

March 31, 2016

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate
Dirksen Senate Office Building
Room 224
Washington, DC 20510-6275

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
Dirksen Senate Office Building
Room 152
Washington, DC 20510-6275

RE: Merrick Garland's Nomination and the Senate's Advice-and-Consent Duty

Dear Senators Grassley and Leahy:

We, the undersigned professors with expertise in the Second Amendment, write to express our concern with recent statements suggesting that the Judiciary Committee will hold neither hearings nor a vote on Chief Judge Merrick Garland's nomination to the Supreme Court, and to urge the Committee to fulfill its constitutional duty by doing so.

Senate Majority Leader Mitch McConnell and others have justified taking no action on Judge Garland's nomination based on serious misrepresentations of the Senate's constitutional obligations and a substantial distortion of Garland's record.

Senator McConnell recently stated that he "can't imagine that a Republican majority in the United States Senate would want to confirm, in a lame duck session, a nominee opposed by the National Rifle Association." For the United States Senate to outsource its constitutional advice-and-consent duty to any special interest group would set a dangerous precedent for future judicial nominations, and would pose a severe threat to our impartial judiciary. We are particularly troubled, in this case, because the N.R.A.'s stated reasons for opposing Judge Garland are based on an extraordinary misrepresentation of his record.

Of course, the N.R.A., like any other organization, can and should express its views on Supreme Court nominees, and Senators should give whatever consideration they deem appropriate to such advocates' arguments as they decide whether to confirm or oppose a nominee. The Senate, however, should give Judge Garland the opportunity to explain, for himself, his views—by holding hearings on his nomination, as is the ordinary and traditional practice in the case of Supreme Court nominations.

The N.R.A. claims that Judge Garland is hostile to gun rights and the Second Amendment, but there is nothing in his record that supports such an attack. Garland's opponents base their specious claims on his actions in two cases that came before the D.C. Circuit during his tenure, but in neither case did Judge Garland take a substantive position on the Second Amendment, the individual right to keep and bear arms, or the Supreme Court's landmark decision in *District of Columbia v. Heller*.

In *Parker v. District of Columbia*, a case challenging the D.C. handgun ban the Supreme Court ultimately found to violate the Second Amendment in *Heller*, Judge Garland was one of four judges—including conservative, George H.W. Bush-appointed, A. Raymond Randolph—who voted for the entire D.C. Circuit to rehear, *en banc*, a three-judge panel’s ruling that the ban violated the Second Amendment. Under the Federal Rules of Appellate Procedure, *en banc* review is called for when a panel decision conflicts with prior judicial precedent and when the case involves a “question of exceptional importance.” *Parker* fit both criteria.

It is well established that such procedural votes say nothing about a judge’s views on the substance of the case, or how he or she would have voted on the merits. Yet, Judge Garland’s critics assert that his vote for *en banc* review “proves” his hostility to the Second Amendment. Any argument that a purely procedural vote reflecting no substantive judgment on the merits of the underlying case is proof that Judge Garland would vote to overturn *Heller* is specious and dishonest, and unworthy of acceptance by the Committee or the Senate as a whole.

Similarly, Judge Garland’s vote in *National Rifle Association v. Reno* is misleadingly characterized as further evidence of an anti-gun position and a desire to create a national gun registry. In that case, Judge Garland joined an opinion holding that the Department of Justice acted lawfully—and did not establish any gun registry—by temporarily retaining records on background checks performed pursuant to the Brady Act. The information the Department temporarily retained—which did not include “addresses of persons approved to buy firearms, nor any information on specific weapons, nor even whether approved gun purchasers actually completed a transaction”—enabled audits designed to ensure an accurate, secure, and private background check system. The information was destroyed within six months, in keeping with the Brady Act. When the N.R.A. appealed, the Bush Department of Justice, under John Ashcroft, defended the opinion Judge Garland joined, writing that “[t]he court of appeals’ decision is correct.”

The Supreme Court agreed, and declined to hear the N.R.A.’s appeal. But Judge Garland’s critics have again distorted the record, portraying his vote in *Reno* as anti-gun and claiming it upheld, in the words of N.R.A. executive Chris Cox, “a federal registry of law-abiding gun owners.”

The First Amendment may grant interest groups like the N.R.A. the right to distort the facts and attempt to mislead the public. Nothing in the Constitution justifies the Senate acceding to such misrepresentations.

As with other issues of national importance, we believe that the health and vitality of our democratic republic benefits when people express their diverse opinions on a Supreme Court nominee’s qualifications, record, and views. It weakens our system of government, however, for the Senate to effectively grant a special interest lobbying organization veto power over a nominee—especially when its opposition is based on an unfair and fundamentally flawed assessment of the nominee’s record.

To prevent such an abdication of responsibility, we urge the Judiciary Committee to fulfill its role by leading the Senate in a sober, objective and fair assessment of Judge Garland’s record, experience,

and qualifications by holding hearings on his nomination. This would provide critics and supporters alike the opportunity to hear from the nominee himself, in a process that, in the past, has been available to scores of past Supreme Court nominees as part of the ordinary course of the nomination process.

Failure to grant a hearing and a vote would not only do a disservice to Judge Garland, it would risk incalculable damage to the Senate, the Supreme Court, and our democracy.

Signed,

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cc: Members of the Senate Judiciary Committee