

# INVESTOR'S BUSINESS DAILY®

## Justice Scalia's Death Is Political Earthquake, May Save Obama Agenda

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Justice Antonin Scalia's death is a stunning blow to conservatives that could hardly have come at a more momentous time.

In recent weeks, the conservative majority on the Supreme Court had, by all appearances, begun to lay the groundwork for the dramatic legal repudiation of President Obama's agenda — from immigration, to the environment to health care. With conservatives now deprived of their majority, big pieces of the Obama agenda will remain stymied, but it will take a Republican president to keep them from getting a new lease on life in 2017.

### Questions Of 'Deep Significance'

After the 2015 Supreme Court term ended with a bruising defeat for conservatives in *King v. Burwell*, a case over the legality of ObamaCare subsidies being disbursed via the federally run HealthCare.gov, Republican approval of the court fell to a record low 18%. Scalia's frustrations bubbled over as he blasted the ObamaCare ruling authored by Chief Justice John Roberts as "jiggery-pokery."

But even in that derided Roberts opinion and in a series of dissenting opinions, the conservative justices were clearly, if quietly, laying out the legal basis for correcting what they saw as the court's undue deference to the executive branch, allowing it to determine what a law means, as long as the interpretation was plausible.

Roberts wrote that the availability of billions in ObamaCare subsidies was "a question of deep 'economic and political significance'; had Congress wished to assign that question to an agency, it surely would have done so expressly." The judicial branch, not the executive branch, is the ultimate arbiter of what a law means when it comes to such weighty questions, Roberts clarified.

The stage had been set for a historic rebuke of a president for overstepping his political authority, and all the pieces of the puzzle seemed to be falling into place.

### 'Take Care' To Uphold Immigration Law

Last month, the justices agreed to hear the Obama administration's request that the court lift a lower court's injunction blocking the implementation of the deferred action program granting de facto legal status to 4.3 million undocumented immigrants, mainly parents with children born in the U.S. But in accepting the case for review, the justices expanded the scope of the question beyond whether the president had exceeded his authority under immigration law. They also decided to consider whether the disregard of the law had been so blatant as to violate the constitutional mandate that the president "take care" to implement the law faithfully.

A Cato Institute brief on the case notes that some granted legal status would otherwise have had to wait up to 21 years to petition for a visa and spend 10 of those years outside the U.S. "Congress explicitly rejected the exact type of expansive family-unity principle that (the deferred action program) is enacting administratively," the authors wrote, even though they personally back legalizing the status of the undocumented.

While it seems unlikely that there are five votes to overturn the injunction, the legality of the law would still be left for a court with a different ideological tilt to decide, possibly in 2017.

### **Clean Power Plan Injunction**

Scalia's death came just days after the 5-4 conservative majority broke with a lower court and granted the request of 26 states for a stay of the Environmental Protection Agency's Clean Power Plan. While the court has already acknowledged the EPA's authority to regulate greenhouse gases, the Clean Power Plan goes far beyond regulating fixed sources of carbon emissions, making states meet emissions targets and shift to renewables.

The surprise ruling was interpreted by opponents as a clear signal that the court would eventually rule that the plan exceeded the Obama administration's authority. But an ideological shift on the court, if a Democrat is elected in 2016, means the Clean Power Plan might have a future after all.

### **The House Suit Over ObamaCare**

Another case expected to reach the Supreme Court in 2017 looked likely to deliver an unprecedented rebuke of a president for usurping the power of the purse that the Constitution entrusts to Congress. Now that outcome may depend on the November election.

A federal judge already has signaled that she'll rule in favor of the House in its ObamaCare lawsuit involving a spending program which compensates insurers for reducing deductibles and other out-of-pocket costs charged to low-income policy holders. University of Michigan law professor Nicholas Bagley, one of ObamaCare's most respected legal defenders, has conceded, "the president appears to have broken the law."

The legal question over funding of ObamaCare's cost-sharing subsidies is straightforward, so the only real question in the case is whether the House has standing to sue. That would be a first, but

the case itself is unprecedented: The Obama administration unilaterally decided to appropriate \$10 billion-plus a year — not as a one-time thing, but on a permanent basis.

Beyond these legal battles over Obama's agenda, major voting rights and public-sector union cases to be decided by the Supreme Court in coming months could have further entrenched Republicans' advantage in the House, while undermining a key bulwark of Democrats' political power. Now Republican hopes in those cases with long-term political consequences also will likely hinge on the 2016 election.

Based on past precedent, cases that deadlock 4-4 in the coming term are likely to be reargued when there is a full bench, presumably in early 2017. That's the conclusion of SCOTUSblog: "The most likely outcome by far is that the Court will order the affected cases reargued next term," wrote publisher Tom Goldstein. To be sure, that isn't the only possibility, though. Most reporting since Scalia's death has assumed that any cases that end in a 4-4 ruling would simply defer to the lower court's decision in the case.