



## A Supreme Decision: Filling Scalia's Seat

*Christopher M. Gacek*

The untimely passing of Associate Justice Antonin Scalia has launched an intense political debate. Essentially, the two positions are that the Senate should consider any nomination sent to it by President Barack Obama or that it should wait to consider a nomination from the next President who will have received a fresh mandate from the American people in the November 2016 election.

The first argument is grounded in the belief that the Senate has a constitutional obligation to consider presidential nominations to the Supreme Court. Some go further and assert that such nominations, once made, should receive deference from the Senate.

The text of the Constitution provides no support for either proposition.

Article II, Section 2 of the Constitution states that the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court." Clearly, filling vacancies on the Court is a shared power belonging jointly to the President and the Senate.

The president is responsible for nominating individuals to fill vacancies on the Supreme Court. However, it is only the Senate that can grant the necessary approval ("advice and consent") to the president's nomination. After having received the Senate's approval the president is then able to complete the appointment process, and the nominee may be sworn in as a member of the Supreme Court.

There are no conditions, requirements, or limitations on the manner in which the Senate must act. In fact, there is no requirement that it act at all. Additionally, non-action may be a form of disapproval that is wholly legitimate. This means that the Senate need not hold appropriate hearings concerning or including the nominee, let alone hold committee or floor votes on the nominee.

The Senate is not constitutionally obligated to perform any specific action toward the president's nominee. Refusal to hold hearings, etc., constitutes a form of "advice." Therefore, absence of Senate confirmation of a presidential nominee dooms that nomination.

According to Adam J. White, in a recent *Weekly Standard* article,<sup>1</sup> presidents have made 160 nominations to the Supreme Court. The Senate has confirmed only 124 of them. Of the 36 nominations that failed, 25 never received an up-or-down vote. Those 25 nominees did not become Supreme Court justices.

With these facts in mind, Family Research Council believes that the Senate should not consider, hold hearings upon, schedule time to consider, or deliberate in any fashion upon any nominee President Obama puts forward to fill the seat vacated by Justice Scalia by his untimely passing. The reason is simple: President Obama's consistent record of nominating and appointing Supreme Court justices and

federal judges who view the Constitution as a malleable political instrument instead of a text with a defined meaning based on the consensus held by the Founding Fathers gives the Senate a justifiable basis for refusing to act upon his nominee.

## Questions and Answers

**Q: What does the Constitution require the Senate to do once the President makes a nomination for a Supreme Court justice?**

A: The Constitution does not require any action on the part of the Senate; rather, it places the burden on the President to obtain the Senate's "advice and consent" before he can make this lifetime appointment.

**Q: Is the Senate required to take action on Supreme Court nominations?**

A: No, the Senate is not required to take action on any nomination, whether for the Supreme Court, a lower federal court, or for a federal agency. Some argue that the Senate should defer to the President's selections for agency appointments because agency appointees are typically charged with carrying out the political goals of the Administration. They serve at the will of the President. Judicial appointments, especially Supreme Court appointments, become members of a co-equal branch of government that is independent of both the Congress and the President. Senatorial deference to such nominations would be completely misplaced.

The "advice and consent" provision in the U.S. Constitution was based on the Massachusetts model under which many nominations made by the governor were never given an up-or-down vote.<sup>2</sup> U.S. judicial history reflects the pattern seen in Massachusetts. As noted above, 25 of 160 Supreme Court nominations were never voted upon by the Senate. As one federal court analyst has noted, nearly all of these faced considerable committee or Senate opposition to the nominee or to the President. Consequently, "[they] were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate." Six of these individuals were subsequently re-nominated and confirmed.<sup>3</sup>

**Q: What are the possible procedural steps that could be taken by the Senate to refuse consent for a presidential nominee?**

A: There are several, the first of which presents the lowest risk of failure:

No Referral to Committee—Senate Majority Leader McConnell can choose not to refer a nominee to the Senate Judiciary Committee or any other committee, leaving the nomination in limbo.

Committee Hearings and no Committee Vote—Senate Judiciary Committee Chairman Chuck Grassley can refuse to hold hearings or to schedule a committee vote. However, a Democrat could attempt to use a "motion to discharge" to remove the nominee from the committee and force a full Senate vote.

Disapproval vote in Committee—The Senate Judiciary Committee can hold hearings and then vote against the nominee in Committee, thereby ending the nomination process. However, hearings are unpredictable, and Republicans outnumber Democrats by only two Senators. A hearing will further the nomination and make a committee vote more likely.

Filibuster a Vote on the Senate Floor—There are 54 Republicans in the Senate. Consequently, there are more than enough Republicans to block any motion to proceed to a nomination. In other words, if

Senators object to floor action on the nominee, and if the Majority Leader did move to bring the nominee to a floor vote, it would still require 60 Senators to end debate and proceed to a final vote on the nomination. Putting it differently, 41 Senators can block any move to a vote on a Supreme Court nominee.

Vote No in Full Senate Vote—Republicans would have to hold all but three votes to defeat the nomination; if they lost four votes and assuming unanimity among Senate Democrats, Vice President Joe Biden would break the tie and the nominee would be confirmed.<sup>4</sup>

**Q: Did President Obama ever filibuster a Supreme Court nomination?**

A: Yes. Senators Barack Obama, Hillary Clinton, Joe Biden, and Chuck Schumer all voted on January 30, 2006 to filibuster Samuel Alito’s nomination for the Supreme Court. Sen. Schumer announced in 2007 that he would block any further nominations then-President Bush might make to the Supreme Court.

**Q: When was the last time a Supreme Court vacancy occurred and was filled in an election year when the White House and Senate were controlled by different parties?**

A: 1880, when Rutherford B. Hayes appointed Justice William Burham Woods. More recently, Associate Justice Anthony Kennedy was confirmed in an election year (1988). Judge Kennedy was nominated by President Reagan on November 11, 1987 after Judge Robert Bork’s nomination failed in the Senate on October 23rd (and the nomination of Judge Douglas Ginsburg was withdrawn at his request on November 7, 1987). Judge Kennedy’s nomination was approved by the Senate on February 3, 1988, and he took the Oath of Office fifteen days later. In essence, Kennedy’s was a 1987 nomination whose confirmation vote took place early the next year.

**Q: Are there important cases this term that could go the wrong way in the absence of Justice Scalia’s vote?**

A: Yes. These are the cases:

*Whole Woman’s Health v. Hellerstedt* (concerning states’ ability to regulate the safety of abortion clinics); *Zubik v. Burwell* (concerning religious nonprofits’ religious freedom rights to not be implicated in government healthcare schemes including drugs the religious nonprofits believe can cause abortions).

*Trinity Lutheran Church v. Pauley* (concerning the rights of churches and religious organizations to participate in the public square by receiving state grant money on the same footing as nonreligious organizations).

*United States v. Texas* (concerning President Obama’s deferred action program for illegal immigrants and whether the program violated the procedural requirements of the Administrative Procedure Act).

*Friedrichs v. California Teachers Association* (concerning whether government workers who choose not to join a union can be compelled to pay fees that fund collective bargaining).

**Q: What happens to cases that are split 4-4 after Justice Scalia’s death?**

A: If the Supreme Court votes 4-4 in a case, the lower court ruling will stand. In some cases the lower court ruling has been favorable to us (e.g., *Hellerstedt*) and in others it has been unfavorable (e.g., some of

the cases which will be considered along with *Zubik*, such as *Little Sisters* (10th Circuit), *Michigan Catholic Conference* (6th Circuit), *Geneva College* (3rd Circuit), and others). Moreover, it is also possible the court could order re-argument in some cases once a new justice is confirmed, which would avoid a 4-4 split, and would delay certain rulings until 9 justices are again on the court.

**Q: How many federal judges nominated by President Obama were acted on by the Senate?**

A: The U.S. Senate has confirmed 321 individuals nominated to the federal bench during Obama's presidency. This total includes 264 district court judges, 55 appeals-court judges, and two Supreme Court justices.<sup>5</sup> Moreover, even the current Republican-controlled Senate has confirmed dozens of the President's nominees.<sup>6</sup> The assertion that Republicans have been "obstructionist" – that is, needlessly blocking Obama nominees – does not reflect the facts. Indeed, as the figure above (321) indicated, the current totals for Obama confirmations surpass those for his GOP predecessor. At this point in the presidency of George W. Bush, only 296 federal judges had been confirmed.<sup>7</sup> Thus, there is no validity to claims that President Obama's nominees have been unfairly treated by the Senate.

*Christopher M. Gacek, Ph.D., J.D., is a Senior Fellow for Regulatory Policy at Family Research Council.*

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<sup>1</sup> Adam J. White, "The Constitution Does Not Require the Senate to Vote on a Nomination," *The Weekly Standard*, February 14, 2016, accessed February 29, 2016, <http://www.weeklystandard.com/the-constitution-does-not-require-the-senate-to-vote-on-a-nomination/article/2001087>; see also, Adam J. White, "Toward the Framers' Understanding of 'Advice and Consent': A Historical and Textual Inquiry," *Harvard Journal of Law & Public Policy* 29 (2005): 103, accessed February 29, 2016, [http://www.law.harvard.edu/students/orgs/jlpp/Vol29\\_No1\\_White.pdf](http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No1_White.pdf).

<sup>2</sup> White, "Toward the Framers' Understanding of 'Advice and Consent,'" 140-1.

<sup>3</sup> Barry J. McMillion, "Supreme Court Appointment Process: Senate Debate and Confirmation Vote," Congressional Research Service: Washington, D.C., Oct. 19, 2015 (R44234), Summary, <https://www.fas.org/sgp/crs/misc/R44234.pdf>.

<sup>4</sup> Brian Darling, "The ABCs of Blocking Obama's Supreme Court Nominee," *Conservative Review*, February 16, 2016, accessed February 29, 2016, <https://www.conservativereview.com/commentary/2016/02/the-abcs-of-blocking-obamas-supreme-court-nominee>.

<sup>5</sup> Hans A. von Spakovsky and Elizabeth Slattery, "Obama and Juan Williams Need a Lesson on the Constitution and the Facts on Judicial Nominations," *National Review*, February 18, 2016, accessed February 29, 2016, <http://www.nationalreview.com/article/431550/supreme-court-nomination-senate-constitution-antonin-scalia-successor>.

<sup>6</sup> "Vacancies in the Federal Judiciary, 114th Congress," USCourts.gov, accessed February 29, 2016, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>.

<sup>7</sup> *Supra*, note 5.