



Written by [Warren Mass](#) on February 16, 2016

## **GOP Senators Want Obama's Successor to Name Supreme Court Justice**

Republican senators, including Majority Leader Mitch McConnell (R-Ky.) have begun their constitutional role to give their advice and consent to the president in selecting a replacement for the late Supreme Court Justice Antonin Scalia, by advising President Obama to decline to nominate anyone.



McConnell (shown) was very prompt in expressing such a view, and included it at the end of the press release he issued on February 13, shortly after Scalia's death had been announced. Following his expression of praise for Scalia's "fidelity to the Constitution" and his and his wife's condolences to the Scalia family, McConnell's statement read:

The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.

What McConnell obviously meant by his statement was that since the Constitution charges the president with the responsibility of nominating Supreme Court justices and appointing them "with the advice and consent of the Senate," the voice of the people — expressed though their election of a president this November — will have an impact on the nominee that the newly elected president will send to the Senate. Presumably, a President Hillary Clinton or Bernie Sanders would nominate a different type of justice for the High Court than a President Donald Trump or Ted Cruz.

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President Obama, however, who is fond of using the term "democracy" (albeit incorrectly) to refer to our system of government (which is in fact a republic), made it clear in his own statement on the passing of Justice Scalia that he favors a different, less "democratic" approach than that proposed by McConnell. Obama also included one of his classic misuses of the term democracy in his statement, asserting: "Justice Scalia dedicated his life to the cornerstone of our democracy: The rule of law." By definition, the rule of law is a *republic*. A democracy is correctly defined as rule *by the majority* — something our Founding Fathers warned against.

After eulogizing Scalia, Obama continued:

I plan to fulfill my constitutional responsibilities to nominate a successor in due time. There will be plenty of time for me to do so, and for the Senate to fulfill its responsibility to give that person a fair hearing and a timely vote. These are responsibilities that I take seriously, as should everyone. They're bigger than any one party. They are about our democracy. [There he goes again!] They're about the institution to which Justice Scalia dedicated his professional life, and making sure it continues to function as the beacon of justice that our Founders envisioned.



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Obama's professed dedication to his constitutional responsibilities may be taken with a grain of salt by some members of Congress, who have in the past taken the president to task for his loose approach to such responsibilities. In particular, several senators strongly criticized the plan he announced in November 2014 to use executive action to grant protection from deportation to millions of illegal immigrants, declaring it was a blatant violation of the Constitution. Additionally, part of the Obama plan was blocked by an injunction issued by U.S. District Judge Andrew Hanen on February 16, 2015 — an injunction that was subsequently upheld by the Fifth Circuit in New Orleans. Following that ruling, a Justice Department spokesman announced that the DOJ would take the case to the Supreme Court, which has yet to act on it.

Among the strongest voices objecting to the Obama amnesty by executive action was presidential candidate Senator Ted Cruz (R-Texas), who posted on his Facebook profile:

[The president's] actions are not only unconstitutional and in defiance of the American people who said they did not want amnesty in the 2014 elections, but they are also unfair to every immigrant who has come to our nation legally.

When Cruz appeared on *Meet the Press* on February 14, host Chuck Todd asked Cruz why the Senate shouldn't just accept Obama's nominations, even if they might be ultimately rejected. Cruz answered passionately:

The Senate's duty is to advise and consent. You know what? The Senate is advising right now, we are advising that a lame-duck president in an election year is not going to be able to tip the balance of the Supreme Court. That we're going to have an election, and if liberals are so confident that the American people want unlimited abortion on demand, want religious liberty torn down, want the Second Amendment taken away, want veterans memorials torn down, want the crosses and stars of David sandblasted off of the tombstones of our fallen veterans, then go and make the case to the people.

The statements from Senate Republicans indicating that they would not vote on any Obama nominees for the High Court received both support and condemnation from two members of the Senate Judiciary Committee, which would hold confirmation hearings and vote on whether to send the nominee to the full Senate.

Republicans outnumber Democrats 11-9 on the committee.

Senator Patrick Leahy (D-Vt.), the ranking member on committee, said in an interview on February 13: "We've never had vacancy and nomination [for] a year that didn't get voted on. Obama's been elected twice. You have to assume if Mitt Romney had been elected he'd be making this nomination."

However, Committee Chairman Chuck Grassley (R-Iowa) made it clear that he has no plans to start up the confirmation process before the presidential election:

This president, above all others, has made no bones about his goal to use the courts to circumvent Congress and push through his own agenda. It only makes sense that we defer to the American people who will elect a new president to select the next Supreme Court Justice.

An article in the *Washington Times* on February 15 explored the possibility of Obama using the recess appointment process to place someone of his choosing on the Supreme Court. This procedure is provided for in Article 11, Section 2 of the Constitution, stating: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which



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shall expire at the End of their next Session.”

As a parliamentary maneuver, it is possible for Senate leaders to block recess appointments by not allowing adjournments of more than three days by holding pro forma sessions at which no formal business is expected to be conducted.

A Wikipedia article notes that in 2012 President Obama attempted to make four appointments during a pro forma session. However, on June 26, 2014, the Supreme Court determined that Obama had improperly used his presidential power to make these appointments, noting that while the Senate was in recess punctuated by pro forma sessions the period of time between the sessions was not long enough to invoke the power of recess appointments.

There would be other political drawbacks for Obama to using the recess appointment method, as well. The *Times* article noted:

Although prospects appear remote that Mr. Obama will get a nominee on the Supreme Court through the traditional process, the option of a recess appointment comes with major drawbacks such as igniting the Republican base in a presidential election year.

If a justice is installed through a recess appointment, he or she could serve only through the end of the next session of Congress — the end of 2017, at the latest.

The *Times* also cited indications from White House officials that they don't expect Obama to make a recess appointment and that he will wait until the Senate is back in session next week before nominating a successor to Scalia.

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