Constitutional Corner – Replacing Scalia.

March 11th would have been Antonin Scalia's 80th birthday.

When I read the news, I gasped. What a great loss for the world of conservatism in general and originalist jurisprudence in particular. No longer will we be able to chuckle at the cocky but witty barbs in Scalia's dissents, or marvel at the lucidity of his majority opinions. But we must mourn quickly, for the forces of progressivism are chomping at the bit. The "Living Constitution" devotees are gathering their forces to assault the White House incessantly until the President relents and chooses one of their own as a replacement. Will he?

Antonin Scalia was confirmed to a seat on the Supreme Court on September 17, 1986 by a vote of 98–0! His confirmation followed close on the heels of a much more contentious confirmation of Chief Justice William Rehnquist, and the Senate Judiciary Committee was plumb worn out. President Reagan had appointed Scalia to the DC Circuit Court of Appeals only four years before and his short stint as an appeals court judge had quickly demonstrated his clear thinking and textualist approach to interpreting the law.

An early over-achiever (valedictorian of his high school and his class at Georgetown University), Scalia graduated magna cum laude from Harvard Law in 1960. He first worked for an international law firm, taught law at the University of Virginia, and then went into government service, first as General Counsel for the Office of Telecommunications Policy, then Chairman of the Administrative Conference of the United States and finally as Assistant Attorney General in the Office of Legal Counsel during the presidency of Gerald Ford. Following Ford's defeat by Jimmy Carter, Scalia worked for a few months at the American Enterprise Institute before returning to the classroom, this time at the University of Chicago Law School. Ronald Reagan found him there and offered him a seat on the 7th Circuit court of Appeals, which Scalia turned down in hopes of obtaining an offer to the DC Circuit Court instead. As hoped, the offer soon came.

A review of Scalia's dissenting and majority opinions is beyond the scope of this essay. I encourage you to refer to his Wikipedia page for a brief summary.

Although I support wholeheartedly Scalia's textualist approach, which he describes quite well in his book: "A Matter of Interpretation," where Scalia and I depart paths is over Natural Law. Scalia, being a textualist, was suspicious of any law he could not see, touch or read. Natural law, i.e., the "laws of nature" in the Declaration of Independence, is just that – it is law created by God which, not having been revealed (as in the Ten Commandments) must be discovered by inquiry and reason. In this speech from 2009, Scalia stated: "I believe in natural law, but I

believe that in democratic political institutions it is up to the people to decide what they think natural law demands…. We all disagree on natural law, why say what a bunch of judges think is the answer?" Thus Scalia would not refer to natural law in a decision unless that natural law precept was already imbedded in a statute; this however removes it from the realm of natural law and brings it kicking and screaming into the realm of positive law. Once it becomes positive law, Scalia is willing to tell us what the words of the statute meant to those who ratified them.

One message comes through loud and clear in *A Matter of Interpretation*: the common exhortation that we must consider the "intent of the Framers" when seeking to understand a clause of the Constitution, is improper. The Framers (those who drafted the Constitution in Philadelphia) did not "make" the document, i.e., they did not bring it to life, the ratifiers in the thirteen ratifying conventions did that. To a textualist, what the Framers intended by their words is immaterial, what they achieved by those words is all that matters. And what they achieved is to be found in the understanding of the ratifiers. This was Scalia's view.

And he nearly single-handedly brought such a view back to the Supreme Court after 40-50 years of absence. Scalia is dead, long live Scalia.

Now he must be replaced, or must he?

Let's review: Article 3 of the Constitution creates "one supreme Court, and … such inferior Courts as the Congress may from time to time ordain and establish." Article 3 goes on to describe the jurisdiction of the Court and a few specifics about judges, but that's about it. The composition of the Supreme Court and all inferior courts is left completely to the discretion of Congress. If Congress wants the Court to remain at its present eight justices they could pass a law tomorrow so stating. Of course the President would veto it, but were there a veto-proof majority in Congress who liked the idea of eight justices, that's the way it would be.

The very first Supreme Court, with John Jay as its Chief, had six justices, and got along until the justices complained of all the circuit riding they were required to do. Over the years, Congress has created a total of eleven Supreme Court seats, two of which were subsequently disestablished, leaving us with the present nine. And who can forget FDR's attempt to pack the court with six additional justices (who would see FDR's New Deal legislation in a more favorable light than the justices then on the Court).

Article 2 states that the President "shall have power" to make appointments, not that he shall make the appointments. The President could leave the seat unfilled until he leaves office next January. He won't, of course. Scalia's death provides the opportunity to cement the left-lean of the court. A nomination is imminent.

Finally, the President's appointment power must utilize the "advice and consent" of the Senate. Ideally, the Senate would advise the President who they feel is best qualified for the job, the President would nominate someone from that list, and the Senate would confirm them. The ideal will not happen.

It is likely the Republican-dominated Senate will forward, or perhaps already has forwarded a list of conservative judges to replace the ideological "hole" left by Scalia, the list might even contain the name of someone who approaches Constitutional interpretation from the same textualist viewpoint as the departed Justice.

The President, however, will be under considerable pressure from the Left to nominate someone as liberal as can possibly be confirmed by a Republican-dominated Senate; practically speaking, that means a left-leaning moderate perhaps with other compelling "qualifications" such as being a woman, an immigrant, or both.

The Senate is under no compulsion to confirm any nominee. It may surprise you (it did me) to learn that rejection of Supreme Court nominations is not a recent phenomenon, though it may seem as such. The first Supreme Court nomination turned down by the Senate occurred in 1795, when George Washington nominated John Rutledge as Chief Justice. The Senate, considerably smaller then, rejected Rutledge by a vote of 10–14. Since then nine other Presidents have seen their nominees rejected by votes, and others "delayed indefinitely." As this short essay outlines, there have been many contentious nominations in recent times.

The other question on everyone's mind is whether the Senate will even hold confirmation hearings should the President forward the name of a moderate who is clearly qualified for the job. But consider "The Thurmond Rule." In 1980, Sen. Thurmond proposed the following rule: "The party not occupying the White House shall block any and all judicial nominees brought before the Senate during a presidential campaign season." Although unwritten, the "rule" is clearly understood, and has indeed been invoked by both Democrats and Republicans, sometimes as early as April or May before a presidential election, when the Presidency was held by the opposite party. In July of 2004, Senate Democrats filibustered four Circuit Court nominees. During the debate on these nominations, Senator Leahy (D) cited the 'Thurmond Rule' as part of the justification for their action. In 2008, now Judiciary Chairman Leahy refused to even consider several outstanding Circuit Court nominees.

Those with more time to spare might want to watch then Senator Joe Biden explain why it is ill-advised to replace a justice during a presidential campaign. He concludes that "Senate consideration of a nominee [during such times] is not fair to the President, the nominee, or to the Senate itself." What goes around comes around.

The longest a seat on the Supreme Court has remained unfilled is 391 days;[1] thus there is ample precedent for leaving this one unfilled until a new President is selected. But the potential effect of leaving it unfilled will be 4-4 tie votes. These have the effect of leaving the lower court ruling intact, which may be good or bad. The lower court ruling then becomes "law" for all the states which comprise that circuit.

Perhaps more important than this immediate appointment will be the 3 or 4 appointments the next President is likely to make, as the ever-aging Justices take retirement, or follow Scalia. The next President's appointments could set the tone of the Court for the next 20-30 years, and thus determine whether the U.S. adheres to the Founders' plan (what's left of it) or drives off further into social experimentation.

That there is this much drama over the selection of a Supreme Court Justice reveals much. This Daily Signal writer thinks the suspense over this issue proves that we have created a far-too-powerful Supreme Court. There is no doubt that we have. The American people have lost track of many of our foundational principles, among them the nature of law and the purpose of government. We must re-learn these principles before it is too late. Yet, we also must face the fact that the average American is oblivious to the true effect of the Court or even who sits on it. According to a poll taken in 2012, only 20% of Americans could name Chief Justice John Roberts, 2/3 could not name a single justice on the court. It is sad to confront this reality: While the average American could care less about the Court, other Americans are intent on using the Court to their advantage. And they have, to great effect. Once the Court staked itself out as "supreme in the exposition of the law of the Constitution,"[2] various advocacy groups quickly figured out that what they could not achieve legislatively could nevertheless be achieved judicially.

In his 1833 work: *Commentaries on the Constitution*, Associate Justice Joseph Story *wrote:* "The truth is, that, even with the most secure tenure of office, during good behavior, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day." (emphasis added) That is what the Court has become: an expression of the passions and politics and prejudices of the day. This must stop.

Let me close by describing a nightmare scenario. I can't take original credit for this, on 29 February I attended a Federalist Society presentation in Norfolk, VA, by Professor Josh Blackman, who teaches at South Texas College of Law. Professor Blackmon warned of this: What if the American people, fed up with the intransigence of Republican Senators over

[1] In 1969-1970, when Associate Justice Abe Fortas was forced to resign, replaced by Harry Blackmun of Roe v. Wade fame.
[2] So stated in Cooper v. Aaron (1958).

stonewalling the President's nominee to replace Scalia, decide to elect enough Democrat Senators (1/3 of the Senate will be up for re-election) to place Democrats once again in control of that House of Congress. The new Senate takes their seats on January 3, 2017. From then until January 20th, Barack Obama will once again enjoy a same-party Senate and could nominate nearly anyone he wanted, the more liberal the better, and Republicans could only watch in despair. I told you it was a nightmare scenario. Republicans could lose the Presidency in the next election; that will not be as damaging as losing the Presidency **and** Senate.

We will be discussing this topic on "We the People, The Constitution Matters" on WFYL radio Friday morning, 4 March, 7-8am. You can "Listen Live" at www.1180wfyl.com, or, if you are fortunate enough to live in the station's broadcast area, on the radio as you drive to work that morning.

You can later download the podcast of the show and listen at your leisure, or you can listen to one of the rebroadcasts during the weekend. I would love to hear your ideas on this topic. Hope you'll join us.