

## Legal Sidebar

# What Does Justice Scalia's Death Mean for Congress and the Nation?

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Over the weekend, the nation was shocked to learn of the passing of Supreme Court Justice Antonin Scalia. The death of the longest serving and, in the view of some commentators, [most influential Justice](#) on the current Court will have significant implications for the third branch of government. Justice Scalia's absence may alter the outcome of several cases of interest to Congress pending before the Court and could mark a seismic shift in many legal doctrines, depending on who is confirmed to fill the newly vacant seat on the Court. The job of confirming the President's nomination to fill the vacancy resides with the Senate, making Justice Scalia's death likely to have a profound impact in both the short and long term on Congress.

This sidebar, the first of several pending CRS projects on Justice Scalia and the new Supreme Court vacancy, provides an overview of the major implications of Justice Scalia's death for Congress.

### Court's Consideration of Cases in the Current and Future Terms

Justice Scalia's passing will undoubtedly impact the work of the Court in the near and long term. He brought well-known views regarding [textualism](#) and [originalism](#) to his consideration of cases before the Court. *Textualism* can be broadly described as a method of construing statutes and other texts that focuses on the plain meaning of the words used, affording little, if any, significance to extrinsic sources, like legislative history. Justice Scalia championed textualism in, among other cases, his recent dissent in [King v. Burwell](#), where he objected that, under the majority's approach, "[w]ords no longer have meaning." Justice Scalia also advocated *originalism* as a mode of constitutional interpretation, which he [articulated](#) as a principle that derives the Constitution's meaning from how its text was understood at the time of adoption. Justice Scalia's originalism was perhaps most famously displayed in the Court's [2008 decision](#) striking down the District of Columbia's ban on handguns, in part, because the Second Amendment was originally understood to protect an individual right to possess firearms unconnected with service in a militia.

Often, although not [universally](#), his textualist or originalist approaches led him to results that [some would characterize](#) as "conservative," and there is widespread speculation that his absence from the Court could sway the outcome in certain high-profile cases pending in this term. For example, [some](#) have predicted Justice Scalia would be the critical fifth vote in a case challenging whether a non-member represented by a public employee union could be required to pay monetary dues to that union. [Others expected](#) him to take the view that President Obama lacks the authority to grant relief from removal and work authorization to over four million unauthorized aliens, given the skepticism that Justice Scalia had voiced in his 2012 dissent in *Arizona v. United States* regarding whether an earlier "deferred action" program was, in fact, consistent with the limited resources available to the Executive to enforce immigration law.

Justice Scalia's death also deprives the Court of one of its most vivid and distinctive prose stylists. Colorful phrases like "[tutti-frutti](#)," "[argle-bargle](#)," and "[jiggery-pokery](#)" recurred in his opinions, particularly dissenting ones.

More generally, Justice Scalia's death means that Supreme Court cases will, for the foreseeable future, be decided by eight Justices, raising the possibility of four to four ties. In the absence of a full Court, when the Justices are evenly divided (four to four or three to three; six Justices are required for a [quorum](#)), the Supreme Court's practice is not to write an opinion, but to enter a judgment that tersely affirms the lower court judgment. For example, in the 2012

decision in [Omega S.A. v. Costco Wholesale Corp.](#), a case in which Justice Elena Kagan recused herself, the Court issued a one-sentence statement indicating that “[t]he judgment [of the lower court] is affirmed by an equally divided Court.” Such decisions indicate no voting alignments and are not considered binding national precedent.

While many anticipate the Court to issue a number of groundbreaking, high-profile decisions on [abortion](#), [immigration](#), [affirmative action](#), and [public sector unions](#) in the upcoming months, it appears that, at least, some of these issues could be left unresolved for the time being if the Court were to split four to four. In the past, the Court sometimes has provided for cases that otherwise would have ended in a tie to be reargued after the vacancy is filled. For example, *Roe v. Wade* was reargued, in part, so that then newly appointed Justices William Rehnquist and Lewis Powell could participate in the proceedings.

As the Court’s history has demonstrated, a Justice’s death can change the course of constitutional law and the country. Chief Justice Fred Vinson’s death in 1953 led to the appointment of Chief Justice Earl Warren, an event that some scholars [suggest](#) made possible the eventual decision in [Brown v. Board of Education](#). The death of Justice Robert Jackson a year later is similarly [seen](#) by some to have deprived the Court of one of its greatest writers and thinkers at the cusp of the legal revolution of the 1960s.

### **Appointment of a Successor to Justice Scalia**

The Appointments Clause of the Constitution provides a shared role for the President and the Senate in the selection of Supreme Court Justices. Specifically, [Article II, Section 2, Clause 2](#) of the Constitution states that the President “shall nominate . . . Judges of the Supreme Court” and will appoint such judges “by and with the Advice and Consent of the Senate.” As a 1997 [opinion](#) written by Justice Scalia noted, the framers provided for Senatorial “Advice and Consent” in order to “curb Executive abuses of the appointment power” and to “promote a judicious choice of persons for filling offices of the union.” As a consequence, the Senate will play a central role in deciding who succeeds Justice Scalia on the Court.

With the Senate on recess since last Friday for the President’s Day holiday, [some](#) commentators have [questioned](#) whether the President could make a recess appointment to the Court within the limits the Court imposed in its 2014 decision in [NLRB v. Noel Canning](#). While some Justices—most recently Chief Justice Earl Warren and Justice William Brennan—have been appointed under the recess appointments power, it [appears](#), at this time, that the Obama Administration will not attempt to make such an appointment.

While it is clear that the Senate’s constitutional role is to provide advice on and consent to the President’s nomination to the Court, it is unclear *when* such a nomination will be made and, if so, *when* the Senate will act on a successor to Justice Scalia. President Obama has [stated](#) that he plans to nominate a successor in “due time,” implying that the Senate may be asked to provide advice and consent in the near future.

In the recent past, Senate consideration of nominations to the Court has entailed extensive hearings on the nominee’s prior legal experience and writings, as well as on his or her views on various issues of statutory and constitutional interpretation of concern to Congress. For example, in their confirmation hearings, Justices Kagan and Sonia Sotomayor [were questioned](#) about abortion and the First Amendment.

Whether the Senate will act on a nominee from President Obama is far from certain. Senate [confirmation](#) of a Supreme Court nominee in a presidential election year is not unprecedented, with Justice Anthony Kennedy’s confirmation in 1988 being the most recent example. However, unlike Justice Kennedy, who was nominated in 1987 and confirmed in 1988, very few individuals who have been nominated during an election year have been confirmed in that election year. For example, President Johnson’s nominations of Abe Fortas and Homer Thornberry failed to receive Senate confirmation in 1968. Justice Frank Murphy’s nomination to and confirmation for the Court in 1940 was the most recent example of a successful nomination to and confirmation for the Court during a presidential election year. Nonetheless, regardless of whether Justice Scalia’s successor is nominated and confirmed in 2016 or later, the Senate will play an important role in determining the future of the Court.

Future CRS products will explore Justice Scalia’s legacy and the nomination of his successor in greater detail. Pre-existing CRS products currently provide information about the [presidential appointment power generally](#) and [Supreme](#)

[Court nominations specifically.](#)

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