douglas	Robert G. Lawson & William H. Fortune Associate Professor of Law	University of Kentucky College of Law	KY
Peter Edelman	Carmack Waterhouse Professor of Law and Public Policy	Georgetown Law	DC
Garrett Epps	Professor of Law	University of Baltimore School of Law	MD
Royal Furgeson, Jr.	Founding Dean Former Judge, U.S. District Court for the Northern District of Texas	UNT Dallas College of Law	TX
Edward Fallone	Associate Professor of Law	Marquette University Law School	WI
Ruben Garcia	Professor of Law	William S. Boyd School of Law	NV
Frederick Gedicks	Guy Anderson Chair and Professor of Law	Brigham Young University	UT
Michael Gerhardt	Samuel Ashe Distinguished Professor in Constitutional Law & Director	University of North Carolina School of Law	NC
Jamal Greene	Dwight Professor of Law	Columbia Law School	NY
Kent Greenfield	Professor of Law and Law School Fund Distinguished Scholar	Boston College Law	MA
Ariela Gross	John B. and Alice R. Sharp Professor of Law and History	USC Gould School of Law	CA
Melissa Hart	Professor of Law, Director of the Byron R. White Center	Colorado Law	CO
Sherrilyn Ifill	President and Director-Counsel	NAACP LDF	NY
Dawn Johnsen	Walter W. Foskett Professor of Law	Indiana University Maurer School of Law	IN

Name	Title	Organization	Location
Anthony Johnstone	Associate Professor	University of Montana	MT
Mark Kende	Professor of Law	Drake University Law School	IA
Neil Kinkopf	Professor of Law	Georgia State University College of Law	GA
Hon. Timothy Lewis	Counsel	Schnader Attorneys at Law	PA
William Marshall	William Rand Kenan, Jr. Distinguished Professor of Law	University of North Carolina School of Law	NC
Janai Nelson	Associate Director-Counsel	NAACP LDF	NY
Gene Nichol	Boyd Tinsley Distinguished Professor of Law	University of North Carolina School of Law	NC
Richard Painter	S. Walter Richey Professor of Corporate Law	University of Minnesota Law School	MN
Jeremy Paris	Executive Director; Former Chief Counsel for Nominations for Sen. Patrick Leahy	Group Plan Commission	OH
Kermit Roosevelt	Professor of Law	University of Pennsylvania Law School	PA
Steve Sanders	Associate Professor of Law	Indiana University Maurer School of Law	IN
Sara Schiavoni	Lecturer in Political Science	John Carroll University	OH
Steven Schwinn	Associate Professor	John Marshall Law School	IL
Neil Siegel	David W. Ichel Professor of Law and Professor of Political Science	Duke Law	NC
Ganesh Sitaraman	Assistant Professor of Law	Vanderbilt University Law School	TN
Peter Shane	Jacob E. Davis and Jacob E. Davis II Chair in Law	Ohio State University Moritz College of Law	OH
Carolyn Shapiro	Co-Director of the Institute on the Supreme Court of the United States at Chicago-Kent College of Law Associate Professor of Law	Chicago-Kent College of Law	IL

Name	Title	Organization	Location
Theodore Shaw	Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights	University of North Carolina School of Law	NC
Jason P. Steed	Chair, Supreme Court & Appellate Practice	Bell Nunnally & Martin LLP	TX
Geoffrey Stone	Edward H. Levi Distinguished Service Professor	University of Chicago Law School	IL
David Strauss	Gerald Ratner Distinguished Service Professor of Law	University of Chicago Law School	IL
Nadine Strossen	John Marshall Harlan II Professor of Law	New York Law School	NY
Barry Sullivan	Professor of Law and Cooney & Conway Chair in Advocacy	Loyola University Chicago School of Law	IL
Carl Tobias	Williams Professor of Law	Richmond School of Law	VA
Mark Tushnet	William Nelson Cromwell Professor of Law	Harvard Law School	MA
Russell Wheeler	Visiting Fellow Government Studies, Brookings Institution; President, Governance Institute; Adjunct Professor , American University Washington College of Law	American University Washington College of Law; Brookings Institution	DC
Verna Williams	Judge Joseph P. Kinneary Professor of Law	University of Cincinnati College of Law	OH
Adam Winkler	Professor of Law	UCLA School of Law	CA
Rebecca Zietlow	Charles W. Fornoff Professor of Law and Values	University of Toledo College of Law	OH