



LAWYERS' COMMITTEE FOR  
**CIVIL RIGHTS**  
UNDER LAW

*A nonprofit, nonpartisan legal organization formed at the request of President Kennedy in 1963*



# **THE IMPORTANCE OF THE SENATE'S CONSIDERATION OF A U.S. SUPREME COURT NOMINEE**



**Prepared by the Lawyers' Committee for  
Civil Rights Under Law**

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## INTRODUCTION

This briefing paper was prepared by the Lawyers' Committee for Civil Rights Under Law, an organization created in 1963 to help protect the legal rights of racial and ethnic minorities. Our Mission Statement provides:

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

History has shown that the nation's courts are often the final guardian of the rights of minorities whose interests can be trampled upon by political majorities. This proposition holds true, not only for racial and ethnic minorities, but for persons subject to discrimination because of their religious beliefs, their sexual orientation, their physical or mental disabilities, and other invidious factors that have nothing to do with their value and role as human beings in our society. The United States Supreme Court is the forum in which legal issues affecting these groups are definitively resolved. For these reasons, the Lawyers' Committee has a particular interest in the fairness and proper functioning of the Court.

Our nation is now faced with a deep division regarding the replacement of Supreme Court Justice Antonin Scalia. President Obama has declared his intention to nominate a replacement, and the Republican leadership of the Senate, including the leadership of the Senate Judiciary Committee, has declared its intention to refuse to consider the nominee during this session of Congress. Because of the importance of the courts in their role to resolve legal disputes about civil rights, particularly the crucial role played by the Supreme Court, the Lawyers' Committee has prepared this briefing paper, which discusses the constitutional considerations, the relevant historical precedent and the stakes for the country in how this disagreement between the President and the Senate is resolved.

## EXECUTIVE SUMMARY

The vacancy on the Supreme Court of the United States created by the unexpected death of Justice Antonin Scalia on February 13, 2016 raises important questions. President Barack Obama has declared his intention to nominate someone to fill the vacancy even as certain members of the Senate, including members of the Senate Judiciary Committee, have publicly insisted that they will not consider any nominee until President Obama's successor takes over in January 2017. Both sides have marshaled legal and historical arguments to support their respective positions, but few systematic efforts have been made to analyze all of the relevant legal and historical precedent to determine the appropriate course of action in these unprecedented times. To remedy this, the Lawyers' Committee for Civil Rights Under Law has conducted an

independent analysis of the relevant legal and historical precedents regarding Supreme Court vacancies.

The Appointments Clause of the Constitution<sup>1</sup> vests the authority for the appointment of Supreme Court justices in the President, subject to the advice and consent of the Senate. The Clause was the result of a compromise between Framers who wanted the Senate to have the exclusive power and those who wanted the appointment power in the Executive Branch. The compromise preserves important separation-of-powers goals by “preventing the diffusion of the appointment power,”<sup>2</sup> while simultaneously “curb[ing] Executive abuses of the appointment power.”<sup>3</sup> Early writings by the Framers, particularly Alexander Hamilton in Federalist No. 76, indicate that they envisioned the advice and consent role of the Senate to be somewhat limited, as a check on the President to ensure that unfit or unqualified people are not appointed.

While the historical record is not unambiguous, the Lawyers’ Committee’s review of it revealed no Senate, or even a single Senator, who took the position that it would flatly refuse to consider a President’s nomination with ten months in his Presidency, even when the Senate was controlled by the opposing party.

The Senate has confirmed the overwhelming majority of nominations for the Supreme Court. Between 1789 and the death of Justice Scalia, Presidents submitted 160 nominations for positions on the Supreme Court.<sup>4</sup> The Senate confirmed 124 of those nominations.<sup>5</sup> It rejected 11 outright, and 13 other nominations received floor consideration but were never voted on.<sup>6</sup> The Senate has only failed to give floor consideration to 12 of the 160 nominations (7.5 percent).<sup>7</sup> In all except one of those cases, the nomination was withdrawn or other special circumstances led the Senate not to consider the nomination. The one exception was William C. Micou, whom President Millard Fillmore appointed in 1853, only one month before the expiration of his term as President.

The historical record also shows that the Senate has acted on several Supreme Court nominees during a presidential election year. While there is precedent for a Senate to refuse to confirm a nominee in part because the nomination was made late in the term of a President, in all such cases the nominee received a hearing and full consideration by the Senate.

## **THE IMPACT OF REFUSAL TO CONSIDER A NOMINEE**

A vacancy on the Supreme Court has a number of detrimental effects on individual litigants as well as the country itself. The most obvious effect is the possibility of a 4-4 tie, which has the effect of affirming the decision of the lower court but without creating binding

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<sup>1</sup> U.S. CONST. art. II sec. 2 cl. 2

<sup>2</sup> Freytag v. Comm’n, 501 U. S. 868, 878 (1991).

<sup>3</sup> Edmond v. United States, 520 U.S. 651, 659 (1997).

<sup>4</sup> Congressional Research Service, Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011, at 2 (2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

precedent for the country. Individuals whose lives are directly affected by the principles at stake in the case are bound by decisions that are not authoritative on a national level and individuals whose rights are at stake in subsequent cases raising the same issues are subject to a climate of legal uncertainty and potential unfairness.

Refusal by the Senate to consider any nominee until the next President takes office would extend this situation on the current Court for an intolerable length of time. Under the current circumstances, a nominee by the next President is not likely to be confirmed until the spring of 2017 or later, resulting in the vacancy resulting from Justice Scalia's death lasting over a year. By contrast, between 1967 and 2006 a median of 69 days elapsed between the date when the Senate received a nominee for the Supreme Court and the date when the Senate took final action on the nominee. Only two vacancies lasted longer than a year in the entirety of the 20th century.

Based on the foregoing analysis, the Lawyers' Committee for Civil Rights Under Law strongly and respectfully urges the Senate to grant President Obama's nominee for the vacancy on the Supreme Court full and fair consideration.

## THE APPOINTMENTS CLAUSE

The Constitution vests the power and duty of appointment to fill important offices, including the Supreme Court, in the President, subject to the Senate's approval. The Appointments Clause provides, the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the supreme Court . . ."<sup>8</sup>

Adoption of the Appointments Clause was a product of compromise at the Constitutional Convention between those wanting the Senate to have the exclusive power to appoint and those who wanted the appointment power in the executive branch.

Alexander Hamilton supported the compromise proposal that split the responsibility for filling offices between the President and the Senate, with different responsibilities assigned to each. It gives the President the exclusive power to nominate and as Hamilton notes, the person appointed can only be the President's nominee. As Hamilton explains in Federalist No. 76, this is because "one man of discernment is . . . better fitted to analyze and estimate the peculiar qualities" of an appointee than a collective body. Meanwhile, the requirement of Senate advice and consent could avoid the "several disadvantages which might attend the absolute power of appointment."<sup>9</sup> Hamilton considered the Senate's role of advice and consent as performing a more limited function, acting as "an excellent check upon the spirit of favoritism in the President." He found that it was "not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."<sup>10</sup> The benefits of the compromise were also echoed by Pennsylvania representative Gouverneur Morris, who noted that "as

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<sup>8</sup> U.S. CONST. art. II sec. 2 cl. 2.

<sup>9</sup> THE FEDERALIST No. 76, at 492-93 (Alexander Hamilton) (Modern Library ed. 1941).

<sup>10</sup> *Id.* at 494.

the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>11</sup>

The Framers intended that the advice and consent role of the Senate would serve important separation-of-powers objectives. As the Supreme Court has explained, the requirement of advice and consent is “more than a matter of etiquette or protocol”; it is a “structural safeguard[ ]” intended to “curb Executive abuses of the appointment power” and to “promote a judicious choice of persons for filling the offices of the union.”<sup>12</sup>

While the Constitution specifies that a Supreme Court Justice may only be confirmed “by and with the advice and consent of the Senate,” it does not set out a procedure for the Senate to carry out its advice and consent role. The Constitution does not set a time limit on when the Senate must consider a nominee, nor is there a textual requirement that the Senate hold hearings or a vote on a nominee. Compare for example, the language in Article I, Section 7, which specifies that if the President does not sign or veto a bill within 10 days and the Congress is not adjourned, “the same shall be law, in like manner as if he had signed it.”<sup>13</sup> On the other hand, it is clear that the Senate has a constitutional responsibility to participate in the Appointments Clause process if the intentions of the Framers are to be realized. The issue before the country raised by the current vacancy concerns the duty and responsibility of the President and the Senate in carrying out their respective roles in accordance with the Constitution.

## THE DUTY OF THE SENATE

The Senate’s role in considering judicial nominees, including Supreme Court nominees, has probably been a more active one than the Framers envisioned. The early history after the Constitution’s ratification reveals that Hamilton’s expectations of a limited Senate role in its advice and consent functions were incorrect. From the beginning the Senate took an active role. President Washington’s Supreme Court nomination of John Rutledge in 1795 was rejected for partisan reasons, and is revealing in part because some of the Senators who voted against the confirmation had been delegates to the Philadelphia Convention.<sup>14</sup> It also rejected Alexander Wolcott (nominated by James Madison) in 1811 and Ebenezer Hoar (nominated by President Grant) in 1870 based on partisan politics.<sup>15</sup>

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<sup>11</sup> JONATHAN ELLIOT’S DEBATES IN THE SEVERAL STATE CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION: DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON, at 566 (J. McClellan & M.E. Bradford eds. 1989); *see also* Edmond v. United States, 520 U.S. 651, 659 (1997) (noting that Advice and Consent Clause “was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one”).

<sup>12</sup> Edmonds, 520 U.S. at 659.

<sup>13</sup> U.S. CONST. art. I sec. 7.

<sup>14</sup> W. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 642-43 (1987). Rutledge had sharply criticized the Jay Treaty, which was meant to restore normal relations with Great Britain, and this angered many of the Federalists in the Senate who supported that treaty, playing a major role in his rejection. *See* H. Flanders, 1 *The Lives and Times of the Chief Justices of the Supreme Court of the United States*, 633-37 (1885).

<sup>15</sup> Ross, *supra* note 14, at 643.

While there may be different interpretations regarding the role of the Senate in considering a judicial nominee, such as the degree to which it should consider the nominee's judicial and political philosophy or the appropriateness of a filibuster, what we do know is that, in the modern era, Presidents and Senators of the President's party traditionally call on the Senate to act promptly on nominees and conduct an up or down vote. Senators of the other party traditionally insist on the right to consider nominations on their own time schedule. We do not attempt to address those issues here. We address only the central question whether the Senate should at least consider a President's Supreme Court nomination when made this early in the last year of a President's term.

The Constitution includes no language that calls for a suspension of the President's constitutional obligation during a presidential election year, nor any other period. While some scholars may disagree about the formal constitutional duty of the Senate to consider a nominee, it is clear that under some circumstances, the Senate would be failing to carry out its constitutional responsibilities if it flatly refused to consider a nominee. The Lawyers' Committee believes that, in the case of a nomination to the Supreme Court, the Senate should consider all the relevant circumstances in determining its duty to the Constitution – and to the country – based on the fundamental principles of the separation of powers, historical precedent, and the overall impact on the welfare of the nation.

## **THE SEPARATION OF POWERS**

There is no doubt that the Framers intended that the President has primary responsibility for choosing appointments to high offices, including Supreme Court Justices. As described above, that power is not unlimited. Like most important questions regarding how our government works, the Framers intentionally divided power among the branches to ensure that no single branch could acquire inordinate power. If the Senate flatly refused to consider any Supreme Court nominee of a President no matter when the nomination was made during a President's term, such a refusal would clearly undermine the separation of powers and constitute an abdication of the Senate's constitutional obligations. While the Supreme Court might decline to intervene in such a dispute on the grounds that it is a non-justiciable political question, there is little doubt that the Senate would be acting inconsistently with the Framers intent as well as the text of the Appointment Clause. On the other hand, there are some circumstances when the Senate may not have the duty to act on a nominee, for example, a nomination made in the final days of a President's term when there is no opportunity to give a nominee thorough and fair consideration.

The vacancy created by Justice Scalia's death arose on February 13, 2016. There are ten months remaining in President Obama's term. A refusal by the Senate to consider a nomination this early in the final year of a President's term would mean that the Senate would deprive the President of the power of appointment for almost one fourth of his term. In our review of the historical record, we could find no Senate that took the position that it would flatly refuse to consider a President's nomination at this point in his Presidency, even when the Senate was controlled by the opposing party.

Much attention has been paid to the statement of then-Senator Biden in July 1992 regarding the appropriateness of the Senate considering a nominee during the final year of a President's term. We have reviewed the statement of then-Senator Biden, who was at that time Chairman of the Senate Judiciary Committee. Most of the statement concerns the degree to which the Senate should examine the constitutional philosophy of a nominee. However, the key parts of the statement concerning confirmations during an election year were the following:

[The] tradition against acting on Supreme Court nominations in a Presidential year is particularly strong when the vacancy occurs in the summer or fall of that election season. Thus, while a few Justices have been confirmed in the summer or fall of a Presidential election season, such confirmations are rare--only five times in our history have summer or fall confirmations been granted, with the latest--the latest--being the August 1846 confirmation of Justice Robert Grier.

In fact, no Justice has ever been confirmed in September or October of an election year--the sort of timing which has become standard in the modern confirmation process. Indeed, in American history, the only attempt to push through a September or October confirmation was the failed campaign to approve Abe Fortas' nomination in 1968. I cannot believe anyone would want to repeat that experience in today's climate.

Moreover, of the five Justices who were confirmed in the summer of an election year, all five were nominated for vacancies that had arisen before the summer began...

Given the unusual rancor that prevailed in the Thomas nomination, the need for some serious reevaluation of the nomination and confirmation process and the overall level of bitterness that sadly infects our political system and this Presidential campaign already, it is my view that the prospects for anything but conflagration with respect to a Supreme Court nomination this year are remote at best.<sup>16</sup>

There are a number of notable points in this statement that are relevant to the current situation. First, Senator Biden referred to a potential nomination in the summer or fall when the Senate would only have a few months to consider the nomination before the election. Second, the statement followed a very contentious nomination battle regarding the nomination of now-Justice Clarence Thomas. Thus, even if one agrees with then-Senator Biden's statement, and the Lawyers' Committee does not endorse or reject it, we do not believe these circumstances are similar to the one faced by the country today.<sup>17</sup>

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<sup>16</sup> 102 CONG. REC. S8853 et seq. (daily ed. June 25, 1992) (statement of Sen. Biden).

<sup>17</sup> Vice President Biden recently commented on his 1992 speech in a New York Times opinion editorial on March 2, 2016: "Some have taken comments I made in 1992 to mean that I supported the same kind of obstructionist position as a senator. But that reading distorts the broader meaning of the speech I gave from the Senate floor that year. It was late June, and at the time there was much speculation that a sitting justice would retire, leaving President George H.W. Bush to appoint a successor in the final months of his first term.

"We had been through several highly contentious Supreme Court confirmation hearings during my tenure, and I feared that a nomination at that late date, just a few weeks before the presidential conventions, would create immense political

## HISTORICAL PRECEDENT

The Senate has confirmed the overwhelming majority of nominations for the Supreme Court. Between 1789 and the death of Justice Scalia, Presidents submitted 160 nominations for positions on the Supreme Court.<sup>18</sup> The Senate confirmed 124 of those nominations.<sup>19</sup> It rejected 11 outright, and 13 other nominations received floor consideration but were never voted on.<sup>20</sup> The Senate has only failed to give floor consideration to 12 of the 160 nominations (7.5 percent).<sup>21</sup> In all except one of those cases, the nomination was withdrawn or other special circumstances led the Senate not to consider the nomination.

The Senate gave no floor action to the following nominees: Harriet Meirs (2005); John Roberts (2005); Homer Thornberry (1968); John M. Harlan (1954); Pierce Butler (1922); William Hornblower (1893); Stanley Matthews (1881); Caleb Cushing (1874); Henry Stanbery (1866); William Micou (1853); John C. Spencer (1844); and William Patterson (1793).<sup>22</sup> However, of these 12, six nominations were withdrawn by the President without floor consideration (Meirs, Roberts, Thornberry, Cushing, Spencer, Paterson), including John Roberts, who was later nominated for Chief Justice (and hence his failure to receive floor action when he was originally nominated to replace Justice O'Connor).<sup>23</sup>

Five of the 12 nominees (Roberts, Harlan, Butler, Matthews, Paterson) who did not receive floor action were later renominated and confirmed.<sup>24</sup> One nominee (Hornblower) was renominated and rejected outright<sup>25</sup>; one nomination (Stanbery) became moot because Congress reduced the size of the Court<sup>26</sup>; and one nominee (Thornberry) was not renominated because the vacancy was eliminated because of the Senate's failure to confirm the elevation of a sitting Justice to Chief Justice.<sup>27</sup>

Only *one* nominee appears to have received no consideration when the President continued to support the nominee.<sup>28</sup> President Fillmore's nomination of William C. Micou in February 1853 did not receive any floor consideration, and it expired when the President left office a month later.<sup>29</sup> At the

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acrimony. So I called on the president to wait until after the election to submit a nomination if a sitting justice were to create a vacancy by retiring before November. And if the president declined to do that, I recommended that the Judiciary Committee not hold hearings "until after the political campaign season is over." Joe Biden, *Senators: Do Your Job*, N.Y. TIMES, Mar. 3, 2016, at A23.

<sup>18</sup> CONG. RES. SERV., SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011, at 2 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 17.

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 18.

time of the nomination, President Fillmore's term was mere weeks from ending, and his successor had already been elected. There apparently was no hearing but the Senate ordered the nomination discharged from the Senate Judiciary Committee.<sup>30</sup> A number of other historical examples show the rarity of a refusal by the Senate to act even when the nomination was made late in a President's term. President Millard Fillmore's nomination of George E. Badger in January 1853 was debated for four days, adjourned multiple times, and ultimately postponed until March 4, the date when the new President would take office. Badger's nomination eventually failed, allowing President Franklin Pierce to make the appointment. Thus, the Senate debated this nomination very late in President Fillmore's term.

President John Quincy Adams' nomination of John Crittenden to the Supreme Court in December 1828, a month after President Jackson was elected to the presidency in November 1828, was opposed by President Jackson's supporters. Consequently, the Senate decided that it was not even required to consider and vote on the nomination itself. Instead, the Senate spent nine days debating an amendment to the following resolution:

Resolved, That it is not expedient to act upon the nomination of John I. Crittenden, as a Justice of the Supreme Court of the United States, until the Senate shall have acted finally on the report of the Judiciary Committee, relative to the amendment of the Judicial System of the United States.<sup>31</sup>

The amendment to the resolution, which was ultimately rejected, would have provided as follows:

That the duty of the Senate to confirm or reject the nominations of the President, is as imperative as his duty to nominate; that such has heretofore been the settled practice of the government; and that it is not now expedient or proper to alter it.<sup>32</sup>

Even though the nomination came after a new President was elected, the Senate felt it needed to debate whether it would consider the nomination for nine days. This is far different from nomination presented to the Senate when a President has nine or ten months left in his term.

An argument has been made that the Senate traditionally has not confirmed a nominee during a Presidential election year. However, the historical record shows that the Senate has acted on a number of Supreme Court nominees during a presidential election year. Chief Justice John Marshall was nominated by John Adams in January 1801 and confirmed weeks later, as Adams prepared to turn over the presidency to Thomas Jefferson. Presidents Taft, Wilson, Hoover, Roosevelt, and Reagan all had nominees confirmed during election years.<sup>33</sup> Justice Kennedy was confirmed in February 1988, the last

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<sup>30</sup> See CONG. RES. SERV., SUPREME COURT NOMINATIONS, 1789 TO THE PRESENT: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE AND THE PRESIDENT, at 24 (Dec. 7, 2012).

<sup>31</sup> S. EXEC. JOURNAL, 20<sup>th</sup> Cong., 2d Sess., 636 (Jan. 26, 1829).

<sup>32</sup> *Id.* at 637 (Jan. 29, 1829).

<sup>33</sup> Amy Howe, Supreme Court vacancies in presidential election years, SCOTUSBLOG (Feb. 13, 2016, 11:55 PM), <http://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/>. Some of the Justices confirmed during an election year included Oliver Ellsworth, 1796; Samuel Chase, 1796; William Johnson, 1804; Philip

year of the Reagan presidency.<sup>34</sup> President Eisenhower recess-appointed Justice Brennan in 1956 (an election year), and Justice Brennan was confirmed as a permanent Justice in 1957.<sup>35</sup> The Senate refused to confirm Abe Fortas to succeed Chief Justice Earl Warren in 1968, an election year, but Chief Justice Warren remained on the Court.<sup>36</sup> Thus, the Senate's failure to confirm Fortas did not leave the Court with a vacancy.<sup>37</sup> In addition, the Senate considered the Fortas nomination by holding hearings and considered the nomination on the floor.<sup>38</sup>

There is precedent for the Senate to refuse to confirm a nominee in part because the nomination was made late in the term of a President.<sup>39</sup> However, in these cases, the Senate still considered the nomination and held hearings. For example, in January 1853, President Millard Fillmore nominated George E. Badger to be an Associate Justice of the Supreme Court. President Fillmore's term was ending and his successor — Franklin Pierce — had already been elected.<sup>40</sup> The Senate debated Badger's nomination for four days before ultimately deciding to postpone consideration until March 4, the day when President Pierce took office.<sup>41</sup>

In short, the overwhelming precedent for nominations late in a President's term is that the Senate has considered the nominee and, in almost all cases when the President continued to support the nominee, the Senate brought the nomination to a vote on the Senate floor. We could find no case where the Senate failed to give any consideration to a nominee made in the spring of a President's final year in office or earlier.

## THE IMPACT OF A REFUSAL TO CONSIDER A NOMINEE

Historically, the Supreme Court, with a full complement of nine justices, has proven to be the most important forum for resolving disputes regarding the legal rights that lay at

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Barbour, 1836; Roger Taney, 1836; Melville Fuller, 1888; Lucius Lamar, 1888; George Shiras, 1892; Mahlon Pitney, 1912; John Clarke, 1916; Louis Brandeis, 1916; Benjamin Cardozo, 1932; Frank Murphy, 1940; and Anthony Kennedy, 1988.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Fortas became the first sitting associate justice, nominated for chief justice, to testify at his own confirmation hearing. Those hearings reinforced what some senators already knew about the nominee. As a sitting justice, he regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam. When the Judiciary Committee revealed that Fortas received a privately funded stipend, equivalent to 40 percent of his Court salary, to teach an American University summer course, Dirksen and others withdrew their support. Although the committee recommended confirmation, floor consideration sparked a filibuster. On October 1, 1968, the Senate failed to invoke cloture. Johnson then withdrew the nomination, privately observing that if he had another term, "the Fortas appointment would have been different." U.S. SENATE, *FILIBUSTER DERAILS SUPREME COURT APPOINTMENT*, [www.senate.gov/artandhistory/history/minute/Filibuster\\_Derails\\_Supreme\\_Court\\_Appointment.htm](http://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm).

<sup>39</sup> CONG. RES. SERV., *supra* note 30, at 7.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

the heart of our democracy, for example, those affecting protected minority groups. A vacancy on the Supreme Court has a number of detrimental effects on individual litigants as well as the country itself. The most obvious effect is the possibility of a 4-4 tie, which has the effect of affirming the decision of the lower court but without creating binding precedent for the country. The lower court decision, e.g., a Court of Appeals or a State Supreme Court decision, remains the law only in their jurisdictions, leaving uncertainty about the state of the law and, in some cases, a conflict among the circuits. Individuals whose lives are directly affected by the principles at stake in the case are bound by decisions that are not authoritative on a national level and individuals whose rights are at stake in subsequent cases raising the same issues are subject to a climate of legal uncertainty and potential unfairness. It is possible that the Court might postpone for reargument before a full bench, rather than allow a tie. But that could mean delay of reargument and a decision into the October 2017 term, leaving the parties and the law uncertain for that lengthy period. Moreover, cases in which certiorari is granted from February 2016 to the end of June and during a large part of the October 2016 Term may not be set down for argument or decided until the October 2017 Term, in some cases with decisions not coming until June of 2018.

## LENGTH OF A VACANCY

The next President will take office on January 20, 2017. He or she will have the task of nominating someone to the Supreme Court if a vacancy continues to exist. The next President will necessarily take some time to choose a nominee, and the Senate will invariably take some time to act. Between 1967 and 2006, a median of 69 days elapsed between the date when the Senate received a nominee for the Supreme Court and the date when the Senate took final action on the nominee.<sup>42</sup> However, this time has often been extended if the nomination proves controversial and is withdrawn or rejected. In that case, the seat has sometimes not been filled for a much longer period. In all, of the 59 vacancies that occurred in the 20th and 21st centuries, only four persisted longer than 200 days. Six were between 150 and 200 days.

Were the Senate to continue to oppose consideration of the President's nominee, a nominee by the next President would not likely to be confirmed until the spring of 2017 or later, resulting in the vacancy resulting from Justice Scalia's death lasting over a year. During the 19th century, a few vacancies lasted more than a year, but these were often under extreme circumstances. For example, during Abraham Lincoln's first year in office, there were three lengthy Supreme Court vacancies, one caused by a Justice's resignation to return to the South after the outbreak of the Civil War.

More relevant precedent is found in the 20th century. We could identify only two vacancies that lasted longer than a year, and the great majority lasted only two or three months. The only vacancy that lasted over a year occurred after the resignation of Justice Abe Fortas, who resigned. His resignation resulted in a vacancy that lasted 391 days. However, this was the result of the rejection of Harold Carswell, who was rejected by the Senate. That extraordinarily long vacancy was the result of two factors. First, it took President Nixon three months to make a nomination

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<sup>42</sup> CONG. RES. SERV., SUPREME COURT NOMINATIONS, 1789 TO THE PRESENT: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE AND THE PRESIDENT, at 14 (Dec. 7, 2012).

because his first choice declined the offer. Second, the first two nominees were advocates of racial segregation and were rejected by the Senate.

Thus, if the Senate refuses to consider a nominee, the vacancy would be the longest in the 20th Century, except for the extraordinary circumstances of the Senate's rejection of a nominee and the time needed for a subsequent nomination and consideration. Moreover, this vacancy would be self-imposed by a conscious decision of the Senate. It would not be the result of the Senate's rejection of a nominee, the withdrawal of a nominee by the President, or other extenuating circumstances.

## IMPACT ON PENDING CASES

The Supreme Court receives 7,000 to 8,000 requests each term for consideration. The Court grants considerations of about 80 cases per term. Virtually all these cases raise very significant legal issues. Many of them raise important constitutional and statutory interpretation questions that affect the lives of millions of Americans. As noted above, a tie vote leaves these issues unresolved and has the potential for unfairness, hardship and legal uncertainty. While this risk occurs for all categories of cases, we note below cases of particular concern to the Lawyers' Committee that were decided by a 5-4 vote. A prolonged vacancy would no doubt create the risk of equally important cases being resolved without a clear legal precedent for the country.

**University Admissions: *Grutter v. Bollinger***<sup>43</sup>

In a 5-4 decision, the Supreme Court held that the Equal Protection Clause does not prohibit public higher education institutions' narrowly tailored use of race in admissions policies to further their compelling interest in obtaining the educational benefits that flow from a diverse student body.

**Voting: *Alabama Legislative Black Caucus v. Alabama***<sup>44</sup>

In a 5-4 decision, the Supreme Court issued a ruling concerning Alabama's state legislative redistricting maps; the Court reinstated plaintiff's racial gerrymandering claim under the Equal Protection Clause and remanded the case to a lower court to evaluate the on a district-by-district basis rather than a statewide basis.

**Employment: *National Railroad Passenger Corporation v. Morgan***<sup>45</sup>

In a 5-4 decision, the Supreme Court held that courts may consider the entire scope of a hostile work environment claim under Title VII, including behavior alleged outside the 300 day statutory period, so long as any act contributing to the hostile environment takes place within the statutory period.

**Housing: *Texas Department of Housing v. Inclusive Communities Project, Inc.***<sup>46</sup>

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<sup>43</sup> 536 U.S. 101 (2002).

<sup>44</sup> 575 U.S. --- (2015).

<sup>45</sup> 536 U.S. 101 (2002).

<sup>46</sup> 575 U.S. --- (2015).

In a 5-4 decision, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act.

**Criminal Justice: *Lafler v. Cooper***<sup>47</sup>

In a 5-4 decision, the Supreme Court ruled that a defendant could challenge his conviction resulting from his reliance upon his public defender's alleged ineffective assistance of counsel.

**Immigration: *Zadvydas v. Davis***<sup>48</sup>

In a 5-4 decision, the Supreme Court held that a post-removal period statute does not permit indefinite detention of the immigrant, but rather requires her release after a reasonable amount of time.

## OTHER ADVERSE EFFECTS OF A PROLONGED VACANCY

A prolonged vacancy can have adverse effects in addition to the possibility of a 4-4 tie. A full complement of the Court is not available to deliberate and vote on granting petitions for certiorari, for granting emergency stays, and for other highly important procedural orders. In addition, a full Court is not available to decide whether to hold over cases for re-argument the following term. This decision can be particularly significant when the Court decides whether to issue an opinion with a 4-4 tie or hold the case over. A vacancy may result in these decisions at least appearing to be the result of political considerations.

## CONCLUSION

We strongly encourage the Senate to consider the President's nomination to the Supreme Court under the current circumstances. We believe a flat refusal to do so at this point in a President's term is inconsistent with the separation of powers as envisioned by the Framers in adopting the Appointments Clause. In addition, based on our historical review, we conclude that no Senate, or even individual Senator, has taken this position in the past, and no Senate has failed to give any consideration of a nominee under these circumstances. Finally, if the Senate does not act, the current vacancy is likely to be the longest in American history.

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<sup>47</sup> 566 U.S. --- (2012).

<sup>48</sup> 533 U.S. 678 (2001).

***About the Lawyers' Committee for Civil Rights Under Law:***

*The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.*

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