

How Justice Scalia's Absence Will Affect Pending US Supreme Court Cases

By [Prof. Marjorie Cohn](#)

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The death of Supreme Court Associate Justice Antonin Scalia raises a number of questions: What will be Scalia's legacy? What will happen to the cases pending in the Supreme Court? Will President Obama successfully fill Scalia's seat on the high court? And how will Scalia's death affect the 2016 presidential election?

Scalia's Record on the Court

Scalia, who was appointed to the Supreme Court by President Ronald Reagan in 1986, was a radical right-wing ideologue who called himself an "originalist," purporting to interpret the US Constitution the way its framers did. He eschewed the idea that the Constitution is a living document that keeps pace with the times. And when voting to allow capital punishment for crimes committed by juveniles, he rejected the Supreme Court's precedent that the Eighth Amendment's banning of cruel and unusual punishments should be interpreted in light of the "evolving standards of human decency that mark the progress of a maturing society."

Scalia favored unlimited corporate election spending and he wrote that the Second Amendment grants an individual the right to bear arms. He [opposed](#) reproductive rights, universal health care, same-sex marriage, affirmative action, voting rights, immigrants' rights, labor rights, LGBT rights and environmental protection. When questioned about his vote to anoint George W. Bush president in *Bush v. Gore*, [Scalia barked](#), "Get over it."



Demonstrators with the "People for the American Way" outside of the Supreme Court in Washington, February 15, 2016. (Doug Mills / The New York Times)

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During the oral arguments in *Fisher v. University of Texas*, the affirmative action case pending in the high court, [Scalia said](#) he was not "impressed by the fact that the University of Texas may have fewer" Black students. He added, "Maybe it ought to have fewer. I don't think it stands to reason that it's a good thing for the University of Texas to admit as many Blacks as possible."

Many of Scalia's opinions demonstrate how out of touch he was with ordinary people. Authoring an opinion that created the right of police officers to chase people without probable cause or reasonable suspicion, [Scalia quoted Proverbs](#): "The wicked flee when no

man pursueth.” He could not imagine why an innocent young person of color might run when he sees a police officer. And when voting to repeal Miranda rights, Scalia [wrote in dissent](#), “Counsel’s presence is not required to tell the suspect that he need not speak. The interrogators can do that.” As if a police officer would be looking out for the rights of a suspect.

Scalia opposed televising Supreme Court arguments. He once sanctimoniously [declared](#), “Law is a specialized field, fully comprehensible only to the expert.”

The Pending Cases

Several cases to be decided this term have already been argued and the justices have likely voted on them. Opinions are being written. So what will happen now? Even if Obama were to nominate a replacement, he or she would not be confirmed before the current term ends in June.

Cases in which Scalia was assigned to author the majority opinion will probably be set for re-argument next term, which starts in October, hopefully with a new justice. If Scalia was part of a five-justice majority, the court will now be divided 4-4. In cases in which there is no majority, the lower court decision will be “affirmed by an equally divided court.” It will create nonbinding Supreme Court precedent. Some cases may be decided on narrow procedural grounds in order to avoid equally divided rulings.

Nine of the 13 US Courts of Appeals have a majority of judges who were appointed by Democrats. Thus, many cases in which the court is evenly divided and the lower court decision stands will have liberal outcomes.

In *Friedrichs v. California Teachers Association*, it appeared that public sector unions would lose the right to collect mandatory dues from their members in order to fund collective bargaining. Now it appears the case will result in a tie, leaving the lower court decision in place. That means unions in California and 22 other states would retain their right to collect dues.

In 11 of the 13 times a vacancy occurred during a presidential election year, the Senate acted on the president’s nomination.

Evenwel v. Abbott is a voting rights case. The issue is who should be included when creating voting districts: all who reside in them or only eligible voters? A 4-4 tie would leave the lower court decision in place, which upheld the counting of everybody. People who are not eligible to vote include children, non-citizens, people formerly convicted of felonies and prisoners. With the exception of prisoners, most of these people deemed ineligible to vote live in urban areas that are largely Democratic. As a result, a tie in this case would also have a liberal outcome.

Zubik v. Burwell is a “religious liberty” challenge to a regulation under the Affordable Care Act that requires some employers to provide birth control to women workers if they don’t sign a form opting out. The case will be argued next month and the lower courts are divided on the issue. A 4-4 tie would result in no decision. Most lower courts across the country have upheld the “contraceptive mandate.”

Whole Woman’s Health v. Hellerstedt is perhaps the biggest threat to *Roe v. Wade* to reach

the Supreme Court. Texas imposed onerous restrictions on clinics that perform abortions. If there were a 4-4 tie, the lower court decision would stand, resulting in the closure of most clinics in Texas, but not elsewhere. Where a woman lives would determine whether she could obtain an abortion. Associate Justice Anthony Kennedy might vote with the liberals to overturn the restrictions placed on women's health clinics. But even if Kennedy does not vote with the liberals, Scalia's absence still eliminates a broader risk that previously existed: If Scalia had participated in that decision, the court may well have allowed states to impose restrictions.

Fisher v. University of Texas is an affirmative action case about whether the University of Texas can maintain a race-conscious admissions plan. Since Associate Justice Elena Kagan recused herself because she had worked on the case when she was solicitor general, only seven justices can vote on it. Kennedy will be the swing vote. If he swings to the right, the university's affirmative action program will be struck down. Scalia's death eliminates the possibility of a tie vote.

United States v. Texas is a challenge to Obama's plan to defer deportation for nearly 5 million undocumented immigrants. A 4-4 split would defeat the program in the Fifth Circuit Court of Appeals, but the US Justice Department could secure authorizations to go forward with the plan in other circuits. Had Scalia not died, the Supreme Court would probably have imposed broader limitations on Obama's authority to issue executive orders.

A critical [climate change decision](#) is also pending before the high court. Obama has charged the Environmental Protection Agency (EPA) with reducing carbon emissions by 32 percent by 2030. In a highly unusual recent move, the Supreme Court issued a 5-4 emergency order blocking the plan, which was put on hold pending a decision by the US Court of Appeals for the DC Circuit. The circuit court, which is generally liberal, refused to grant the stay before the high court did so. The DC circuit court will hear the case this summer. The EPA could change the plan slightly and expect the circuit court to allow it to proceed.

What Happens Next?

Senate Majority Leader Mitch McConnell vowed to block anyone Obama might choose to nominate to fill the vacancy on the court. The GOP candidates piled on, reiterating that Obama should refrain from nominating someone to fill Scalia's seat so the next president could make the nomination. They know that Obama has an opportunity to change the balance of what has been a conservative court for four decades.

But Obama does not have the discretion to refrain from nominating a replacement for Scalia. The US Constitution says that when a vacancy occurs on the Supreme Court, the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court." The language is mandatory, not permissive. There is no exception for vacancies that occur near the end of a president's term.

Interestingly, McConnell [wrote in 1970](#) that "the Senate should discount the philosophy of the nominee" and that "the president is presumably elected by the people to carry out a program and altering the ideological direction of the Supreme Court would seem to be a perfectly legitimate part of a presidential platform."

If no justice is appointed until the next president takes office, there will be a vacancy on the high court for nearly a year, hobbling its ability to carry out its constitutional function.

Republicans disingenuously claim that no Supreme Court nominee has been confirmed in an election year. But Justice Anthony Kennedy was nominated by President Reagan and confirmed in 1988, with nearly unanimous support from Democrats. And in 11 of the 13 times a vacancy occurred during a presidential election year, the Senate acted on the president's nomination.

For the most part, the Senate has deferred to presidents' choices for Supreme Court nominees.

Obama will probably nominate a moderate such as Srikanth Srinivasan. In 2013, on a 97-0 vote, the Senate unanimously confirmed Srinivasan, an Indian-American judge, to the US Court of Appeals for the DC Circuit. He had served as principal deputy solicitor general, arguing some 20 cases on behalf of both the George W. Bush and Obama administrations. Although he doesn't have a long paper trail, Srinivasan would probably vote with the liberal justices.

It appears that anyone Obama nominates will not get a vote in the Senate. A president's nomination is referred to the Senate Judiciary Committee, which is currently comprised of 11 Republicans and 9 Democrats. That committee should investigate the nominee's background and hold a hearing at which the nominee is interrogated. The committee should then vote on the nominee. If the committee votes against the nominee, the nomination will not reach the Senate floor for a decision. If it does reach the Senate floor, a simple majority is required to confirm a nominee. But Republicans can filibuster the nomination, which means 60 votes would be necessary for confirmation. The Senate has 54 Republicans and 44 Democrats.

Although filibusters of Supreme Court nominations are rare, a filibuster seems possible in this case because the political system is unusually polarized. If McConnell stands by his threat to block Obama from carrying out his constitutional duty to nominate someone to the vacant seat, there could be a standoff until the election. The Democrats are likely to take back the Senate, and it would fall to the next president to fill the vacancy. Although Obama can make a recess appointment until the Senate resumes on February 22, he is much more likely to nominate a candidate in due course, and wait for the Republicans to hoist themselves on their own petard, knowing that Independents and moderate Republicans would bridle at such blatant obstructionism.

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Articles by: [Prof. Marjorie Cohn](#)

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