

Forbes

Don't Confirm Scalia's Replacement Until After the Election

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February 14, 2016

Justice Antonin Scalia was one of a kind, a giant who heralded a renaissance of both originalism and textualism. He reoriented the study and practice of law towards the meaning of the actual constitutional and statutory text. As we've seen in cases like *District of Columbia v. Heller*—confirming the individual right to bear arms, where both sides argued over the meaning of the Second Amendment in historical context—we're all originalists now.

Scalia was also, of course, a conservative icon: the justice most likely to be identified by lawyers and civilians alike, and the one most likely to be read by law students. Agree or disagree with him on any particular case—I did plenty of both—he was a force to be reckoned with.

Which is all the more reason that in this hazy, crazy, bizarre election year, his seat should remain vacant until the American people can decide whether they want to swing the balance of the Supreme Court, possibly for decades. For Scalia is one of four conservatives on the Court, who, when joined by Justice Anthony Kennedy, form a majority that has been crucial for enforcing the First and Second Amendments, federalism, the separation of powers, and other constitutional protections for individual liberty.

If he's replaced by a progressive jurist—or even a “moderate” one—all that comes crashing down and there will be no further check on the sorts of executive abuses that have only increased under a president who thinks that when Congress doesn't act on his priorities, he somehow gets the authority to enact them regardless. (And many criminal-procedure cases—regarding the Fourth Amendment protection against warrantless searches and the Sixth Amendment right to confront witnesses, for example—feature heterodox coalitions of the more principled justices against the more pragmatic ones, so a centrist would be bad there too.)

In other words, this is one of the rare instances where I agree with a strategy laid out by Senate Majority Leader Mitch McConnell and Judiciary Committee Chairman Charles Grassley, namely not to consider any nominee until after the presidential election. To put a finer point on it, given how consequential Justice Scalia's replacement will be, it would be irresponsible for the Senate to confirm *any* nominee President Obama may send them.

A new president will take office in 11 months and the stakes are just too high in our politically schizophrenic nation to change the Supreme Court's direction without an interceding popular vote. On the other side of the ledger, only about 15-25% of the cases each year are decided on a 5-4 vote, so an eight-justice court can be almost fully functional.

Indeed, because it's exceedingly unlikely that a new justice could be confirmed in time to consider and decide cases by the end of June, this term's close cases will either be released with a 4-4 non-decision (affirming the lower court without setting a precedent) or carried over to the next term. Next term starts in October, so pushing until the November election would cause minimal disruption

And if the Democrats keep the White House, at that point there would really be little justification for the Senate to continue its policy and the normal process of hearings and votes could begin—subject to filibuster or not, depending on how that separate procedural debate goes. Given that no justice has been nominated and confirmed during a presidential-election year since before World War Two, there would really be very little remarkable to having Justice Scalia's replacement play out this way. (Justice Kennedy was confirmed in 1988, but (a) he was nominated in the year before and (b) this was President Reagan's third attempt to fill a vacancy that originated in July 1987.)

Finally, while some may argue that it's somehow "illegitimate" or even unconstitutional for the Senate not to provide its "advice and consent" as specified under Article II, Section 2, there's simply no basis to conclude that this provision constitutes an obligation to act on presidential nominations. Much as senators have defended their institutional prerogative by placing "holds" on executive nominees—and just like the Senate refused to take up nominees to the National Labor Relations Board in a case that resulted in the Supreme Court's unanimous invalidation of President Obama's recess appointments—they can certainly decide to slow-walk this Supreme Court nomination.

This is purely a political debate; I'm not making a legal argument beyond the axiomatic one that the Senate doesn't have to do anything it doesn't want to. Justice Scalia's death has given the Republican Party the opportunity to make the Supreme Court into the national election issue it claims more Americans should prioritize.

Refusing to consider President Obama's nominee—whoever he or she is—certainly ratchets up the stakes in an already volatile campaign, but giving the American people an opportunity to weigh in on such an important matter is every legislator's paramount duty

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