



Without Antonin Scalia, what's next for the Supreme Court?

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Justice Antonin Scalia's unexpected death Saturday comes at a time when the Supreme Court is more consequential than ever. In this term, the court is hearing cases on the Obama administration's executive actions on immigration, contraception coverage, union contributions, abortion restrictions, affirmative action and more.

The high court is now left with eight justices, instead of nine, and it could be several months, if not longer, before the vacancy left by Scalia is filled. While the confirmation process typically takes two to three months, the Republican Senate majority leader has vowed that the Senate will refuse to consider any nominee before a new president is elected. With 11 months left in President Obama's second term, the court could be without a ninth justice until well into 2017.

In this term, too, his absence will be felt. According to Supreme Court rules, decisions are not final until the moment they are handed down, noted the Associated Press. If Scalia did cast a vote, but the decision has not been announced, his vote would be voided in those cases. And if the eight justices deadlock 4-4, the ruling of the lower court will stand.

"Even if President Obama nominates and even if the Senate were to go along with someone and confirm, the soonest would not be in time to decide these cases from this term," said Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute. "At best they would be pushed for re-argument in the fall which, again, is even closer to the presidential election."

On other cases where there was a wider division among the justices, the decisions will proceed.

"It really just depends on what the court internally wants to do with a lot of these different cases," Shapiro said. "Only about 15 to 25 percent of the cases end up 5-4 so it's not that the entire work of the Supreme Court comes to a grinding halt."

If the Republican leadership in the Senate remains committed to carrying over the vacancy to the next president, there will not be a nominee until at least November. And even then, especially if the Republicans maintain control of the Senate, it will have to be a nominee who could garner support in both parties.

Ordinarily, "because the opening was unexpected, the nomination would not be forthcoming for a couple of months, and then the confirmation process would take several more months," wrote Tom Goldstein, the publisher of SCOTUSblog. "Theoretically, that process could conclude before the November election. But realistically, it cannot absent essentially a

consensus nominee -- and probably not even then, given the stakes. A Democratic president would replace a leading conservative vote on a closely divided Court. The Republican Senate will not permit such a consequential nomination -- which would radically shift the balance of ideological power on the Court -- to go forward."

Shapiro said the president has two options: He could try to "hit a home run" by nominating a staunch ideological ally who would have always been a nonstarter with a Republican Congress. Or, he could pick someone who is perceived as moderate and widely accepted - like D.C. Circuit Court Judge Sri Srinivasan who was confirmed by a vote of 97-0 in May 2013.

"The point to make there would be to put pressure on the Republicans and call them obstructionist," Shapiro said. "The Republicans would say, 'look we have no problem with this judge in particular...after the presidential election we will process his nomination in due order but this is an institutional prerogative we're going to be protecting.'"

Here's one wildcard scenario: the president could use a recess appointment to make a nomination to the court. The Senate could try to block such an appointment by not ever going into a formal recess, although they will have to at the end of his term.

"If he wanted to play hardball, he could make an appointment at that time. I think it would be a mistake," George Washington University Law Professor Jonathan Turley told CBS News. "I think history would judge him poorly to put in a recess appointment in the twilight of his term."

Turley noted that 12 people have been put on the court with recess appointments, and eleven were later confirmed by the Senate.

One benefit to the debate, Shapiro said, is the fact that it will likely spark renewed discussion about judicial appointments in the 2016 election. And he says that's a good thing.

"Legal pundits always talk about how judges should be a more important issue in election campaigns, and now...it's going to be," Shapiro said.

What lies ahead for key decisions this term:

Immigration: 26 states sued President Obama over his executive action to grant 5 million undocumented immigrants a reprieve from deportation. In January, the Supreme Court agreed to hear the case after the 5th U.S. Circuit Court of Appeals upheld the injunction blocking the administration's moves. The Court has not yet heard the case. The injunction could remain in place if the justices rule this term but are divided, or if the case gets kicked to the next term.

Contraception coverage: In 2014, the Supreme Court ruled that closely-held private companies like Hobby Lobby are exempt from the Obamacare contraception mandate if the firm's owners have religious objections. But several groups still found the act of filing for an exemption onerous. The court has agreed to hear seven different cases in which appeals courts came to different conclusions about whether the exemption was still too burdensome for religious organizations. If the court is divided -- as Goldstein believes it will be now -- the lower court rulings will stand and the law would be applied differently in different parts of the country.

"In some parts of the country the contraceptive mandate could be applied to these nonprofits and others it would not," Shapiro said.

Union contributions: Last month, the Supreme Court heard arguments in *Friedrichs v. California Teachers Association*, which considers whether public school teachers must pay fees to unions, whether or not they are part of the union. Goldstein wrote that Scalia's death is likely to have a big impact on this case, since he was expected to be part of a 5-4 decision that would limit mandatory union contributions. Without Scalia, the court will be deadlocked.

The 9th U.S. Circuit Court of Appeals was the last to rule, upholding a 1977 case that allows public unions to collect dues from both members and non-members, as long as money is not used for political action.

Abortion restrictions: Justices agreed to hear a major abortion case for the first time in eight years. At stake are two new restrictions in Texas: one which requires doctors who perform abortions to have admitting privileges at a hospital no further than 30 miles away from the location at which the abortion is performed, and another which requires abortion clinics to be constructed like surgical facilities. The outcome will likely affect laws in several states seeking to limit access to abortion.

"In my estimation, the Court was likely to strike those provisions down. If so, the Court would still rule - deciding the case with eight Justices," Goldstein wrote.

Affirmative action: Goldstein wrote that the Supreme Court was likely to limit the use of affirmative action in *Fisher v. University of Texas at Austin*, Goldstein wrote. Since Justice Elena Kagan was recused from the decision, there were just three liberal justices hearing the case. The conservatives will still likely prevail, just with a smaller majority, he said.

One person, one vote: This case examines whether states must consider the total number of residents when drawing congressional districts -- as has always been the practice -- or merely the total number of eligible voters. The lower court decision upheld the principle of "one person, one vote," so states would continue basing congressional maps on total population if the court is deadlocked.