



Supreme showdown: GOP Senate may stall on court until after election

Nita Kumar and Lesley Clark

February 13, 2016

The sudden death of Supreme Court Justice Antonin Scalia sets up a high stakes election-year showdown in which the voters - as much as or more than the president and Senate - may ultimately decide the direction of the court.

President Barack Obama will face enormous pressures first to nominate a liberal, magnified by the surprisingly strong challenge of self-described socialist Bernie Sanders for the Democratic nomination to succeed him. Liberal groups are emboldened by Sanders' early successes against Hillary Clinton and pressing already to have their way with Obama's choice.

At the same time, that makes it all but certain the Republican Senate will refuse to even consider Obama's choice, preferring to leave the seat vacant and hoping that a Republican could win the White House this November and make a new choice - even though they also may lose control of the Senate at the same time. GOP leaders in the Senate and for the party's presidential nomination moved quickly to signal that the Senate will indeed wait until after the election.

"The American people should have a voice in the selection of their next Supreme Court justice," Senate Majority Leader Mitch McConnell, R-Kentucky, said in a statement Saturday. "Therefore, this vacancy should not be filled until we have a new president."

Obama said in an address from California that he plans to "fulfill my constitutional responsibilities to nominate a successor in due time." He said he would do so in "plenty of time for congress to fulfill its responsibilities and give the nominee a fair hearing."

Democrats also want Obama to nominate a replacement immediately and want the Senate to act now - before the election.

“It would be unprecedented in recent history for the Supreme Court to go a year with a vacant seat,” Senate Minority Leader Harry Reid, D-Nevada said in a [statement](#). “Failing to fill this vacancy would be a shameful abdication of one of the Senate’s most essential Constitutional responsibilities.”

“The Republicans in the Senate and on the campaign trail who are calling for Justice Scalia’s seat to remain vacant dishonor our Constitution,” Clinton said in a statement. “The Senate has a constitutional responsibility here that it cannot abdicate for partisan political reasons.”

It’s been more than 80 years since a [Supreme Court](#) justice has been confirmed in an election year to fill a vacancy that occurred that year, experts said.

But Obama, who faces criticism from those on the left who think he has not gone far enough on a variety of issues, won’t abide a moderate who might have a better chance at winning some moderate Republican support in the Senate.

“We fully expect and encourage President Obama to swiftly nominate a replacement justice who shares our progressive values, including protecting abortion rights and overturning Citizens United,” said Charles Chamberlain, executive director of Democracy for America, a liberal group.

“I can’t speak to the politics, but there’s no good reason for failing to confirm when you have qualified judges out there...failing to confirm would leave the Court short staffed for nearly a year.”

Elizabeth Wydra, president of the liberal-leaning Constitutional Accountability Center

Thomas Keck, a professor of constitutional law and politics at Syracuse University's Maxwell School of Citizenship and Public Affairs, said Obama could presumably nominate someone moderate enough to win moderate votes, or appeal to a valuable constituency such as picking an Asian American or someone older who might not serve as long but has a distinguished record.

“My guess is that the White House will try, knowing full well it might not work,” Keck said, noting that forcing Senate Republicans to block a qualified Asian or Hispanic candidate could carry “political cost” for Republicans.

One name frequently mentioned as a potential Obama jurist is [Sri Srinivasan](#), who Obama nominated to the DC circuit. He's well respected and would be the first Asian American on the high court.

Scalia, one of the court’s conservative icons, was nominated to the Supreme Court in 1986 by President Ronald Reagan. His replacement would tip the balance of power of the nation's highest court, which now consists of four conservatives and four liberals. Conservative Justice Anthony Kennedy sometimes joins with the liberals on high profile issues, including gay rights and the death penalty.

“There has never been an election-year confirmation that would so dramatically alter the ideological composition of the court,” said Ed Whelan, who clerked for Scalia and currently serves as the president of the Ethics and Public Policy Center. “Senate Republicans would be grossly irresponsible to allow President Obama, in the last months of his presidency, to cement a liberal majority that will wreak havoc on the Constitution. Let the people decide in November who will select the next justice.”

“EVEN A MODERATELY LIBERAL NOMINEE WOULD SHIFT THIS TO 5-4 LIBERAL-CONSERVATIVE BALANCE, WITH ENORMOUS IMPLICATIONS FOR THE NEXT PRESIDENT. THE INTEREST GROUP MOBILIZATION WILL BE MONUMENTAL, AND ALL SIDES WILL MOVE TO A REAL WAR FOOTING. ITS GOING TO BE A BLOODY, BARE-KNUCKLE DONNYBROOK” Charles M. Cameron, professor of politics and public affairs at Princeton University

The Republican presidential candidates, who debated Saturday night in South Carolina, agreed. Donald Trump said it’s up to McConnell to block the nominee. “It’s called delay, delay, delay,” he said.

Former Florida Gov. Jeb Bush noted that Obama “has every right to nominate” a candidate, but said, “in return we should have consensus” – which he said he did not expect.

Republican presidential candidates tend to emphasize three points when they discuss their prospective Supreme Court appointments: They want someone who would outlaw most abortions, dilute the executive power they believe Obama has exercised too much, and kill Obamacare.

Hillary Clinton and Bernie Sanders, the Democratic candidates, both stress the need to have justices who would better control money in politics and uphold equal rights laws. They want stricter enforcement of laws making it easier for minorities to vote, for instance, and for women to be assured of equal pay.

“GIVEN HOW CONSEQUENTIAL JUSTICE SCALIA’S REPLACEMENT WILL BE—DECIDING ALL THOSE 5-4 CASES AND SERVING ON THE COURT FOR DECADES—IT WOULD BE IRRESPONSIBLE FOR THE SENATE TO CONFIRM ANY NOMINEE PRESIDENT OBAMA MAY SEND THEM. ELECTION 2016 IS NOW ABOUT THE DIRECTION OF THE SUPREME COURT. LET THE PEOPLE DECIDE”
Cato Institute Senior Fellow Ilya Shapiro

Bill Dal Coll, a veteran GOP campaign operative, said Scalia’s death will push the the court to the top of the agenda for voters in both parties.

“In the general election, it will highlight that the next president will have one, maybe four picks,” Dal Coll said. “From a conservative standpoint, because Scalia was such an icon, I think it energizes Republicans more.”

But even if Republicans win the White House, they could have a rough time retaining control of the Senate next year. Of the 34 seats up in 2016, the GOP holds 24 and Democrats 10. Democrats need a net gain of five seats to win control, four if the party wins the White House.