

Supreme Court Vacancies That Arose During One Presidency and Were Filled During a Different Presidency

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This CRS Insight provides data and analysis related to Supreme Court vacancies since 1797 that arose during one presidency and were filled during a different presidency. As of this writing, Senate debate on the current vacancy created by the death of [Justice Antonin Scalia](#) on February 13, 2016, has focused, in part, on [whether to confirm a successor to Justice Scalia prior to a new President taking office on January 20, 2017](#). Note that this Insight does not take a position as to when the Senate might approve a new Justice for the Court.

This Insight is not intended to provide a comprehensive analysis of the Supreme Court nomination and confirmation process. Longer analyses on the Supreme Court selection and confirmation process are provided by other CRS products (see, for example, [CRS Report R44235](#)—addressing the selection of nominees by a President).

As shown by **Figure 1**, there have been seven vacancies on the Court which arose during one presidency and were filled during a different administration. Such vacancies are relatively rare—the seven vacancies represent approximately 7% of all vacancies filled on the Court during the past 219 years (not including the six initial vacancies filled by President Washington in 1789).

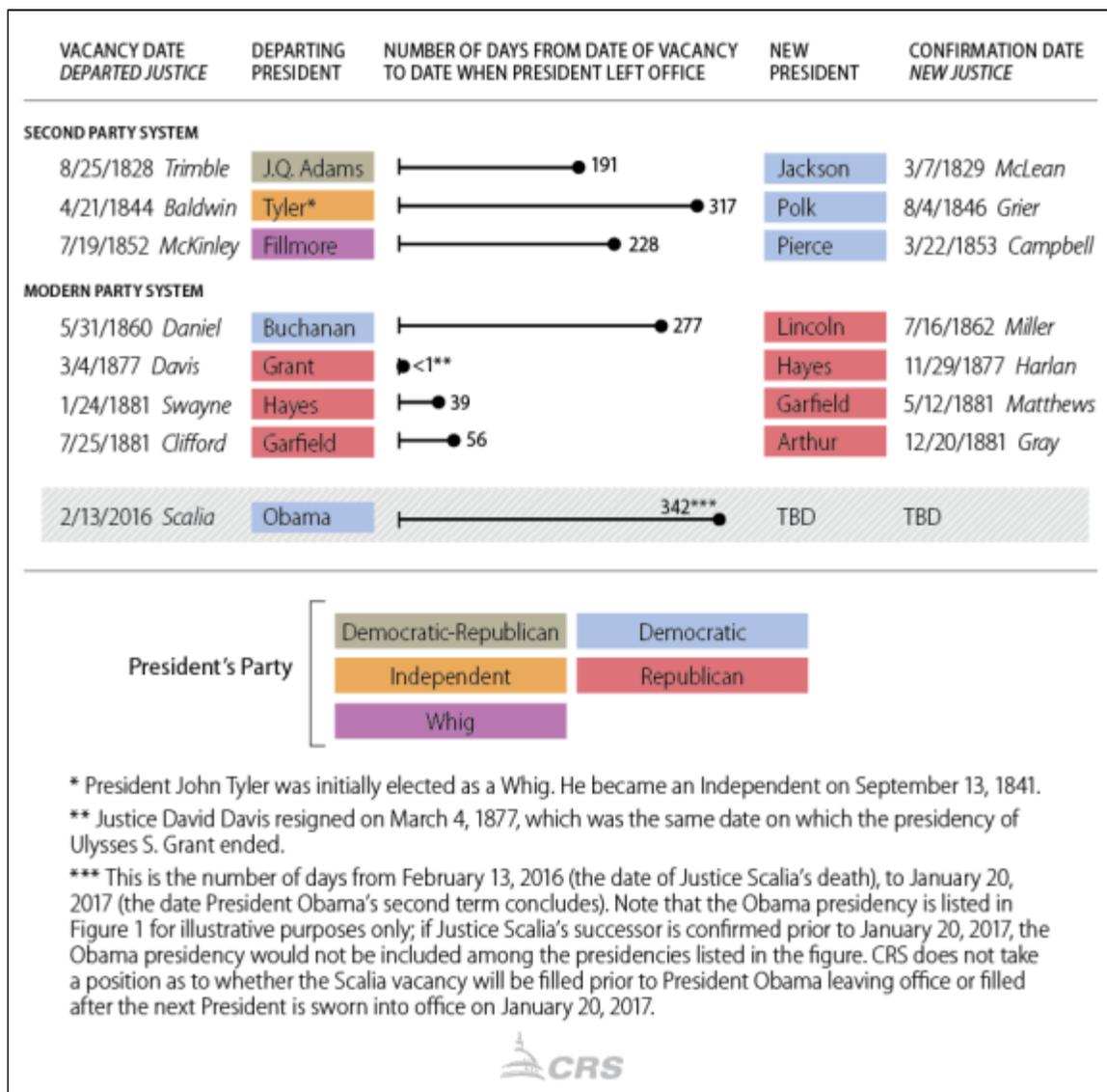
The last time a Supreme Court vacancy arose during one presidency and was filled during a different presidency was in 1881. The death of [Justice Nathan Clifford](#) created a vacancy on the Court on July 25, 1881. Approximately two months later, President Garfield was assassinated and the Clifford vacancy was eventually filled by his successor, President Arthur, in December of that same year.

The last time a Supreme Court vacancy arose during one presidency and was filled during a different administration—and for which the party of the new President was different than the party of the previous President—was in 1862. The death of [Justice Peter Daniel](#) created a vacancy on May 31, 1860. While the vacancy arose during the final year of the Buchanan presidency, it was not filled until the second year of the Lincoln presidency (and not until after the onset of the Civil War in 1861).

Three of the vacancies reported in **Figure 1** occurred during the "Second Party System," a period from approximately 1828 to 1854 (in which the Whig Party was one of the major political parties). Four of the vacancies listed in the figure occurred during the "Modern Party System," a period from approximately 1854 to the present. The beginning of this period coincides with the founding of the Republican Party in 1854.

Figure 1. Supreme Court Vacancies That Arose During One Presidency and Were Filled During a Different Presidency

(1797—Present)



Source: Congressional Research Service

As shown by **Figure 1**, there was variation in the number of days from when a vacancy arose to when an outgoing President left office—ranging from less than a day to 317 days (during the Tyler presidency). The Senate declined three times to act on nominations submitted by President Tyler to fill the vacancy created by the death of [Justice Henry Baldwin](#). This was due, in part, to [President Tyler's strained relations with the majority Whig Party in the Senate](#) (Tyler had previously been [expelled from the party](#) in 1841).

If the current vacancy is not filled until after January 20, 2017, it would be the greatest number of days (among Supreme

Court vacancies that arose during one presidency and were filled during a different presidency) from a vacancy occurring on the Court to when a President has left office. Specifically, as shown by **Figure 1**, 342 days will have elapsed from the Scalia vacancy occurring to President Obama leaving office (followed by 317 days from the Baldwin vacancy occurring to the end of the Tyler presidency).

If the current vacancy is filled prior to January 20, 2017, the Obama presidency will not be among the presidencies included in **Figure 1** because Justice Scalia's successor will have been appointed to the Court prior to the end of President Obama's term in office.

While not represented in the figure, most of the "departing Presidents" listed in **Figure 1** submitted a nomination for the respective vacancy that arose during each of their presidencies. Specifically, five of the seven past Presidents submitted a nominee to the Senate prior to departing (while two, Presidents Grant and Garfield, did not). President Hayes's nominee for the Swayne vacancy, [Stanley Matthews](#), was renominated by his successor, President Garfield, and [narrowly approved by the Senate](#) within 70 days of Hayes leaving office. As for the current vacancy, President Obama [nominated Merrick B. Garland on March 16, 2016](#).

Note that the number of days reported for each vacancy in **Figure 1** does not represent the number of days each vacancy existed prior to being filled with the appointment of a new Justice. Three of the five Supreme Court vacancies that lasted the greatest number of days were filled during the same presidency in which each arose. Two of the five longest-lasting vacancies, however, are among the vacancies listed in **Figure 1**. Specifically, the vacancy that arose during the Tyler presidency and was filled by President Polk lasted a total of 835 days, while the vacancy that arose during the Buchanan presidency and was filled by President Lincoln lasted 776 days.

The vacancies reported in **Figure 1** were *actual* vacancies on the Court that were created after a Justice died, resigned, or retired from office. Consequently, the figure does not include *anticipated* vacancies on the Court. Such a vacancy might be anticipated by a President but ultimately not occur on the originally anticipated timetable and, thus, not be filled until the President has left office. For a discussion of an anticipated vacancy in 1968 during the final year of the Johnson presidency, see [CRS Insight IN10455](#) (addressing nominations to the Supreme Court during presidential election years).