

opinion

VACANCY CREATES UNCERTAINTY ON SUPREME COURT



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The current controversy about filling a vacancy left by the death of Justice Antonin Scalia threatens to weaken the U.S. Supreme Court for roughly two years. The recalcitrance of Senate Republicans and their refusal to either hold confirmation hearings or even meet with President Barack Obama's nominees is wrongheaded and injurious to the court as well as to other sectors of government and to the economy more generally. Two recent headlines underscore those injuries.

On Feb. 9, the court issued an order to the Environmental Protection Agency that its Clean Power Plan rules could not go forward; those rules, in legalese, were "stayed." The order was a 5-4 decision that included Scalia in the majority. Most notably, the order staying a government agency from doing its job was unprecedented. At no time in its history had the court stopped an agency from carrying out its constitutional obligations.

The Clean Power Plan has its defenders as well as its detractors. Nonetheless, it is subject to ongoing litigation and arguments are scheduled to be heard about its legality this June in the U.S. Court of Appeals for the District of Columbia. Those arguments will take place; however, this highly unusual action by the Supreme Court signals its view of the merits of the case be-



AP FILE

The Supreme Court will be weakened if its vacancy isn't filled before the November election, says the former dean of the University of Cincinnati College of Law.

fore the justices have the benefit of the lower court's ruling and before they either grant or deny a petition to be heard in their own court.

Last week, Dow Chemical settled an antitrust lawsuit that was pending before the court as a result of the vacancy. The lawsuit has been pending for a decade and the lower court awarded the plaintiffs in that class action \$1.06 billion. Rather than risk either an outright loss or a 4-4 split, which would leave the lower court's ruling stand, Dow decided to write a check to the plaintiffs for \$835 million. Quite simply, the uncertainty of a favorable verdict forced Dow's hand and led to the settlement.

Both of these examples demon-

strate the foolishness of keeping a vacancy open for any period of time. In the case of the Clean Power Plan, government must be able to operate; it must be able to govern. The current stay hampers action, slows the country's transition to a clean energy economy and introduces uncertainty in the economy more generally. Similarly, the possibility of multiple 4-4 splits on the court also brings uncertainty to businesses that require resolution for their ability to plan and to invest.

The founders of the country took great pains to organize our federal government in such a way that the three branches of government would work within a system of

COMING WEDNESDAY

What do Tuesday's election results mean for the Greater Cincinnati region and politics as usual?

Enquirer Opinion Editor Cindi Andrews will be live at Cincinnati.com at 1 p.m. Wednesday to get top local Democratic and Republican leaders' answers to that question.

Hamilton County Democratic Chairman Tim Burke and longtime Republican insider Chip Gerhardt will represent their parties.

Questions may be emailed to candrews@enquirer.com or Tweeted at [@cindiincincy](https://twitter.com/cindiincincy).

checks and balances. In part, that system is designed to diffuse power rather than concentrate it in any one branch. Our tripartite system is intended to further democracy by enabling a multitude of voices to be heard in Congress, in the executive branch, and, when controversies arise, to be decided by the judiciary. The failure to fill Scalia's vacancy upsets that balance, adversely impacts government and business and does a severe disservice to the American citizenry.

The president has a constitutional duty to nominate and the Senate has a constitutional duty to give or withhold their advice and consent. In short, confirmation hearings should be held because our Constitution requires no less. And, confirmation hearings should be held so our elected officials can govern and so business can operate with greater certainty.

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