March 3, 2016

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

We write to you as scholars of American history, politics, and the law. We express our dismay at the unprecedented breach of norms by the Senate majority in refusing to consider a nomination for the Supreme Court made by a president with eleven months to serve in the position. We believe the idea that a "lame duck" president should not submit a nominee when there is a vacancy on the highest court in the land is a novel and absurd notion, as is the claim that for eighty years or more, no Supreme Court vacancy occurring in an election year has been filled before the election.

In fact it is standard practice when a vacancy occurs on the Supreme Court to have a president, whatever the stage in his term, to nominate a successor and have the Senate consider it. And standard practice (with limited exception) has been for the Senate, after hearings and deliberation, to confirm the president's choice, regardless of party control, when that choice is deemed acceptable to a Senate majority. The most recent example, of course, is Justice Anthony Kennedy, confirmed by a Senate with a Democratic Party majority in February of 1988, during President Ronald Reagan's last year. It is true that Kennedy was nominated in November, 1987, but that is irrelevant—and, of course, the Senate commendably expedited the time between nomination and confirmation despite the election ahead.

The claims of an eighty-year precedent by Republican Senate leaders are artfully phrased deliberately to exclude the current situation, which itself is new: it is rare for a justice to die in office, and even more rare for that to happen in a presidential election year. History, however, is replete with instances where a vacancy on the Supreme Court was filled during a presidential election year. In 1912, a nominee of President Taft was confirmed to fill the vacancy created by the death of John Marshall Harlan; in 1916, Woodrow Wilson had two nominees confirmed by the Senate; in 1932, President Roosevelt had a nominee confirmed after Oliver Wendell Holmes retired; FDR had another vacancy filled with confirmation by the Senate in 1940.

President Eisenhower picked William Brennan in 1956 to fill a vacancy and used his recess appointment power to install Brennan, who was subsequently confirmed by a Senate controlled by Democrats in 1957. It is important to note that there was no objection to Eisenhower's use of the recess appointment—there was instead a widespread recognition that it was bad to have a Supreme Court operate for months without its full complement of nine members.

True, Lyndon Johnson's nomination of Abe Fortas to be Chief Justice, made in 1968, was blocked by the Senate via an extended filibuster. But there was at the time no vacancy on the Court; Chief Justice Warren stayed on until his successor could be confirmed, and Fortas was an associate justice. While some senators did object to Fortas on the grounds that it was an election year, most of the objections were based on ideology and ethical considerations. And it is important to note

that the Fortas nomination was considered by the Senate and there were votes on the floor, even if those were votes on cloture.

Divided government can bring sharp differences of opinion about the qualifications and character of nominees to the Supreme Court. But consider the precedent set by a Democratic Senate with the highly contentious nomination of Clarence Thomas. The Senate Judiciary Committee deadlocked 7-7 on his nomination—but instead of letting the nomination die, the committee voted 13-1 to allow the full Senate to make the decision. Thomas ultimately was confirmed by a narrow margin with no filibuster.

If we accept the logic that decisions made by "lame duck" presidents are illegitimate or are to be disregarded until voters make their choice in the upcoming election, that begs both the questions of when lame duck status begins (after all, a president is technically a "lame duck" from the day of inauguration), and why senators up for reelection at the same time should not recuse themselves from decisions until the voters have decided whether to keep them or their partisans in office.

It is technically in the power of the Senate to engage in aggressive denial on presidential nominations. But we believe that the Framers' construction of the process of nominations and confirmation to federal courts, including the Senate's power of "advice and consent," does not anticipate or countenance an obdurate refusal by the body to acknowledge or consider a president's nominee, especially to the highest court in the land. The refusal to hold hearings and deliberate on a nominee at this level is truly unprecedented and, in our view, dangerous.

We are well aware that politics intervenes when judicial nominations are made, and increasingly reflect the broader partisan and ideological polarization in American politics. We do not believe any party is without blame. But we also recognize that confirmation at all levels of the federal judiciary has been increasingly driven by partisan obstructionism, which has reached a peak during the Obama presidency. The refusal by the Republican Senate to confirm any nominees to the D.C. Circuit Court of Appeals is the poster child for that phenomenon.

The Constitution gives the Senate every right to deny confirmation to a presidential nomination. But denial should come after the Senate deliberates over the nomination, which in contemporary times includes hearings in the Judiciary Committee, and full debate and votes on the Senate floor. Anything less than that, in our view, is a serious and, indeed, unprecedented breach of the Senate's best practices and noblest traditions for much of our nation's history.

Respectfully,

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