
FOREWORD

SHAPING SCOTUS: THE IMPACT OF THE 2016 PRESIDENTIAL ELECTION ON THE FUTURE OF THE SUPREME COURT

*Christopher M. Connors**

INTRODUCTION

The 2016 presidential election promised to be one of the most interesting of all time, and laid the foundation for the *Albany Law Review's* annual fall symposium. The two main candidates involved—Republican and eventual 45th President of the United States, Donald J. Trump,¹ and Democrat and former United States Secretary of State, Hillary Clinton²—created a media flurry. From heated debates to *Saturday Night Live* skits,³ the Nation was flooded with media coverage of both the election and the candidates themselves. While many maintained the belief that Hillary Clinton would inevitably win the presidency, in an unexpected turn of events early on November 9, 2016, businessman Donald Trump took the election.⁴

Several months prior, on February 13, 2016, United States Supreme Court Justice Antonin Scalia passed away,⁵ leaving a vacancy on the Court. Despite then President Barack Obama's nomination of Merrick Garland, Chief Judge of the United States Court of Appeals for the District of Columbia, the Republican-

* Executive Editor for Symposium, *Albany Law Review*; J.D. Candidate, 2017, Albany Law School; B.A., 2014, Western New England University.

¹ See Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

² See *Biographies of the Secretaries of State: Hillary Rodham Clinton*, U.S. DEP'T STATE: OFF. HISTORIAN, <https://history.state.gov/departmenthistory/people/clinton-hillary-rodham> (last visited May 15, 2017).

³ See *Saturday Night Live: Donald Trump vs. Hillary Clinton Debate Cold Open* (NBC television broadcast Oct. 1, 2016), <https://www.nbc.com/saturday-night-live/video/donald-trump-vs-hillary-clinton-debate-cold-open/3108903?snl=1>.

⁴ See Flegenheimer & Barbaro, *supra* note 1.

⁵ See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

controlled Senate refused to hold a hearing or vote to fill the vacancy.⁶ This meant that the next President would undoubtedly be tasked with nominating the next Supreme Court Justice.

Naturally, a focal point of the presidential debates and other speeches given by each candidate leading up to the election was each candidate's plan to appoint the next Supreme Court Justice.⁷ This discussion became even more critical when information on the decreasing health of Justice Ruth Bader Ginsburg was released,⁸ and American voters realized the potential that the next President could nominate not only one, but several, Justices to the highest Court in the United States. There was no doubt that the 45th President was going to have an effect on the Supreme Court, and the *Albany Law Review* elected to examine just how much of an impact he or she would have.

Volume 80 of the *Albany Law Review* held its 2016 symposium, entitled: *Shaping SCOTUS: The Impact of the 2016 Presidential Election on the Future of the Supreme Court*, in the Dean Alexander Moot Court Room at Albany Law School on October 20, 2016. The symposium brought together professors from all different areas of expertise to discuss important issues and cases that are likely to be in front of the Supreme Court in the coming months and years, and how those decisions could be affected by the particular person elected to the highest office in the country because the person elected would ultimately decide who to nominate to the Court. Our panelists and moderator discussed issues including Second Amendment gun rights, campaign finance, election rights, sex-based citizenship laws, and criminal law and procedure, to name a few.

MODERATOR

This year, we were honored to have Albany Law School's own Professor Stephen Clark moderate the symposium. Professor Clark joined the Albany Law School faculty in 2000. Prior to coming to Albany Law School, Professor Clark worked in private practice with Winston & Strawn in Chicago, specializing in employment-related

⁶ See Manu Raju et al., *Senate GOP: No Hearings for Supreme Court Nominee*, CNN (Feb. 23, 2016), <http://www.cnn.com/2016/02/23/politics/joe-biden-supreme-court-senate-republicans/>.

⁷ See Rebecca Shabad, *How Could the Next President Reshape the Supreme Court?*, CBS NEWS (Jan. 5, 2016), <http://www.cbsnews.com/news/the-next-president-could-reshape-the-supreme-court/>.

⁸ See Ruth Bader Ginsburg: *Her View from the Bench*, CBS NEWS (Oct. 9, 2016) <http://www.cbsnews.com/news/ruth-bader-ginsburg-her-view-from-the-bench/>.

appellate litigation; was a visiting professor at the University of Toledo College of Law; was a law clerk to the Chief Justice of the Supreme Court of Indiana; and was a staff assistant to former Senator Al Gore. Professor Clark's research interests include employment discrimination, federalism, and lesbian and gay rights. He holds a B.A. from the University of Tennessee and a J.D. from Yale Law School. Before moderating our event, we were fortunate enough to have Professor Clark provide an overview of the effect that the next Supreme Court Justice could have on Second Amendment rights.

PANELISTS

Professor Eugene Mazo is a specialist in the law of democracy. He has taught at the George Mason University School of Law in Virginia, at Rutgers Law School in New Jersey, and at the Wake Forest University School of Law in North Carolina. Professor Mazo's latest book, *Election Law Stories* (with Joshua A. Douglas), was published by Foundation Press in April, 2016. He is currently working on a second book, *Democracy by the People: Reforming Campaign Finance in America* (with Timothy K. Kuhner), which is scheduled to be published by Cambridge University Press in 2017. Professor Mazo's research focuses on the regulation of the political process and on democratic development. A graduate of Columbia College, he received his master's degree from Harvard, a doctorate from Oxford, and his law degree from Stanford.

Professor James Acker is a Distinguished Teaching Professor at the University at Albany's School of Criminal Justice. He earned his J.D. at Duke Law School and his Ph.D. at the University at Albany. His scholarship focuses on issues of criminal law and criminal procedure, including capital punishment, wrongful convictions, and the legal rights of children. His most recent book is entitled *Lawlemmas: In Search of Principled Choices in Law, Justice, and Life* (Carolina Academic Press 2016). With Albany Law School Professor Vincent Bonventre and his colleague at the University at Albany, Hans Toch, Professor Acker is co-editing a forthcoming volume, *Living on Death Row* (American Psychological Association Books), which focuses on the legal and psychological issues involved with death row confinement.

Professor Martha Davis teaches constitutional law, human rights, and professional responsibility at Northeastern University School of Law, where she is also a faculty director for the law school's human

rights program and as well as its legal innovation lab. From 2015 to 2016, Professor Davis held the Fulbright Distinguished Chair at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund, Sweden, and she remains an affiliated scholar with the Institute. Professor Davis has written widely on women's rights and social justice issues, with scholarly articles in the *Yale Law Journal*, the *North Carolina Law Review*, *Fordham Law Review*, and the *Albany Law Review*. Her most recent book, published by Cambridge University Press in 2016, is *Global Urban Justice: The Rise of Human Rights Cities*, which critically discusses the potential that human rights cities hold for global urban justice. Prior to joining the Northeastern Law faculty in 2002, Professor Davis was Vice President and Legal Director of the NOW Legal Defense and Education Fund. As a women's rights practitioner, she was counsel in a number of cases before the U.S. Supreme Court, including *Nguyen v. INS*, a case involving a challenge to sex-based citizenship laws in which Professor Davis argued before the Court. Professor Davis also served as the first Kate Stoneman Visiting Professor of Law and Democracy at Albany Law School.

Professor Robert G. Boatright is a Professor of Political Science at Clark University and the Director of Research at the National Institute for Civil Discourse. His research focuses on the effects of campaign and election laws on the behavior of politicians and interest groups, with a particular focus on primary elections and campaign finance laws and practices. He is the author or editor of six books, including *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2016); *Getting Primaried: The Causes and Consequences of Congressional Primary Challenges* (University of Michigan Press, 2013); and *Interest Groups and Campaign Finance Reform in the United States and Canada* (University of Michigan Press, 2011). He received a Ph.D. from the University of Chicago and a B.A. from Carleton College.

Professor Andrew Kent teaches and writes about constitutional law, foreign relations law, federal courts and procedure, national security law, public international law, professional responsibility, and legal ethics. He received the Dean's Distinguished Research Award (2016-2017) for his scholarship. After graduating from Yale Law School, Professor Kent clerked for the Hon. Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit and the Hon. Carol B. Amon of the U.S. District Court for the Eastern District of New York. Before joining Fordham's faculty, he was a Climenko Fellow at

Harvard Law School and an attorney at both Sullivan & Cromwell and WilmerHale. From 2014 to 2015, Professor Kent served as Senior Counsel to the Solicitor General, State of New York, Office of the Attorney General. Professor Kent is a member of the New York City Bar's Professional Responsibility Committee and also provides appellate representation to the indigent as a member of the Pro Bono Panel of the U.S. Court of Appeals for the Second Circuit.

IN THIS ISSUE

This year's issue predominantly focuses on the future of the Supreme Court. It first contains an article that thoroughly examines the historical background and political machinations of nominees past who were rejected by the Senate.⁹ The next article considers the effects of the recent "McConnell Majority" phenomenon on the nomination and confirmation process,¹⁰ while another article reviews the nomination process as a whole for Supreme Court Justices based on three different theories.¹¹ The final two articles contain two case reviews of topics that were of great debate during the 2016 election season with the potential to be continuing issues for the Supreme Court in the future.¹²

CLOSING THOUGHTS

This year's symposium was a great success, due in most part to the tremendous efforts of our esteemed moderator and panelists. The event received coverage from several news stations and local papers, and was even featured in a report by *Time Warner Cable News*.¹³ The timeliness of the event, which occurred the day after the third and final 2016 presidential debate,¹⁴ and the hard work of the entire Editorial Board of the *Albany Law Review*, also greatly contributed

⁹ Benjamin Pomerance, *Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 ALB. L. REV. 627 (2016/2017).

¹⁰ J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making*, 80 ALB. L. REV. 743 (2016/2017).

¹¹ Aimee Brown, *Judicial Confirmation Theory through the Lens of Constitutional Interpretive Theory*, 80 ALB. L. REV. 807 (2016/2017).

¹² Martha Davis, *Sex-Based Citizenship Classification and the "New Rationality,"* 80 ALB. L. REV. 851 (2016/2017); Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 ALB. L. REV. 877 (2016/2017).

¹³ See Geoff Redick, *Albany Law Dissects Debate from Supreme Court Standpoint*, TIME WARNER CABLE NEWS (Oct. 20, 2016), <http://www.twcnews.com/nys/capital-region/politics/2016/10/20/albany-law-dissects-debate-from-supreme-court-standpoint.html>.

¹⁴ See *Full Transcript: Third 2016 Presidential Debate*, POLITICO (Oct. 20, 2016), <http://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

to the symposium's success. I would like to thank our moderator and panelists, as well as the authors who contributed well-written and enlightening articles to this very special issue. I also would like to thank Albany Law School President and Dean Alicia Ouellette, Dean Rosemary Queenan, and *Albany Law Review* faculty advisor Professor Vincent Bonventre for their support of this law review.