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Supreme Court Vacancies: Frequently Asked Questions

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Summary

The unexpected death of Supreme Court Justice Antonin Scalia on February 13, 2016—in the middle of the Supreme Court’s October 2015 term—has prompted questions about the process for filling the vacancy and how the Court will proceed in hearing cases and issuing opinions. These questions pertain to the constitutional role of the President and Senate in filling Supreme Court vacancies, whether and when the President and the Senate must act, and how the Supreme Court may proceed in hearing cases and issuing opinions with a vacant seat. This report provides answers to frequently asked legal questions about filling Supreme Court vacancies.

Additionally, other CRS products address other procedural and historical issues surrounding Supreme Court vacancies. See CRS Report R44400, *The Death of Justice Scalia: Procedural Issues Arising on an Eight-Member Supreme Court*, by Andrew Nolan; CRS Report R44235, *Supreme Court Appointment Process: President’s Selection of a Nominee*, by Barry J. McMillion; CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion; CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey; and CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

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Introduction

The unexpected death of Supreme Court Justice Antonin Scalia on February 13, 2016—in the middle of the Supreme Court’s October 2015 term—has prompted questions about the process for filling the vacancy and how the Court may proceed in hearing cases and issuing opinions. In particular, these questions pertain to the constitutional role of the President and Senate in filling Supreme Court vacancies, when the President and the Senate must act, and how the Supreme Court may continue hearing cases and issuing opinions with a vacant seat. This report provides answers to frequently asked legal questions about filling Supreme Court vacancies.

Are Nine Justices Required?

The Supreme Court is not required to have nine Justices. The Constitution is silent on the number. Historically, by statute Congress has set the number of Justices for the Court.¹ Currently, that number is nine: one Chief Justice plus eight Associate Justices.² But only six Justices are needed for a quorum.³ In the event that the Court is scheduled to hold a session but there is not a quorum, the Justices (or the clerk or deputy clerk) may announce that the Court will not meet until a quorum is restored.⁴

Is the President Required to Appoint a New Justice?

The nature of the President’s prerogatives under the Appointments Clause is unclear. The Obama Administration has taken the position that the President has a constitutional obligation to nominate and appoint a Supreme Court Justice when there is a vacancy.⁵ The Constitution’s Appointments Clause states that the President “*shall* nominate, and by and with the advice and consent of the Senate, *shall* appoint ... judges of the Supreme Court.”⁶ Courts have generally construed the word “shall,” in the Constitution and federal statutes, to impose a mandatory obligation.⁷ For instance, when interpreting the word “shall” in Article III of the Constitution, the

¹ Act of Sept. 24, 1789, Ch. Xx, § 1, 1 Stat. 73 (1789) (“That the supreme court of the United States shall consist of a chief justice and five associate justices.”); Rev. Stat. § 673 (1878) (a Chief Justice and eight associate Justices); *see generally* Wright and Miller, *Supreme Court-Introduction*, 16B FED. PRAC. & PROC. JURIS. § 4001 (3d ed).

² 28 U.S.C. § 1.

³ *Id.*; SUP. CT. R. 4.

⁴ SUP. CT. R. 4.2.

⁵ President Barack Obama, *A Responsibility I Take Seriously*, SLATE (Feb. 24, 2016, 8:00 AM), <http://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/>. In response to the current debate about whether President Obama should nominate a Justice to fill Justice Scalia’s seat versus whether the next President should, the President stated that his appointment power is “a duty that I take seriously.” *Id.*

⁶ U.S. CONST. art. II., § 2, cl. 2 (emphasis added).

⁷ *See, e.g.*, *Martin v. Hunter’s Lessee*, 14 U.S. 304, 314 (1816); *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (“It is also fixed usage that ‘shall’ means something on the order of ‘must’ or ‘will.’”); *United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000) (noting that the Appointments Clause “makes nomination and confirmation the requisite appointment protocol”); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (“‘*Shall*’ means *shall*.” The Supreme Court and this circuit have made clear that when a statute uses the word ‘shall,’ Congress has imposed a mandatory duty upon the subject of the command.”); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967) (“When used in statutes the word ‘shall’ is generally regarded as an imperative or mandatory and therefore one which must be given a compulsory meaning.”); *see also* Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 391 n.96 (2013).

Supreme Court stated that “[t]he word shall, is a sign of the future tense, and implies an imperative mandate, obligatory upon those to whom it is addressed.”⁸ However, the Court has not clarified *when* in the future the President needs to act. Supreme Court precedent regarding vacancies in other positions subject to presidential appointment suggests that the President has significant discretion as to *when* a vacancy “shall” be filled.⁹

Is the Senate Required to Act Once the President Submits a Nomination?

The Senate’s prerogatives under the Appointments Clause are even less clear. The Appointments Clause states that the President “shall nominate, *and by and with the advice and consent of the Senate*, shall appoint ... judges of the Supreme Court.”¹⁰ Unlike the duties spelled out for the President, the Appointments Clause does not provide that the Senate “shall” give its advice and consent, nor does it expound on what the Senate must do to give its advice and consent—two distinct tasks.¹¹ Additionally, the Supreme Court has not fully interpreted the specific terms “advice” and “consent” as they are used in the Appointments Clause, so it is not entirely clear what actions the Senate must take, assuming any action were seen to be required. For instance, during a 1975 symposium on “Advice and Consent on Supreme Court Nominations,” then-Senator James Abourezk noted that, “[w]hile the ‘consent’ aspect of the Senate’s constitutional role is thus readily discernable, the same cannot be so easily said of the Senate’s duty to give its ‘advice’ on a Supreme Court appointment” or “to state precisely just how that duty is to be exercised institutionally.”¹² In the past, the Senate has provided its advice and consent by various means, ranging from committee hearings to a vote on the Senate floor.¹³

Accordingly, there is disagreement in the legal community about the Senate’s role in presidential appointments.¹⁴ Although there is no doubt that the Senate has a constitutional role in the

⁸ *Hunter’s Lessee*, 14 U.S. at 314; *see also* *United States v. Sprague*, 282 U.S. 716, 731 (1931) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention in [sic] clear there is no room for construction and no excuse for interpolation or addition.”). Moreover, Chief Justice Roberts said in dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, that when seeking to define constitutional language, “there is no better dictionary than the rest of the Constitution itself,” 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting), suggesting that “shall,” as used in Articles I and II of the Constitution, should be interpreted to have the same meaning.

⁹ *See* *N.L.R.B. v. Canning*, 134 S. Ct. 2550, 2559 (2014) (“‘Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.”) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

¹⁰ U.S. CONST., art. II, § 2, cl. 2 (emphasis added).

¹¹ *See* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L. J. 783, 800-01 (2006) (“[T]he phrase ‘Advice and Consent’ refers to different types of review.”); Sen. Charles McC. Mathias Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 202 (Winter 1987) (noting that the terms “advice” and “consent” in the Appointments Clause “ensured a role for the Senate in both the nomination and confirmation of judges”).

¹² Subcommittee on Separation of Powers of the Committee on the Judiciary United States Senate, *Advice & Consent on Supreme Court Nominations*, available at 8 GREEN BAG 2d 404, 407 (Summer 2005).

¹³ *See, e.g.*, CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey; Jason Eric Sharp, Note, *Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice out of “Advice and Consent,”* 26 U. ARK. LITTLE ROCK L. REV. 747, 754 (Summer 2004); Brandon P. Denning, *Reforming the New Confirmation Process: Replacing ‘Despise and Resent’ with “Advice and Consent,”* 53 ADMIN. L. REV. 1, 14-25 (Winter 2001).

¹⁴ *See, e.g.*, Steven I. Friedland, “*Advice and Consent*” in the Appointments Clause: *From Another Historical* (continued...)

appointments process, much of the disagreement surrounds how robust that role is, especially concerning advice. Some view the Senate's role to give advice as an active one, in which failing to consider a nominee at all would violate its constitutional obligations.¹⁵ For example, one former Senator has stated that “[a]mong all the responsibilities of a United States Senator, none is more important than the *duty to participate in the process* of selecting judges and justices to serve on the federal courts.”¹⁶ The Obama Administration similarly contends that the Senate has a constitutional obligation to act—a position previously taken by the George W. Bush Administration.¹⁷

Conversely, others assert that the Senate has no constitutional obligation to act once the President nominates a new Justice, contending, for example, that the lack of “shall” in the advice-and-consent text in Article II creates only a prerequisite for the President's nominee to be confirmed by the Senate.¹⁸ Additionally, at least one Senator has reportedly taken the view that “[i]t's up to the Senate to decide how we do our job with regard to” advice and consent,¹⁹ suggesting that interpreting the Senate's role in the Appointments Clause could be seen as a political question²⁰

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Perspective, 64 DUKE L.J. ONLINE 173, 178-80 (2015) (noting disagreements among legal scholars about Framers' understanding of “advice and consent”); Matthew D. Marcotte, Note, *Advice & Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 521 (2001-2002).

¹⁵ See, e.g., Letter from Debra L. Raskin, President of New York City Bar Association to Senators Chuck Grassley and Mitch McConnell (Mar. 1, 2016), available at <http://www.nycbar.org/pdf/report/uploads/20073053-SupremeCourtAppointmentsClauseSenateRaskin3.1.16.pdf> (contending that the Senate's refusal to consider any nomination to fill vacancy violates the Appointments Clause); Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053, 1069 (Summer 2001) (asserting that Framers' debates on “advice and consent” provision and early historical practice support an “active Senate role in the judicial selection process”); Mathias, supra n.11, at 203 (labeling Senate's advice and consent a “constitutional responsibility” that is “not a mechanical formality, but ... an integral part of the structure of government”).

¹⁶ Mathias, supra n.11, at 200 (emphasis added).

¹⁷ See Jeff Mason, *Obama Calls Out GOP: Constitution is Clear on SCOTUS Nomination Process*, HUFFINGTON POST (Feb. 16, 2016 5:29 PM, updated Feb. 17, 2016), http://www.huffingtonpost.com/entry/obama-scotus-nominee_us_56c39f2be4b0c3c550530723 (“Obama told senators he has a constitutional duty to nominate a new justice after Saturday's death of conservative Justice Antonin Scalia and reminded them of their constitutional obligation to ... vote to approve or reject his nominee.”); Press Release, The White House Office of the Press Secretary, Statement on Judicial Nominations (Dec. 23, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041223-1.html>.

¹⁸ See Ilya Somin, *The Constitution Does Not Require the Senate to Give Judicial Nominees an Up or Down Vote*, WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/the-constitution-does-not-require-the-senate-to-give-judicial-nominees-an-up-or-down-vote/>; Adam J. White, *The Constitution Does Not Require the Senate to Vote on a Nomination*, THE WEEKLY STANDARD, (Feb. 14, 2016 6:37 PM), <http://www.weeklystandard.com/the-constitution-does-not-require-the-senate-to-vote-on-a-nomination/article/2001087> (“Can you show me the clause that says the Senate must vote on, let alone confirm, a President's nominee?”); Adam J. White, *Toward the Framers' Understanding of “Advice and Consent”: A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 147-48 (Fall 2005) (arguing that the Constitution's text imposes no direct implied obligation for the Senate to act on judicial nominations).

¹⁹ See Josh Gerstein, *Senators Square Off Over Supreme Court Vacancy*, POLITICO (Mar. 9, 2016 10:19 AM), <http://www.politico.com/story/2016/03/senators-square-off-over-supreme-court-vacancy-220489>.

²⁰ The Supreme Court has recognized several considerations that are relevant to a court's assessment of whether an issue is nonjusticiable on political grounds:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning (continued...)

for the legislative branch to decide. However, absent a definitive resolution by the judicial branch—which would be unlikely²¹—settlement of occasional disputes between the President and Senate regarding their respective roles in the Supreme Court nomination process seem likely to be resolved through interbranch negotiation and accommodation.²²

Can the President Make a Recess Appointment for a Supreme Court Justice?

The Constitution’s Recess Appointments Clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session.”²³ The Supreme Court has not addressed whether the Constitution permits the President to appoint an Article III judge (including Supreme Court Justices) using a recess appointment, and thus the issue remains unsettled. The Appointments Clause, though, which precedes the Recess Appointments Clause, authorizes the President to appoint “judges of the supreme Court.”²⁴ Accordingly, some courts have concluded that the Recess Appointments Clause encompasses filling Article III judicial vacancies.²⁵ For example, the Eleventh Circuit opined in *Evans v. Stephens* that President George W. Bush

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adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

²¹ See Lee Renzin, Note, *Advice, Consent, and Senate Inaction – Is Judicial Resolution Possible*, 73 N.Y.U.L. REV. 1739, 1751-87 (1998) (examining potential obstacles to judicial review of “Advice and Consent” Clause, including standing, Speech or Debate Clause, and political question doctrine).

²² Past practice of the President and Senate concerning their roles under the Treaties Clause could also offer guidance, particularly examples of (1) when the President has signed a treaty but the Senate never gives its consent (*i.e.*, ratification), and (2) when the Senate has proposed conditions to add to a treaty submitted for ratification—seemingly a form of advice. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 309 & n.5 (Summer 2007); Curtis A. Bradley, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 404-05 (2000). This is so because the Treaties Clause, like the Appointments Clause, is contained in Article II, Section 2, Clause 2 of the Constitution, and states that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.” Yet, as one scholar noted, it is unclear whether the Framers intended for “advice and consent” to have the same meaning in different contexts. See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1147 (1988) (“The Convention of 1787 throws disappointingly little light on the meaning of ‘advice and consent of the Senate.’ To be really helpful, the record would have had to deal with the question whether the phrase did or did not have the same meaning in the contexts of ratification of treaties and appointment of ambassadors, cabinet officers, inferior federal judges, and members of the Supreme Court. Nowhere did the discussion approach that level of concreteness.”)

²³ U.S. CONST., art. II, § 2, cl. 3.

²⁴ U.S. CONST., art. II, § 2, cl. 2.

²⁵ See *Evans v. Stephens*, 387 F.3d 1220, 1222-23 (11th Cir. 2004) (en banc) (“Clause 2 explains the appointments the President may make with Senate advice and consent; Clause 3 explains the President may make temporary appointments to ‘all’ of these offices without Senate advice and consent. Recess appointments to the judiciary are allowed.”); *United States v. Woodley*, 751 F.2d 1008, 1009-10 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 708-09 (2d Cir. 1962); 106 Cong. Rec. 18130 (1960) (statement of Sen. Hart: “If there ever was ground for the argument that the more specific language of article III of the Constitution should be construed as excluding judicial appointments from the general authorization given the President in article II, time has answered it. The President does have such power and this resolution does not argue otherwise.”); see also Lyle Denniston, *Is a Recess Appointment to the Court an Option?*, SCOTUSBLOG (Feb. 14, 2016, 12:24 AM), <http://www.scotusblog.com/2016/02/is-a-recess-appointment-to-the-court-an-option/>.

lawfully appointed a judge to the U.S. Court of Appeals during an 11-day Senate recess. Despite reaching this conclusion, the court noted tension between Article III—which provides for tenure during “good behaviour”²⁶—and appointing Article III judges under the Recess Appointments Clause,²⁷ for whom the appointment would expire at the end of the congressional session in which the recess appointment was made.²⁸ Additionally, when the Supreme Court declined to review *Evans*, then-Supreme Court Justice Stevens wrote to emphasize that the denial of certiorari was not a ruling on the merits that confirms the Eleventh Circuit’s decision, perhaps suggesting that he had doubts about the veracity of the ruling.²⁹

Assuming, however, that the President *could* use the Recess Appointments Clause to appoint a new temporary Supreme Court Justice, the Senate typically must be in recess for at least 10 days for the recess appointment to be valid.³⁰

Could a Nominee Who Is Rejected, or Not Subject to Senate Action, Be Re-nominated?

Presidential nominations under the Appointments Clause expire at the end of the congressional term during which they are made.³¹ But nothing in the Constitution or in any federal law prohibits the President from re-nominating a Supreme Court nominee who was rejected or never voted on during the Senate’s term. For example, President Eisenhower first nominated John Marshall Harlan II to be a Supreme Court Justice on November 9, 1954, but the Senate did not vote on the nomination.³² President Eisenhower re-nominated Harlan on January 10, 1955, and the newly constituted Senate confirmed the nomination.³³

When May the Supreme Court Rehear Cases that Have Already Been Argued?

In general, cases may be reheard in one of two ways. First, parties may petition the Supreme Court for rehearing after the Court issues an adverse ruling on the merits or denies granting review for a case (sought through a petition for a writ of certiorari or extraordinary writ).³⁴ For cases already decided on the merits, a majority of the Court must grant the petition for rehearing,

²⁶ U.S. CONST., art. III.

²⁷ U.S. CONST., art. II, § 2, cl. 3.

²⁸ See *Evans v. Stephens*, 387 F.3d 1220, 1223 (2004) (en banc) (“The conflict between these equally important constitutional provisions is not irreconcilable: the *temporary* judges appointed under the Recess Appointments Clause are an exception to the general rule of Article III.”) (emphasis added).

²⁹ See *Evans v. Stephens*, 544 U.S. 942 (2005); see also JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 84-85 (2011).

³⁰ See *N.L.R.B. v. Canning*, 134 S. Ct. 2550, 2556-57, 2567 (2014); see also CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

³¹ See Standing Rules of the Senate, S.Res. 285, 113th Cong. § 1, Rule XXXI (2013), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI>; CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

³² SUPREME COURT NOMINATIONS, PRESENT-1789, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Mar. 18, 2016).

³³ *Id.*

³⁴ SUP. CT. R. 44.

which would be considered only at the request of one of the Justices who concurred in the Court's judgment on the merits.³⁵ Second, the Court typically will order cases to be reheard if the Justices conclude that they cannot resolve the case before the Court's summer recess.³⁶ For example, the Court, on its own initiative, decided to rehear three cases that had been argued after Chief Justice Rehnquist's death but before the vacancy had been filled.³⁷

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³⁵ *Id.*; see also *Califano v. McRae*, 434 U.S. 1301 (1977) (Mem.); Stephen M. Shapiro, et al., *Supreme Court Practice* 829 (10th ed. 2013).

³⁶ See Shapiro, *supra* n.34 at 11 (citing *Ins v. Chadha*, 458 U.S. 1120 (1982)).

³⁷ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hudson v. Michigan*, 547 U.S. 586 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006).