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High Stakes: Shaping The Post-Scalia Supreme Court



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Whoever said, “When you change one justice on the U.S. Supreme Court, you change the court,” was correct. On Feb. 13, 2016, Justice Antonin Scalia passed away. Where will the new justice fit with the other eight justices?

Lecturing in California on the cases from the court over the last 15 years, I realized that patterns of personal judicial affinities were plainly visible. For some years, the “5-to-4” reference in my talks told the audience exactly who I was talking about. In case after case, Justices Scalia, Anthony Kennedy, Samuel Alito, Clarence Thomas and John Roberts were the five. Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan were the four. Some years ago, Justice Kennedy began to occasionally join the four, and led the court on gay rights and limitations on the death penalty.

We all have our own hopes for the qualities the new justice will possess. Philosophically, I have three hopes. First, I hope the new justice starts considering any case that includes doubt about what is the right result. Second, I hope the new justice comfortably works with inductive and deductive reasoning. And third, I hope the new justice has a willingness and ability to consider the effect of a decision on those affected by it.

There are several traditional obstacles to appraising whether new nominees fit in with the present court:

First, there is personal favoritism for certain specific results in cases. For example, I am concerned that Judge Merrick Garland, the present nominee, will not be as strong on protections of the Fourth Amendment as Justice Scalia was. I would also like a new justice to combine with other justices and set aside the decision in *Rapanos v. United States*, an opinion authored by Justice Scalia. Ten years ago, he wrote a fractured holding deciding which navigable waters were deserving of environmental protection that suggested rivers like the San Joaquin in California were not covered because they go partly dry at times.

The second obstacle is the fact that any nominee might, for example, be “good” on the subject of “one

person, one vote" and "bad" on women's rights in specific situations.

Third, our views are filtered through court coverage. Because the court is the best unending law show in town, its many critics bring their own perspectives. Two wonderful, very different, recent books make the point. *Uncertain Justice*, by Laurence Tribe and Joshua Matz, wields a polite tone tempered with deep-cutting distinctions and profound jurisprudential points, while Erwin Chemerinsky's *The Case Against the Supreme Court* bluntly hits hard against historical judicial mistakes and shows their current relevance. Both books are good reads. The fundamental point here is that lawyers and senators in confirmation hearings can become enamored of the legal craft of an applicant, versus how he or she will actually rule. Justice Roberts' confirmation hearings had that quality because of his obvious qualifications.

Fourth, there are the nominee's handlers. These Beltway habitués do all in their power to prevent the American public from learning what a nominee might actually do.

Fifth, and most important, any human is a dynamic set of intellectual impulses that change with experience. The influence of the other eight justices on the court is demonstrated by many historical examples. The intellectual alliances between Justices Oliver Wendell Holmes and Louis Brandeis, Justice Harry Blackmun and Chief Justice Warren Burger (until it dramatically broke apart), and recently Justices Scalia and Thomas, are good examples. Senators' questions during confirmation hearings asking, "Are you more like X or Y?" are trying to get at this compatibility issue.

If you look at the court's decisions since Justice Scalia's passing, you will see the new dynamism that the new justice will step into. Will the new justice help accelerate the trend of more progressive decisions? In the last year or two, there have been greater progressive energies within the court. Will the new justice be closer to the power centers of Justice Kennedy and Chief Justice Roberts? Justice Kennedy has asserted his concept of liberty, which includes the individual development of personality by all citizens as manifested in his gay rights and death penalty decisions. Has Justice Roberts decided he cannot lead a court from the dissenting position? How is it he ruled for defendants in three cases last term? Will the new justice have the candlepower to sway Roberts a time or two? A tall order.

Since Justice Scalia passed, Justices Thomas and Alito have been in a number of lonely dissents. Will the new justice take the place of Scalia and return the court to a frequent 5-to-4 balance? Will Justice Sotomayor, the most progressive justice on the court, have a new ally tipping the court balance to a solid progressive alignment?

The power of the court was demonstrated by three cases decided on June 27 this year. In *McDonnell v. U.S.*, Justice Roberts, for a unanimous court, limited the definition of "official act" in the bribery case of a former Virginia governor. How will the new justice align with those who are drawing lines between officeholder bribes on the one hand and protected rights of petition and political contributions on the other? In *Voisine v. United States*, six justices held that reckless domestic assault qualified to forbid the possession of a firearm by the defendant. How will the new justice fit into gun cases? In *Whole Woman's Health v. Hellerstedt*, with Breyer writing and Kennedy joining, the court held that two Texas laws placed too heavy a burden on a women's right to an abortion. How will the new justice fit into the court's abortion cases?

Finally, where will the new justice stand on the issue of *Citizens United v. FEC*? No more pernicious doctrine has eroded public participation in the political process of our country. How does an incumbent-minded Senate view that case in light of a nominee?

To say choosing the new justice is important or even crucial doesn't really tell the story of what is in play. We will see in the months ahead how the new justice will fit into the court and affect the development of American law.

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