President has constitutional power to appoint, not just nominate, successor to Scalia

March 24 2016, by Phil Ciciora

After the death of Supreme Court Justice Antonin Scalia, Republican senators, led by Senate Majority Leader Mitch McConnell, announced that they would neither consider nor vote on any nominee to the court picked by President Barack Obama. According to a new paper co-written by two University of Illinois legal experts, that position may be more problematic - both pragmatically and constitutionally - than those senators realize.

"They justify their position by saying that no president has nominated a Supreme Court Justice during an election year in the last 80 years," said U. of I. law professor Robin B. Kar. However, Kar's research with co-author Jason Mazzone shows that in all 104 cases in which an elected president has faced a vacancy on the Supreme Court and began the appointment process prior to the election of a successor, the sitting president was able to both nominate and, with the advice and consent of the Senate, appoint a replacement justice.

"This is an important and unbroken line of historical precedent," Kar said.

By announcing in advance that they will break from this precedent, Senate Republicans are explicitly seeking to delegate the current president's Supreme Court appointment powers to an unknown successor, which is constitutionally tenuous ground, Kar and Mazzone

write.

"Senate Republicans have publicly explained that their aim is not to reject any particular Obama nominee, such as Merrick Garland, but rather to prevent full senatorial consideration of any and all nominees put forth by President Obama," Kar said. "These senators believe that the president's successor, rather than President Obama himself, should be given this appointment power."

And that's the crux of the problem: An outright refusal on the part of some senators to consider any nominee from President Obama is an attempt to delegate an elected president's Supreme Court appointment power.

"While the Appointments Clause of the Constitution allows Congress to delegate a president's appointment power in certain instances, it does not permit delegation with respect to Supreme Court appointments. Thus, this delegation raises a potential problem of the separation of powers," said Mazzone, the Lynn H. Murray Faculty Scholar in Law and co-director of the Program in Constitutional Theory, History, and Law at the College of Law.

"Constitutional text, structure and history - all of those factors suggest that the Senate may well lack the constitutional power to delegate the current president's Supreme Court appointment powers to an unknown successor - or to anyone else, for that matter," said Kar, also a professor of philosophy.

None of this means that the Senate cannot vote against President Obama's nominees, the authors caution.

"To be sure, the Senate can and should still thoroughly vet any candidate, including Garland, and scrutinize the candidate's record and suitability

for a seat on the Supreme Court," Kar said. "But the delegation problem identified in our paper provides a significant reason for Republican senators, who swore to uphold the Constitution, to rethink their current position. They should instead consider and vote upon Garland or any other timely submitted nominee."

However, an outright refusal to do anything at all with respect to a Supreme Court nominee is a different matter, the authors said.

"There is no precedent for that approach, and considerations of constitutional text and structure weigh against it," Mazzone said.

"The fact that this plan is even arguably constitutionally problematic means that the risks associated with it may be particularly severe," Kar said. "A break with such long-standing senatorial precedent is already risky, because there is no logical stopping point. It may be a sign that we are moving to a situation where appointments to the Supreme Court can only occur when the president and majority in the Senate are of the same party."

At minimum, the unprecedented nature of Republican senators' current plan is likely to make future Supreme Court appointments more difficult - for Republicans and Democrats alike, Kar said.

"But these risks are exponentially greater when, as here, one party acts in ways that may well be constitutionally questionable," he said. "If Democrats feel as though they've been strong-armed by Senate Republicans, they might be tempted to retaliate in unprecedented but constitutionally permissible ways."

For example, if Hillary Clinton wins the next presidential election, Obama might withdraw the nomination of Merrick Garland, a relative consensus candidate, and allow her to appoint a more liberal justice.

"Or, if Democrats were to win the Senate but lose the White House, a new majority of Democratic senators might undo the existing senatorial filibuster rule by simple majority vote," said Kar, also the Walter V. Schaefer Visiting Professor of Law at the University of Chicago. "They might then push an Obama appointee through more easily during a lame-duck session before the inauguration of the next president. Democrats might even try to persuade justices Ginsburg and Breyer to resign in early January so that Obama can push through three new justices instead of one. If there is even a perceived constitutional violation, all bets are off the table.

"Let's hope it doesn't come to that."

More information: Why President Obama Has the Constitutional Power to Appoint – and Not Just Nominate – a Replacement for Justice Scalia, papers.ssrn.com/sol3/papers.cf … ?abstract_id=2752287

Provided by University of Illinois at Urbana-Champaign