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Wednesday, February 17, 2016

## An empty seat on the court

**Erwin Chemerinsky** is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law. He is the author of "The Case Against the Supreme Court" (Viking 2014).



Within hours of Justice Antonin Scalia's death, the intense political fight over his successor began. This is not surprising. Replacing Scalia with a liberal justice could create a majority to overrule recent decisions on gun rights and campaign finance, and secure a majority to uphold

abortion rights and affirmative action. This could mean an additional progressive on the U.S. Supreme Court for decades to come.

Not surprisingly, Republicans, such as Senate Majority Leader Mitch McConnell, immediately proclaimed that the Senate would not hold hearings or consider any nominee by President Barack Obama. Some Republicans even suggested that it was illegitimate for a lame-duck president to nominate someone for the Supreme Court. That, of course, is nonsense. Article II gives the president the authority to nominate justices for the Supreme Court no matter when the vacancy occurs; there is no clause that says "except in an election year." In fact, in 1956, shortly before the presidential election, President Dwight Eisenhower made William Brennan a recess appointment to the Supreme Court.

But what should Obama do? Most importantly, he should not pick a compromise candidate who would please conservatives in the Senate. Many have suggested that the best approach would be for him to select a moderate or even a conservative who would have the best chance for confirmation. This would be a mistake that Democrats would rue for decades. This seat on the Supreme Court is pivotal and the nominee should be someone like his prior picks, Sonia Sotomayor or Elena Kagan, who will advance the president's values. Every president in history, since George Washington, has selected justices who share the president's core beliefs. Obama should not relinquish this opportunity.

Obama should pick a person of impeccable credentials with a compelling life story. For many reasons, an individual of color - an African-American or Asian American or Hispanic - would be ideal. This would add diversity to the court. In other words, Obama should pick someone who will be very difficult for conservatives to campaign against or to block. The nominee should be an individual who deserves admiration from those all across the political spectrum.

Selecting such a person also will allow Obama and the Democrats to run against the obstructionism of the Republicans. If the Republicans block Obama's pick for the Supreme Court, the vacancy will exist for the remainder of this term and likely all of next. If the new president nominates someone on the day of the inauguration, Jan. 20, the confirmation process will stretch through most of October Term 2016. It will mean that the Supreme Court will have to function with eight justices. Important issues, where the circuits are split, will not be resolved. The court will not be able to carry out

### Litigation

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Gerald Rosenberg has denied for now plaintiff's motion for reconsideration in shareholder case

### U.S. Supreme Court

#### Clerks, critics remember justice

The legal profession was struck by the death of U.S. Supreme Court Justice Antonin Scalia, a legal giant who impressed, inspired and challenged many with his writing and belief in originalism.

### Obituaries

#### Daniel L. Brenner 1951-2016

Los Angeles County Superior Court Judge Daniel L. Brenner died Monday night after being struck by an automobile. He was 64.

### Government

#### Riverside County officials seek expanded use of flash incarceration

To counter Riverside's dearth of jail beds and high early release rates, the district attorney and other local officials are trying to expand probation officers' authority to incarcerate a larger group of individuals for short periods when they disobey supervision rules.

### Judges and Judiciary

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Retired judge known for his tireless work ethic — and a ruling composed in verse

### Law Practice

#### Employment boutique opens outpost in Century City

Atlanta employment boutique Constangy, Brooks, Smith & Prophete LLP poached the co-head of Proskauer Rose LLP's California employment law group, Kenneth Sulzer, to open the firm's new Century City office Monday.

#### Beverly Hills Bar to honor IP veteran Morgan Chu

The Beverly Hills Bar Association will honor Morgan Chu Wednesday, bestowing upon him the Excellence in Advocacy Award.

its constitutional responsibilities. In fact, such a long delay in the confirmation of a Supreme Court justice is unprecedented in American history.

It is too soon to know what will happen when Obama makes his nomination for Justice Scalia's replacement. The Democrats need to get four Republicans to cross party lines to have a majority to confirm a nominee. Might four Republicans from swing states who are facing re-election in November be willing to do so depending on the nominee? Might they be able to pressure the Republican leadership for a vote? Or even if this happens will more conservative Republicans filibuster? All of this is impossible to know until a nomination is made.

It is likely that even if Obama nominates someone quickly the confirmation process will take a few months. It means that this term the Supreme Court will function with only eight justices. In fact, for any case already argued and voted upon, Scalia's vote will not count. A justice must be on the bench at the time of decision for his or her vote to count. This means that there likely will be a number of cases with a 4-4 split.

The Supreme Court then will face a choice to either affirm by an evenly divided court or to put the case over for argument next term. The latter has happened in many landmark cases. *Brown v. Board of Education*, *Roe v. Wade*, and *Citizens United v. Federal Election Commission* all were argued and then put over and reargued the next term.

*Fisher v. University of Texas*, the affirmative action case, poses a particularly interesting challenge for the court. Justice Kagan is recused from participating because she was involved in the case while solicitor general of the United States. Without Scalia, there is the possibility of a 4-3 decision. Would the court want to hand down a major ruling with only seven justices participating?

The longest lasting legacy of any president is who he or she puts on the Supreme Court. Antonin Scalia served 30 years and certainly was everything that the president who nominated him, Ronald Reagan, could have hoped for and wanted. President Obama should pick someone that 30 years from now he can look back on with satisfaction and pride. This is an opportunity that he must not squander.

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This past weekend, we lost a great justice, American and individual. Scalia applied his approach to the law in a principled rigorous way, even if it led to outcomes he might not have favored as a voter. By **Julian W. Poon**

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## Litigation

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### An empty seat on the court

Unsurprisingly, the intense political fight over Justice Antonin Scalia's successor began within hours of his death. By **Erwin Chemerinsky**

## U.S. Supreme Court

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