

THE MERCURY

Editorial: Death of Justice Scalia raises stakes for 2016 election

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In this most extraordinary political season, prepare yourself for another novelty: a seat on the U.S. Supreme Court that isn't filled for more than a year. After Justice Antonin Scalia's death on Feb. 13, it's almost certainly going to happen.

If someone like Elena Kagan, President Obama's second Supreme Court appointee, and a person who had made little impact in legal circles prior to her nomination, could garner only 63 affirmative Senate votes in 2010 when she was up for confirmation, it's hard to see how anyone the president is likely to select to replace Scalia could get the 60 votes needed in a Republican-controlled Senate to overcome a filibuster.

Kagan was replacing the liberal justice John Paul Stevens and represented no threat to the court's narrow ideological divide (which is sometimes overstated given how Justice Anthony Kennedy, a Republican-appointee, has provided the court's liberal wing with several major victories, such as same-sex marriage).

By contrast, Scalia's replacement could swing the court firmly into the liberal camp for decades to come. The stakes are vastly higher this time and everyone knows it. Republicans will dig in their heels and hope their candidate prevails in November. And before the left starts bringing up "Constitutional duty," Democrats would do the same if the roles were reversed.

That doesn't mean Obama should defer to his successor and fail to appoint someone. It's his job to name a replacement and he should. And if he wants any chance of getting the nominee confirmed, he'll select someone with a clear record of judicial or ideological moderation — or even a maverick. That would put Republicans in the difficult position of having to calculate the odds of facing a more liberal nominee in the event a Democrat wins this fall.

But the ultra-partisan Obama isn't likely to follow that route, since he considers the court no less important for his party's agenda than Republicans do for theirs. Critics can bemoan the extent to which judicial appointments have become politicized, but it's a little late in the day for such laments — not with the high court determining the fate of everything from the Affordable Care Act to the Clean Power Plan.

Moreover, the nominating process has changed since the irrepressible Scalia was appointed to the court in 1986.

As Trevor Burrus at the Cato Institute noted after Scalia's death, "Now, two qualifications are paramount for possible Supreme Court justices: 1) youth; 2) ideological conformity. The grueling nomination process also means that prospective nominees must have led ideologically milquetoast lives, never having said too much to push the wrong people's buttons, but having said just enough to convince the party that they are a predictable, party-line vote."

So don't be surprised if the nation's highest court muddles through the next year with eight members and many of the votes end up with 4-4 ties, which means any cases the Supreme Court cannot reach majority agreement on will revert to decisions made by lower courts.

Make no mistake: Even if Scalia were still alive, this presidential election was likely to determine the future of the court. Not only was Scalia 79, but so is Kennedy, while Stephen Breyer is only slightly younger. And liberal Justice Ruth Bader Ginsburg will turn 83 next month. The actuarial clock is ticking.

Now, however, there is no doubt about the matter: The next president will shape the balance of the court, maybe even for the next generation. A huge election just got even more important.