



An American flag flies at half-staff outside the U.S. Supreme Court after the death of Justice Antonin Scalia.

One of the top priorities for President Donald Trump is to fill the vacancy on the Supreme Court. The untimely death of Justice Antonin Scalia last February has led to a new battle between Democrats and Republicans. The Supreme Court consists of nine Justices, each with their own views and beliefs which may align with the Democratic (liberal) or Republican (conservative) parties.

Each party is weighing in on their opinion on how to deal with this vacancy. As we have studied, federal courts are often called the “guardians of the Constitution” because their rulings protect rights and liberties guaranteed by the Constitution. Through fair and impartial judgments, the Supreme Court Justices interpret and apply the law to resolve disputes.

President-elect Trump’s upset victory means the U.S. Supreme Court’s conservative wing will shape its decisions for the immediate future. It also guarantees that Merrick Garland, President Obama’s nominee for the seat formerly held by Justice Antonin Scalia, will not be confirmed by the Republican-led Senate.

Eight Justices – How to break a tie?

While the vacancy exists, the Supreme Court still conducts its usual business of ruling on disputes from the lower courts. Without the late Justice Antonin Scalia on the bench, the court will muddle through the remainder of its 2015 term — and possibly into the 2016 term starting in October — with eight justices.

Four were appointed by Republican presidents, four by Democratic presidents. And they usually vote that way on divided cases. That raises the specter of frequent 4-4 ties.

What happens then? The high court's ruling is rendered almost meaningless; it leaves the most recent decision intact, usually from a federal appeals court or a top state court. There is no new, national precedent created by the nation's highest court.

And when previous justices have died in office or retired before their successors could be confirmed, the court has gone forward with eight members — sometimes for months when Senate confirmation hearings drag on, or a nominee is rejected.

An example: When Justice Lewis Powell retired from the court in June 1987, it took President Ronald Reagan three tries to confirm a nominee, mostly due to the Senate's rejection of Robert Bork. It wasn't until Anthony Kennedy was confirmed in February 1988 that the court returned to having nine justices, a gap of more than seven months.

The last death in office was that of Chief Justice William Rehnquist in September 2005. In that case, the vacancy was extremely brief, because John Roberts had already been nominated to replace Sandra Day O'Connor as an associate justice. Roberts was confirmed as chief justice within weeks.

Nominating a New Justice

As we know, the president appoints a great number of officials in the executive branch as well as justices in the judicial branch. Per U.S. Constitution (Article II, Section 2, Clause 2) states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court."

Each federal judge holds office for life and may be removed only by impeachment. There are no expressed qualifications for federal judges in the Constitution. Some former Justices have had no previous judicial experience including eight chief justices. However, all have had experience in public service. Among the remaining members of the current Court, all have had previous judicial experience.

On January 31, 2017 President Donald Trump nominated Judge Neil Gorsuch to the Supreme Court. The nomination of Gorsuch, a 49-year-old federal appellate judge from Colorado, gives Trump and Republicans the opportunity to confirm someone who could cement the conservative direction of the court for decades.

Trump's selection sets up an intense fight with Senate Democrats, still angry over the Republicans' decision to essentially ignore former President Barack Obama's nomination of Judge Merrick Garland for the empty Supreme Court seat last year. There will be many debates leading up to vote on the Senate floor to confirm Gorsuch.

Besides the Gorsuch nomination, other Trump-appointed nominees could soon follow. The current crowd on the court are older: Ginsburg is 83-years-old, Justice Anthony Kennedy is 80 and Justice Stephen Breyer is 78.

What's alarming for Democrats are that two of the oldest (Ginsburg and Breyer) are liberals, meaning Trump could replace them with conservatives in the event of illness, death, or retirement. The nightmare scenario for liberals, as NYU law prof Barry Friedman told the *New York Times*: "In the worst case, we end up with a 7-2 conservative court, and a relatively young one at that. This could be a typhoon for the Supreme Court."

Needed Time to Approve New Justices

The current members of the court faced an average of 69 days (including Antonin Scalia).

Current Justices	President who nominated	Days from submission to final vote
Elena Kagan	Obama	87
Sonia Sotomayor	Obama	66
Samuel Alito, Jr.	G.W. Bush	82
John Roberts, Jr. (Chief Justice)	G.W. Bush	23
Stephen Breyer	Clinton	73
Ruth Bader Ginsburg	Clinton	42
Clarence Thomas	G.H. Bush	99
Anthony Kennedy	Reagan	65

The vacant seat is critical to the future of the closely divided court. Each party will want to choose their candidate. President Trump will have leverage as the Republican Party controls Congress and has strong incentives to support their values and beliefs.

The longest vacancy on the Supreme Court was 27 months between the Tyler and Polk administrations before the Civil War. Tyler, derided as "His Accidency," because he was the first vice president elevated to the

White House, also holds the distinction of a record eight nominees rejected or withdrawn.

Discussion Review

TRUE OR FALSE? Write a **T** or **F** in the space provided.

- ___ 1. If there are only eight justices, the Supreme Court will temporarily suspend and no rulings will take place.
- ___ 2. The Supreme Court Justices are considered "guardians of the Constitution."
- ___ 3. A vacancy on the Supreme Court occurs about once every couple years, so a president will probably have at two or three appointments during his or her term.
- ___ 4. The current justices get to vote on who will fill a vacancy.
- ___ 5. Article 2 of the U.S. Constitution describes the president's role in nominating a Supreme Court Justice.
- ___ 6. Supreme Court nominees always have previous judicial experience.
- ___ 7. Justices are obligated to rule according to the ideology of the president who appointed them.
- ___ 8. After the president announces a nominee, it is presented to the voters to confirm.
- ___ 9. You meet the Constitutional requirements for a Supreme Court justice.
- ___ 10. There is still a judge on the Supreme Court that was nominated by Ronald Reagan.
- ___ 11. The longest vacancy on the Supreme Court was six years.

Answers to the T-F Questions:
1. F 2. T 3. F 4. F 5. T 6. F 7. F 8. F 9. T 10. T 11. F

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