

## **Tweet to President Elect Trump:**

### **You Can Make the Judiciary Great Again by Appointing Moderate Judges to the Courts!**

*To Start the Beginning of an Independent non-political Third Branch of Government Our New President Should Take Chief Judge Roberts' Concerns about the Senate to Heart, Depoliticize the Judiciary by Selecting President Obama's Nominee, Judge Merrick Garland, to the Supreme Court and then Continue to Appoint Neither Conservative nor Liberal Judges and Search for Moderate Judges*

*By Louis G. Adolfsen<sup>1</sup>*

Following the untimely death of Justice Antonio Scalia, a vacancy arose on the Supreme Court. In normal times, the Senate would have held hearings on the president's nominee. But these are not ordinary times, the Senate refused to hold hearings and no one was selected.

The rationale for this attitude was that the new president should select the new justice even though there were a full 8 months to go before there would be a new president. The underlying rationale was that Obama would pick someone who was liberal and likely to uphold *Roe v. Wade* and might tip the balance of the court.

President Obama and the democrats argue against the Senate's position but to no avail. But a more important person and one who has shown that he is not governed by ideology even though he is conservative, spoke up on the subject. As reported in the New York Times:

It was not long ago that qualified nominees coasted onto the court, Chief Justice Roberts said last month, in a speech at New England Law, a private law school in Boston. In 1986, Justice Scalia was confirmed by a vote of 98 to 0. In 1993, Justice Ruth Bader Ginsburg was confirmed by a vote of 96 to 3.

These days, Chief Justice Roberts said, "the process is not functioning very well."

The last three justices should have sailed through, too, he said. He was referring to Justice Samuel A. Alito Jr., appointed by President George W. Bush, and Justices Sonia Sotomayor and Elena Kagan, appointed by Mr. Obama. Forty-two senators voted against Justice Alito, 31 against Justice Sotomayor and 37 against Justice Kagan.

"Look at my more recent colleagues, all extremely well qualified for the court," Chief Justice Roberts said, "and the votes were, I think, strictly on

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<sup>1</sup> The recommendations herein do not necessarily reflect the views of the members of Melito & Adolfsen P.C.

party lines for the last three of them, or close to it, and that doesn't make any sense. That suggests to me that the process is being used for something other than ensuring the qualifications of the nominees."

## **John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy**

By Adam Liptak, March 21, 2016

Judge Roberts himself has been criticized by conservatives by twice voting to uphold the Affordable Care Act known as Obama Care. What his vote showed was that someone with the ideological way of a conservative does not necessarily vote against everything that might be considered liberal legislation. Yet, he voted as he sought, without regard to how some people think he ought to have voted as a conservative appointee to the court.

As Adam Litpak of the New York Times commented:

If Justices Sotomayor and Kagan were "extremely well qualified for the court," it is a safe bet that Chief Justice Roberts has a similarly high regard for Judge Garland, with whom he served on the United States Court of Appeals for the District of Columbia Circuit.

The concerns of conservatives and liberals alike are the parties in power that will tip the court toward their point of view. This has been going on for a long time. *Roe v. Wade* which provided nationwide right to an abortion, was probably a bit far-reaching for its time. The result has been decades of efforts by the states to cut back on *Roe v. Wade*, once again pitting conservative versus liberal ideology on what should be a straight, legal question.

It has been said that President Dwight Eisenhower said that Earl Warren, who he appointed chief Judge of the Supreme Court, was one of his worst appointments. The Warren court issued the famous *Miranda* case with the warnings that are now benchmarked in our culture. Efforts to cut back on *Miranda* like efforts to cut back *Roe v. Wade*, have gone on for years. Similarly, *Mapp v. Ohio* was also decided by the Warren Court and efforts to cut back on its search and seizure requirements have plagued the courts for decades.

On the other side of the ledger, the blocking of the appointment of Robert Bork, who by all standards belonged on the U.S. Supreme Court, by a Democratic Senate was a dark stain on the Senate's involvement with the judicial process.

What these events show is that this back and forth between conservative and liberal Supreme Courts does no good to the judicial progress or the country as a whole. It makes this third branch of government a subset of the other two branches. Whoever is in

power can sway the court one way or another. This should not be the way that law is made in America. We should have independent, moderate judges who try to weigh the issues.

President Obama picked such a person in Merrick Garland. As Judge Garland is described in Wikipedia:

Garland is considered a judicial moderate and a centrist. Garland has been described by Nina Totenberg and Carrie Johnson of NPR as "a moderate liberal, with a definite pro-prosecution bent in criminal cases". Tom Goldstein, the publisher of *SCOTUSblog*, wrote in 2010 that "Judge Garland's record demonstrates that he is essentially the model, neutral judge. He is acknowledged by all to be brilliant. His opinions avoid unnecessary, sweeping pronouncements." Garland has a reputation for collegiality, and his opinions rarely draw a dissent. Likewise, Garland has only written fifteen dissents in his two decades on the court.

According to Wikipedia:

"the majority of Republican senators voted to confirm Garland, including Senators John McCain, Orrin Hatch, Susan Collins, and Jim Inhofe. Senators Mitch McConnell, Chuck Grassley, and Jeff Sessions were among those who voted against Garland. All of the 23 "no" votes came from Republicans, and all were based "on whether there was even a need for an eleventh seat" on the D.C. Circuit."

President-elect Donald Trump has already shown a willingness to listen to both sides on every issue. He was elected as a Republican but he's been considered liberal and he was registered as a Democrat. One senses that Donald Trump himself is a moderate and does whatever he thinks makes the most sense in the circumstances. Of course, in business he will drive hard to make a bargain but in terms of what is right and wrong his background does not suggest that he pushes too hard for any ideology. This is why he could really do something important in America if he would try to start the process and defy the Republican Senate, and the Republicans who he fought against in the primaries, by selecting President Obama's choice. This is not to favor the Democrats, it is to see if we can begin the process of having an independent judiciary. Judge Garland is not likely to overturn *Roe v. Wade*, but he is also unlikely to make changes with regard to the right to bear arms under the Second Amendment. He will, as his record shows, respect the decisions of the past and carefully weigh what should be done in the future. We need judges like him. If President-elect Trump does not think Judge Garland is the right person, he should nonetheless look for someone like him and continue that with all his judicial appointments. That would be a true service to the American Public and judiciary.

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