

March 1, 2016

Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, D.C. 20510

Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senators McConnell and Grassley:

On behalf of each of our organizations and the millions of Americans we represent, we thank you for your commitment to exercise your authority under Article II, Section 2 of the Constitution to wait to confirm the successor to Justice Antonin Scalia until the 45<sup>th</sup> President offers a nominee.

For over three decades, Justice Scalia was among the most eloquent and principled voices on the Supreme Court for adherence to the text and history of the Constitution and rejection of judicially imposed legislation. He would be the first to emphasize that the Constitution's textual guarantees do not change due to his passing. However, it is also clear that his replacement on the Court by a nominee chosen by President Obama in his last months of office would radically shift the direction of the Court and significantly impact the rights of all Americans. And were there any question about the likely ideological leaning of any nominee, President Obama has flatly answered "no" to the suggestion he may nominate a "moderate" Justice to replace Justice Scalia.<sup>1</sup>

Less than one year remains in President Obama's term. The country is engaged in a healthy and vigorous debate over who should lead it. The role of the Court and the Constitution will surely be a key element of that debate with the open seat on the Court. This is an unprecedented opportunity for Americans to consider whose vision of the Court and Constitution they support. Filling the vacant seat prior to January 20, 2017, would deprive the nation of the opportunity to have this long-overdue discussion. Moreover, it has been well over a century

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<sup>1</sup> "Obama Says 'No' To Moderate Supreme Court Nominee," <http://dailysignal.com/2016/02/17/obama-says-no-to-moderate-supreme-court-nominee/> (last visited Feb. 17, 2016).

since the Senate has confirmed a nominee of the opposition party President to fill a seat on the Supreme Court vacated in the final year of a President's term, and never where such a nomination could effect such a profound change on the Court. Precedent counsels strongly against the Senate advancing any nomination under these circumstances. It is noteworthy that the position you have staked out is consistent with that advocated in 1992 by Senator Joseph Biden, who was at that time the chairman of the Judiciary Committee, and in 2007 by Senator Charles Schumer, who is expected to be the Democratic leader in the next Congress.

The Constitution's plain text authorizes the Senate to "advise" the President on the nomination process and requires that no nominee can become a Justice without the "consent" of the Senate. U.S. CONST. ARTICLE II, SEC. 2. We thank you for your announcement that the Senate will not act on a replacement for Justice Scalia until after the newly elected President has the opportunity to make that nomination. We urge you to stand firm in this resolve to await the selection of the next President, declining to hold any hearings or votes on any nominee put forth in these last months of President Obama's final term. Our organizations will encourage senators to support your stand, and will defend those who do.

While Democratic-controlled Senates have rejected Supreme Court nominations of Republican Presidents,<sup>2</sup> no Republican-controlled Senate has rejected a Democratic nominee. But the authority entrusted to the Senate by the Constitution does not vary by political party and it is time for this Senate to exercise it. It is of utmost importance to each of our organizations and those we represent that the Senate take this opportunity to exercise its constitutionally prescribed role and delay consideration of the replacement of Justice Scalia until the next president is elected and sworn into office.

Again, thank you for your strong stance in exercising your Constitutional duty. We look forward to a spirited debate during the current campaign as well as when the new President nominates Justice Scalia's successor.

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<sup>2</sup> Democratic-controlled Senates rejected two nominees under President Nixon in addition to the nomination of Judge Bork in 1987. [https://en.wikipedia.org/wiki/Unsuccessful\\_nominations\\_to\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Unsuccessful_nominations_to_the_Supreme_Court_of_the_United_States) (last visited February 17, 2016). More recently, Democrats (including then Senator Obama) attempted to filibuster the nomination of Justice Alito, <http://www.foxnews.com/politics/2016/02/17/white-house-obama-regrets-decision-to-filibuster-supreme-court-justice-alito.html> (last visited February 17, 2016), and Senator Schumer urged that the Democratic-controlled Senate should refuse to consent to a nomination to fill a potential vacancy on the Court during the last eighteen months of President Bush's term. <http://hotair.com/archives/2016/02/15/video-schumer-insists-that-lame-duck-president-should-not-get-supreme-court-pick/> (last visited February 17, 2016).

Respectfully,

Carol Tobias, President  
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Director  
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National Right to Life Committee

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