March 10, 2016

Senate Majority Leader McConnell
317 Russell Senate Office Building
Washington, DC 20510

Senate Judiciary Committee Chair Grassley
135 Hart Senate Office Building
Washington, DC 20510

Senate Minority Leader Reid
522 Hart Senate Office Building
Washington, DC 20510

Senate Judiciary Committee Ranking Member Leahy
437 Russell Senate Office Building
Washington, DC 20510

Dear Senate Majority Leader McConnell, Senate Judiciary Committee Chair Grassley, Senate Minority Leader Reid, and Senate Judiciary Committee Ranking Member Leahy:

We are retired Chief Judges of federal courts of appeal in the D.C. and the Third Circuits., appointed respectively by Democratic and Republican presidents. We write to urge the U.S. Senate to fulfill its constitutional role to advise and consent on a nominee selected by the President to fill the vacancy created by the death of Justice Antonin Scalia in an appropriately expeditious manner. Only in that way can the Supreme Court continue its vital work of declaring and harmonizing national law in our rapidly changing economy and areas of social concern.

Our several decades of judicial service at the Court of Appeals level have instilled a profound awareness of the critical need for a full component of nine Justices on the Supreme Court. This number is not only necessary to resolve conflicts among circuits but, just as important, it is essential to the Court's primary function of declaring what the law is in a rapidly moving society where crises frequently arise that must be decided at the highest judicial level whether conflicts in lower courts exist or not. How should captures from the terrorist conflicts be treated; should executions of domestic criminals be carried out or stayed; should regulations of monumental environmental impact and enormous cost be allowed to proceed or be stopped? These are decisions that should not be imposed by an equally divided Court on one part of the country but not other parts solely on the basis of the geographical boundaries of a circuit. In this term alone, decisions on the right to vote, the right of immigrants to resist deportation, of women to access assistance in reproductive decisions, and of public servants to organize effectively are slated for Supreme Court resolution and could well produce an even split on the Court. Surely the drafters of our Constitution did not envision a country whose citizens would not be treated equally under law by the Highest Court in such matters. Single instance recusals of Justices on grounds of conflict of interest or illness, inevitable though they may be, have been infrequent; Justice Scalia wrote "[e]ven one unnecessary recusal impacts the functioning of the Court," *Cheney v. United States District Court,* 541 U.S. 913 (2004)(memorandum of Justice Scalia), and in no case have they lasted over substantial parts of two terms, as could occur here were the Senate to delay action on a nominee until after the November 2016 presidential election.

Article II of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…Judges of the supreme Court." There is no express exception for years when a Presidential election is pending and no reason to infer one. There is instead ample precedent for confirming Justices during an election year; Justices Kennedy, Cardozo and Brandeis

were all confirmed in an election year. To recognize such an exception would set a dangerous precedent, and invite attempts to extend it to other situations where the Executive and Legislative branches are in political conflict with one another. The Supreme Court would be in danger of becoming a bargaining chip in such situations, although the Framers expressly sought to make it independent of the political desires or ambitions of the other branches.

It is in that spirit of reverence toward the intent of the drafters of the Framers, and against the backdrop of our experience with the workings of the federal courts of appeal and their special relationship with the Supreme court, that we urge you as leaders of the Senate conscientiously to fulfill your "advise and consent" role on any forthcoming nomination by the President to fill Justice Scalia's seat on the Supreme Court.

Sincerely,

Hon. Patricia M. Wald
Retired Chief Judge
United States Court of Appeals
for the District of Columbia Circuit

Hon. John J. Gibbons
Retired Chief Judge
United States Court of Appeals
for the Third Circuit