

As official veneration of right-wing justice continues

Divisions emerge over appointment of Scalia's successor to US Supreme Court

By Tom Carter
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Over the past week, the American population has been subjected to a media barrage glorifying the late Supreme Court Justice Antonin Scalia as an “extraordinary legal figure.”

Played over and over on all the major news channels was a video clip showing President Barack Obama and his wife ceremonially contemplating Scalia's casket as it reposed in the Great Hall of the Supreme Court on Friday.

Scalia's funeral on Saturday was presented as a major national event, with political figures from both parties jostling each other in front of the television cameras to be seen making their obeisances. Vice President Joseph Biden, former Vice President Dick Cheney and other war criminals were in attendance. The funeral was held with full religious pageantry at the Catholic Basilica of the National Shrine of the Immaculate Conception. Scalia's son, a Catholic priest, used the occasion to attack the separation of church and state.

“God blessed Dad, as is well known, with a love for his country,” Father Paul Scalia said, in remarks featured prominently by the media. The elder Scalia, he said, saw in the country's “founding, as did the founders themselves, a blessing—a blessing quickly lost when faith is banned from the public square or when we refuse to bring it there.”

Former law clerks and other figures in the political establishment lined up to make their obsequious tributes to “Nino” (Scalia's nickname) on talk shows and in newspaper columns. The viewing public was inundated with fond remembrances of “Nino's” love of wine, sense of humor, large personality, sharp wit, rigorous work ethic, sincere religious devotion and so forth.

By any objective standard, Scalia was a corrupt political thug and sadist whose contribution to Supreme Court jurisprudence is best summed up by the phrase, borrowing from Lenin, “reaction all down the line.” He advocated dictatorial powers for the president, abrogation of basic democratic rights, chauvinist backwardness on every social

question and the general prostitution of the law to the major corporate and financial interests.

What was “extraordinary” about Scalia as a jurist was only the provocative arrogance with which he crudely distorted facts, history, law, logic and the English language to suit his predetermined—invariably reactionary—political ends.

While the American political establishment and media have united behind efforts to canonize Scalia, internal divisions have emerged over the appointment of his successor.

Thus far in the 21st century, the nine-justice US Supreme Court has been divided between two main ideological camps. At the time of Scalia's death, these camps consisted on the one hand of the more traditional right-wing justices Ruth Bader Ginsburg, Elena Kagan, Sonia Sotomayor and Stephen Breyer (together, the supposedly liberal faction), and on the other hand the ultra-right bloc of Scalia, John Roberts, Samuel Alito and Clarence Thomas (the so-called conservative faction). The ninth Justice Anthony Kennedy is described as a “swing justice,” but he more often than not sided with the latter bloc.

The death of Scalia has been met with efforts to shift this framework in one direction or the other. Within hours of the discovery of his body, bitter squabbles had broken out over whether his successor should be appointed before or after the upcoming election.

Leading Republicans have closed ranks around the position that Scalia's successor should not be confirmed until after the November 2016 election, in hopes that a Republican president will have the right to appoint the successor, instead of Obama. The Republican position is that this represents “tradition,” although six Supreme Court justices have been confirmed in an election year since 1900. The Democrats' position, no less motivated by pragmatic electoral and political considerations, is that a successor should be appointed immediately.

Scalia's death is likely to affect the outcomes of some of the significant cases pending in the Supreme Court's present term, which covers the period from October of last year until June 2016. While the Supreme Court does not report the individual justices' positions before a formal opinion is issued, circumstantial evidence from oral arguments and past decisions suggest that several decisions that would have been 5-4 with Scalia in the majority will now take the form of a 4-4 tie vote. A tie vote, in general, means that the decision of the lower court is not disturbed.

Two pending cases in particular reflect ongoing divisions in the American capitalist class over the best policies with which to advance its interests and contain social discontent.

One case, *Fisher v. University of Texas*, concerns the fate of controversial "affirmative action" policies (racial preferences) at American universities. During oral arguments in that case, Scalia delivered a racist diatribe in which he contended that black students should attend "lesser schools." The ostensibly liberal justices favored retaining affirmative action as a necessary measure to foster a "diverse elite," which the population will regard as "legitimate."

Based on the positions of the justices during oral arguments and their prior decisions, the Supreme Court's decision in the *Fisher* case was expected to be against affirmative action. (Justice Kagan recused herself because she worked on the case while a solicitor general.) Scalia's death leaves seven justices to vote on the outcome, which makes the "swing" vote of Justice Kennedy the likely deciding factor.

Another important case, *Friedrichs v. California Teachers Association*, concerns the legality of so-called agency shop agreements for public employees. The legality of these agreements is a major issue for the Democratic Party and the political establishment as a whole. These agreements force public employees to pay a portion of their salary to the unions, which then provide substantial campaign contributions to Democratic Party politicians. In return, the unions work hand-in-glove with management and the politicians to police the workers and block their struggles.

The "liberal" faction of the Supreme Court would have retained agency shop agreements, on the grounds that they help to promote "labor peace," i.e., the suppression of working class struggles. The "conservative" faction, including Kennedy, was expected to deem the agreements illegal. Before the case arrived in the Supreme Court, the union position was endorsed by the Ninth Circuit Court of Appeals, so Scalia's death would seem to make a 4-4 tie (and thus a union victory) the likely outcome.

Obama has not yet nominated a successor, but several likely names have been circulated in the media. One is

federal appeals court Judge Merrick Garland, who was twice previously considered for appointment by Obama. However, as one Associated Press article cynically noted on February 15, "as a 63-year-old, white male, Garland doesn't check the diversity or youth boxes."

While Garland, a Clinton appointee, is generally considered one of the most conservative choices, he wrote a scathing opinion in 2013 denouncing the Central Intelligence Agency's refusal to confirm or deny it had any records regarding its assassination program.

Appeals court Judge Sri Srinivasan, 48, is another apparent candidate. He was confirmed unanimously to his current post in 2013, and the Obama administration contends that the Republican-controlled legislature can have no objection to his credentials. Srinivasan represented former Enron executive Jeffrey Skilling before the Supreme Court in 2010, and he has also defended corporations accused of human rights abuses abroad. In 2005, he was awarded the Office of the Secretary of Defense Award for Excellence by the Department of Defense.

Attorney General Loretta Lynch, who replaced Eric Holder in 2015, has also been named as a possible replacement for Scalia. Lynch is a thoroughly establishment figure with a reactionary record, including helping BP escape the consequences of the 2010 Deepwater Horizon oil spill, imposing martial law in Baltimore after the killing of Freddie Gray in 2015, promoting "reforms" following the revelations by NSA whistleblower Edward Snowden that actually entrenched domestic spying, and facilitating scandalously light settlements in connection with Wall Street criminality.

Despite this record, she has the support of sections of the political establishment on the grounds that she is a black woman. The *New York Times'* Jonathan Martin and Patrick Healy wrote Tuesday: "The combination of her gender and race, her ample qualifications and her previous support among Republicans would put immense pressure on them to at least vote on her nomination."

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