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The Death of Justice Scalia: Procedural Issues Arising on an Eight-Member Supreme Court

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Summary

On February 13, 2016, Justice Antonin Scalia unexpectedly passed away at the age of 79, vacating a seat on the Supreme Court that he had held for nearly 30 years. Supreme Court vacancies that arise in presidential election years rarely occur, and have in the past led to a seat on the Court staying open for extended periods of time. With suggestions that Justice Scalia's successor may not be confirmed for several months, let alone before the fall election, a possibility exists that Justice Scalia's seat on the High Court may remain open for an extended period of time, including throughout the remainder of the 2015 Supreme Court term.

While the Supreme Court consists of nine Justices, it does not need nine Justices to decide a case. Instead, Congress has established quorum requirements for the Court, providing that any six Justices "shall constitute a quorum." By tradition, the agreement of a majority of the quorum is necessary to act for the Court. As a consequence, with an eight-member Court, there is the possibility of split votes, where a majority cannot agree on the outcome in a given case. With several high-profile cases pending on the Court's docket, including cases on public employee unions, abortion, and immigration, it appears that the Court could become equally divided on a number of matters in the near future.

In the absence of a full Court, when the quorum of Justices is evenly divided (four to four or three to three), the Supreme Court has empirically adopted one of two approaches. First, if the participating Justices are equally divided on the merits of a case, the Court's practice has, at times, been not to write an opinion, but to enter a judgment that tersely affirms the lower court judgment without any indication of the Court's voting alignment. Such an order has no precedential value. Second, in lieu of issuing a summary affirmance of the lower court opinion, the Court could instead order reargument of the case. The Court possesses inherent authority to order reargument of a case *sua sponte* or on its own volition, and has exercised such authority in the past when there was an open seat on the Court. In addition, an unsuccessful petitioner could petition the Court for a rehearing in anticipation of a Court with a changed composition. Nonetheless, the "more likely" vehicle for rehearing, where the Court is equally divided among its members, is for the Court to order a rehearing *sua sponte* prior to issuing a decision on the merits.

This report provides an overview of the Supreme Court's procedural rules and requirements when the Court is staffed with less than nine members. Included in this discussion is an overview of the Court's quorum requirements, rehearing procedures, and vote count practices, with a focus on how the Court has traditionally responded to a change of composition during a term. The report concludes by highlighting over a dozen cases from the current term that could result in an evenly divided Supreme Court.

Contents

Introduction	1
The Supreme Court Without Nine Justices	1
An Equally Divided Court.....	4
Possible 4-4 Deadlocks for the 2015 Term.....	6
Conclusion.....	10

Tables

Table 1. Potential 4-4 Cases on the 2015 Docket	8
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Contacts

Author Contact Information	10
Acknowledgments	10

Introduction

On February 13, 2016, Justice Antonin Scalia unexpectedly passed away at the age of 79, vacating a seat on the Supreme Court that he had held for nearly 30 years.¹ A vacancy on the Supreme Court that arises during a presidential election year is a relatively rare occurrence,² with the last such vacancy arising in 1968, when Chief Justice Earl Warren submitted a resignation letter less than six months before the general election.³ While Chief Justice Warren's seat was not filled until the following year,⁴ the last time a Supreme Court vacancy arose in an election year *and* the Senate approved a new appointee to the Court in that same year was 1932, when the seat vacated by the retirement of Justice Oliver Wendell Holmes Jr. in January of that year⁵ was filled by Justice Benjamin Cardozo two months later.⁶ Given this history and with suggestions that Justice Scalia's successor may not be confirmed for several months, let alone before the fall election,⁷ the possibility exists that Justice Scalia's seat on the High Court may remain open for an extended period of time, including throughout the remainder of the 2015 Supreme Court term. This report provides an overview of the Supreme Court's procedural rules and requirements when the Court is staffed with less than nine members. Included in this discussion is an overview of the Supreme Court's quorum requirements, rehearing procedures, and vote count practices, with a focus on how the Court has traditionally responded to a change of composition during a term. The report concludes by highlighting over a dozen cases from the current term that could result in an evenly divided Supreme Court.

The Supreme Court Without Nine Justices

Article III of the U.S. Constitution provides that the judicial power of the United States shall reside in "one Supreme Court" and any lower courts Congress chooses to establish.⁸ Although the Constitution creates the Supreme Court, the nation's founding document is silent on the Court's

¹ See John G. Roberts, Jr., *Statement by Chief Justice John G. Roberts, Jr.* (February 13, 2016), available at http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16.

² Justice Anthony Kennedy, upon taking the oath of office, assumed his seat on the Supreme Court on February 18, 1988. See *Members of the Supreme Court of the United States* (No Date Provided), available at http://www.supremecourt.gov/about/members_text.aspx (hereinafter "Members of Supreme Court"). However, the seat that Justice Kennedy filled had been vacant, upon the retirement of Justice Lewis Powell, Jr. on June 26, 1987. *Id.*

³ See Ronald Ostrow, *Chief Justice Warren Submits Resignation*, BOSTON GLOBE, June 22, 1968, at 1.

⁴ After the Senate did not act on President Johnson's nominee to replace Chief Justice Warren, the Chief Justice agreed to remain on the Court until his successor was named. See Carroll Kirkpatrick, *Warren Agrees to Finish Term As Chief Justice: Jurist, Nixon Concur on Continuity*, WASHINGTON POST, December 5, 1968, at A1. On June 23, 1969, Warren Burger succeeded Earl Warren as Chief Justice. See *Members of Supreme Court*, *supra* note 2.

⁵ See *Justice Holmes, Near 91, Quits Supreme Bench*, N.Y. Herald Tribune, January 13, 1932, at 1.

⁶ See Genevieve Forbes Herrick, *Benjamin N. Cardozo Is Sworn as U. S. Supreme Court Justice*, CHICAGO DAILY TRIBUNE, March 15, 1935, at 5. Justice Sherman Minton's retirement in September of 1956 resulted in President Eisenhower appointing Justice William Brennan to the High Court through a recess appointment a few weeks later. See Don Shannon, *Eisenhower Picks Democrat for Supreme Court Vacancy: New Jersey Jurist Gets Minton Post*, L.A. TIMES, September 30, 1956, at 1. The Senate confirmed Justice Brennan via a voice vote the following March. See Willard Edwards, *Two Confirmed for High Court*, CHICAGO DAILY TRIBUNE, March 19, 1957, at B3.

⁷ See, e.g., Mitch McConnell and Chuck Grassley, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST, February 18, 2016, available at https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html.

⁸ See U.S. CONST. art. III, §1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

makeup and design, and, as a result, Congress has generally exercised the authority to define the Court by statute.⁹ The first Congress, for example, enacted the Judiciary Act of 1789, which stated that the Supreme Court consists of “a chief justice and five associate justices.”¹⁰ The size of the Court varied during the 19th century,¹¹ with the Court shrinking to five judges following the passage of the Judiciary Act of 1801¹² and growing as large as 10 judges after the enactment of the Judiciary Act of 1863.¹³ In 1869, Congress reduced the number of judges on the Supreme Court to nine,¹⁴ and the size of the Supreme Court remains the same today.¹⁵ In contrast to the federal appellate courts, the Supreme Court has, perhaps because of the constitutional establishment of “one” court, “always functioned as a single body, without dividing into panels.”¹⁶

While the Supreme Court consists of nine Justices, it does not need nine Justices to decide a case. Instead, Congress has established quorum requirements for the Court, providing that any six Justices “shall constitute a quorum.”¹⁷ By tradition, the agreement of a majority of the quorum is necessary to act for the Court.¹⁸ In recent years, the most likely reason for a Justice to be unavailable to participate in a proceeding before the Court has occurred when a Justice determines that he has a personal or financial interest in a case.¹⁹ Nonetheless, recusals are a rare occurrence on the Court.²⁰ In the last five terms, only a handful of opinions have been released by an eight-member Court, and none have been released by a Court of seven or six members.²¹ If the

⁹ See Wright and Miller, *Supreme Court—Introduction*, 16B FED. PRAC. & PROC. JURIS. §4001 (3d ed.).

¹⁰ See Act of September 24, 1789, c. 20, §1, 1 Stat. 73.

¹¹ See John V. Orth, *How Many Judges Does it Take to Make a Supreme Court*, 19 CONST. COMMENTARY 681, 684-85 (2002).

¹² See Act of February 13, 1801, ch. 4, §3, 2 Stat. 89.

¹³ See Act of March 8, 1863, ch. 100, §1, 12 Stat. 794.

¹⁴ See Act of July 23, 1869, ch. 22, §1, 16 Stat. 44.

¹⁵ See 28 U.S.C. §1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices....”).

¹⁶ See *Supreme Court—Introduction*, 16B FED. PRAC. & PROC. JURIS. §4001 (3d ed.). Single Justices are empowered to act on incidental matters when authorized by law. See SUP. CT. R. 22. Often applications addressed to a single Justice are for stays of execution in death penalty cases or more mundane matters such as extensions of time for filing documents with the Court. See 22-401 MOORE’S FEDERAL PRACTICE - CIVIL §401.03.

¹⁷ 28 U.S.C. §1.

¹⁸ See *FTC v. Flotill Prods.*, 389 U.S. 179, 183 (1967) (“The almost universally accepted common-law rule is [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.”); see generally Eugene Gresman, et. al., SUPREME COURT PRACTICE 5-6 (9th ed. 2007); Saul Levmore, *More Than Mere Majorities*, 2000 UTAH L. REV. 759, 765 (2009) (“[T]here is almost universal convergence on the requirement of an absolute majority coalition for ... ‘disposition,’ or the immediate, enforceable result affecting the litigants.”).

In the Nineteenth Century, the Court followed a rule wherein if a case involved a constitutional question, the Court would not deliver any judgment unless the decision was that of a “majority of the whole court.” See *Briscoe v. Commonwealth’s Bank of Ky.*, 33 U.S. (8 Pet.) 118, 122 (1834). It appears that the Court no longer adheres to this rule. See *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 616 (1975) (Blackmun, J., dissenting) (arguing that *Fuentes v. Shevin*, 407 U.S. 67 (1972), “should not have been brought down and decided by a 4-3 vote when there were two vacancies on the Court at the time of argument.”).

¹⁹ 22-401 MOORE’S FEDERAL PRACTICE - CIVIL §401.03.

²⁰ See Ryan Black and Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 84-94 (2005) (arguing that the Justices are reluctant to recuse themselves because of the risk that the remaining eight Justices will split evenly on an outcome).

²¹ **2015 Term:** *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016) (6-2) (Alito, J., recused). **2014 Term:** *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (6-2) (Breyer, J., recused); *Commil USA, LLC v. Cisco* (continued...)

Court is scheduled to hold a session but a quorum of Justices is not present, the Justices attending, or the Clerk or a Deputy Clerk, if no Justice is present, may announce that the Court will not meet until there is a quorum.²²

Congress has delineated the procedures to be followed if the Supreme Court cannot hear or decide a case because of the absence of a quorum.²³ These procedures differ depending on if the case is coming before the Court on direct appeal from a district court. While the majority of cases arrive at the Supreme Court from the lower *appellate* courts or are a part of the Court's original jurisdiction,²⁴ a small number of cases, mostly respecting redistricting and campaign finance, come to the Court through a direct appeal after being heard initially by a three-judge district court.²⁵ If the High Court cannot meet to rule on a case on *direct appeal* from a district court because of the absence of a quorum, Section 2109 of Title 28 allows the Chief Justice to remit the case to the court of appeals for the circuit that encompasses the district in which the case arose.²⁶ Upon remittance to the appellate court, the lower court, sitting *en banc* or through a specially composed panel of three senior circuit judges, hears the case and renders a "final and conclusive" decision.²⁷ In *all other cases* where a quorum is lacking, Congress has established that if a majority of the qualified Justices determine that the "case cannot be heard and determined at the

(...continued)

Sys., 135 S. Ct. 1920 (2015) (6-2) (Breyer, J., recused). **2013 Term:** POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014) (8-0) (Breyer, J., recused); United States v. Quality Stores, Inc., 134 S. Ct. 1395 (2014) (8-0) (Kagan, J., recused); Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (7-1) (Sotomayor, J., recused); Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (6-2) (Kagan, J., recused); EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014) (6-2) (Alito, J., recused). **2012 Term:** Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (8-0) (Kagan, J., recused); Decker v. Nw. Env'tl. Def. Ctr., 133 S. Ct. 1326 (2013) (7-1) (Breyer, J., recused); Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (7-1) (Kagan, J., recused); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) (6-2) (Kagan, J., recused); FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) (5-3) (Alito, J., recused); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (5-3) (Sotomayor, J., recused). **2011 Term:** Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414 (2012) (8-0) (Roberts, C.J., recused); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) (8-0) (Kennedy, J., recused); FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307 (2012) (8-0) (Sotomayor, J., recused); Reichle v. Howards, 132 S. Ct. 2088 (2012) (8-0) (Kagan, J., recused); Golan v. Holder, 132 S. Ct. 873 (2012) (6-2) (Kagan, J., recused); FAA v. Cooper, 132 S. Ct. 1441 (2012) (5-3) (Kagan, J., recused); Arizona v. United States, 132 S. Ct. 2492 (2012) (5-3) (Kagan, J., recused).

²² SUP. CT. R. 4.2.

²³ 28 U.S.C. § 2109.

²⁴ For example, during the 2014 term, of the Court's 172 merit opinions and memorandum orders, 169 reached the Court on appeal from the highest state appellate court or a federal circuit court of appeals, while 3 came to the Court on direct appeal from a district court. See *The Statistics*, 129 HARV. L. REV. 381, 381 (2015).

²⁵ See, e.g., 28 U.S.C. §2284(a) (authorizing a district court of three judges when an action is filed "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); see also 52 U.S.C. §§10101, 10304, 10306, 10504, 10701 (authorizing a three-judge panel for various voting rights violations); 42 U.S.C. §2000a-5(b) (authorizing civil action before a three-judge panel by the Attorney General on finding a pattern or practice of civil rights violations with regard to public accommodations); 42 U.S.C. §2000e-6 (authorizing a civil action before a three-judge panel by the Attorney General on finding a pattern or practice of civil rights violations with regard to discrimination in employment); 26 U.S.C. §§9010-9011 (authorizing three-judge panels for cases respecting certain campaign finance violations); see generally 28 U.S.C. §1253 (authorizing direct appeal to the Supreme Court for review of "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.").

²⁶ *Id.*

²⁷ *Id.*

next ensuring term, the court shall enter its order affirming the judgment of the court from which it was brought for review....”²⁸ Such an order has no precedential value.²⁹

An Equally Divided Court

A Supreme Court consisting of eight or six sitting members raises the possibility that the Court may be equally divided as to the outcome of a given ruling. In the absence of a full Court, when the quorum of Justices is evenly divided (four to four or three to three), the Supreme Court generally has taken one of two approaches. First, if the participating Justices are equally divided on the merits of a case, the Court’s practice has, at times, been not to write an opinion, but to enter a judgment that tersely affirms the lower court judgment without any indication of the Court’s voting alignment.³⁰ In such a case, the judgment of the lower court would stand, but the Supreme Court’s summary affirmance would not be accorded any value as precedent.³¹ For the Court, “no affirmative action can be had in a case where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.”³² As a consequence, as one commentator noted, “In baseball, a tie goes to the runner; in the High Court, a tie goes to the Respondent.”³³ The rule of affirmance by an equally divided court was most recently invoked in the 2010 term, when the Court split 4-4 on two cases in which Justice Kagan had recused herself.³⁴

Second, in lieu of issuing a summary affirmance of the lower court opinion, the Court could instead order reargument of the case.³⁵ The Court possesses inherent authority to order the reargument of a case *sua sponte* or on its own volition.³⁶ The Court has, in the past, exercised such authority to have a case be reargued after identifying additional issues for consideration or determining that more time is needed to resolve a case.³⁷ However, in a practice particularly relevant in the current circumstances, the Court has also ordered reargument in instances where the Court is equally divided and holding the case over for reargument could allow a new Justice to cast the deciding vote to create a majority opinion.³⁸ For example, the abrupt resignation of

²⁸ 28 U.S.C. §2109.

²⁹ *Id.*

³⁰ See Gressman, *supra* note 18, at 6.

³¹ *Id.*

³² See *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

³³ See Thomas E. Baker, *Why We Call the Supreme Court “Supreme,”* 4 GREEN BAG 2D 129, 130 (2001). The respondent is the party against whom an appeal is taken. See BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁴ See *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010); *Flores-Villar v. United States*, 564 U.S. 210 (2011).

³⁵ The term “reargument” is often used interchangeably with the term “rehearing.” However, “reargument” generally refers to oral argument before the Court, while “rehearing” also encompasses requests for written briefs and submissions to questions from the Court. See Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI. KENT. L. REV. 919, n.3 (1989).

³⁶ See *id.* at 930-32.

³⁷ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (restoring case for reargument and asking the parties additional questions).

³⁸ See Gressman, *supra* note 18, at 816. In cases where the presence of a new Justice makes a majority decision possible, the traditional practice has been for the incoming Justice not to participate in consideration of whether to order reargument, but to take part in the consideration and judgment of a case subsequent to such an order. *Id.* For a compilation of rearguments and 4-4 affirmances arising from a vacancy on the Supreme Court, see Josh Blackman, *Reargument and 4-4 Affirmances on the Short-Handed Supreme Court*, JOSH BLACKMAN’S BLOG, (Feb. 23, 2016), available at <http://joshblackman.com/blog/2016/02/23/rearguments-and-4-4-affirmances-on-the-short-handed-supreme-court-1945-2006/>.

Justice Abe Fortas in May of 1969 created a vacancy on the Court that was not filled until Justice Harry Blackmun took the oath of office on June 9, 1970.³⁹ With several cases that were heard during the 1969 term resulting in an equally divided Court, the Court “reschedul[ed] an inordinate number of cases for reargument during the 1970 term.”⁴⁰ Similarly, upon Justice Kennedy’s confirmation to the Court, filling a seat that had been vacant for more than seven months, the Court issued several orders allowing for reargument of cases that had previously been heard by an eight-member Court.⁴¹ Even short vacancies on the Court have resulted in reargument in closely divided cases. For example, at least one case, which was originally argued before an eight-member Court in October of 1991 after Justice Thurgood Marshall’s retirement, was reargued so that newly appointed Justice Clarence Thomas could cast the decisive vote in the case.⁴² Most recently, in 2005, the Court, on its own initiative, provided for reargument in three cases that had originally been argued between the death of Chief Justice Rehnquist and the swearing-in of Justice Alito.⁴³

It should be noted that it is not unprecedented for the Court to order reargument following the installment of new Justices even if there is not an equal division among the sitting members. Following the retirement of Justices Hugo Black and John Marshall Harlan II in the fall of 1971, the Court’s remaining seven members heard oral argument in *Roe v. Wade* and *Doe v. Bolton*.⁴⁴ After the confirmation of Justices Powell and William H. Rehnquist, Chief Justice Burger led an effort to have the cases reargued so that the two new Justices could participate in the decision.⁴⁵ Justice Blackmun concurred, stating “I believe, on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court.”⁴⁶ Ultimately, the Court heard reargument in both cases on October 11, 1972. The reargument resulted in a 7-2 decision in favor of abortion rights,⁴⁷ although the votes of Justices Powell, who voted with the majority in both cases, and Rehnquist, who dissented in both cases, did not alter the outcome of the cases. In other words, in cases of special import or significance, reargument to allow a new Justice to participate in the case could be a possibility, regardless of whether there is a tie vote.

Finally, it is also important to note that even if the Court chooses to issue a summary affirmance as the result of an equally divided Court, the petitioner (i.e., the party that initially asked the Court to hear the case) can request the Court to rehear the matter.⁴⁸ Supreme Court Rule 44 permits an unsuccessful party to submit a petition for rehearing within 25 days of the entry of an

³⁹ See “Members of the Supreme Court,” *supra* note 2.

⁴⁰ See *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 344 (1971) (noting that 17 cases were reargued during the 1970 term).

⁴¹ See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

⁴² See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993). Two additional cases from the 1991 term that were argued prior to Justice Thomas joining the Court were scheduled for reargument. See *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); *Doggett v. United States*, 505 U.S. 647 (1992). However, in both of those cases, Justice Thomas dissented, indicating that either the cases were not equally divided before reargument or that another Justice changed his or her vote after reargument.

⁴³ 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).

⁴⁴ See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴⁵ See John A. Jenkins, *THE PARTISAN* 140-41 (2012).

⁴⁶ *Id.* at 141.

⁴⁷ See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴⁸ See SUP. CT. R. 44.

adverse decision or judgment on the merits or denial of *certiorari*.⁴⁹ In the context of a summary affirmance arising as a result of an equally divided Court, the petitioner, who sought to have the lower court's ruling reversed, may want to seek rehearing of the matter. Despite the existence of this option, as one commentator has noted, "the Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision" upon the motion of a losing party.⁵⁰ The infrequency with which petitions for rehearing are granted is likely due to the fact that the Court engages in a thorough consideration of each case prior to issuing a decision, making it unlikely that reargument of a case would change the outcome of even a closely divided Court.⁵¹ This principle generally adheres even when there is a change in composition of the Court, as rehearing will not be granted "except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision."⁵² Put another way, only if a Justice who agreed with the underlying decision now thinks rehearing is appropriate, and if a majority of the Court agrees in that decision, will rehearing be granted upon request. As a result, the Court generally will grant a petition for rehearing only in "exceptional situations" where the Court itself has "substantial doubts as to the correctness as to what it has decided, or where the unanticipated consequences of the Court's decision are clearly explained only in the rehearing petition."⁵³ As such, while an unsuccessful petitioner could theoretically petition the Court for a rehearing in anticipation of a Court with a changed composition, the "more likely" vehicle for rehearing, where the Court is equally divided among its members, is for the Court to order a rehearing *sua sponte*.⁵⁴

Possible 4-4 Deadlocks for the 2015 Term

Given these rules and practices of the Court, the question that remains is how the Supreme Court will resolve the pending cases on its current docket absent Justice Scalia. This question is particularly appropriate given the unusual number of cases on the present docket that have been perceived to be highly controversial and likely to divide the Justices.⁵⁵ Indeed, the Court during the 2015 term has heard or is scheduled to hear cases on public employee unions, abortion, immigration, and affirmative action, among other hot button issues.⁵⁶ Predicting the outcome of any Supreme Court case, let alone some of the most high profile cases, is a difficult task, as the ultimate outcome of a case may depend on a number of complicated factors, not all of which are

⁴⁹ *Id.*

⁵⁰ See Gressman, *supra* note 18, at 814.

⁵¹ *Id.* at 815 ("Since decisions on the merits generally follow full briefing and oral argument, at which the case is thoroughly explored, a rehearing attempt by the losing party to present the same arguments anew, even in an improved fashion, has hardly any chance of success.").

⁵² See SUP. CT. R. 44.1.

⁵³ See Gressman, *supra* note 18, at 817.

⁵⁴ See CRS Report RS22300, *The Retirement of Justice O'Connor: Quorum Requirements, Rehearings and Vote Counts in the Supreme Court*, by (name redacted) p. 3.

⁵⁵ See generally Dahlia Lithwick and Mark Joseph Stern, *The Supreme Court's Most Important Cases of the New Term*, SLATE (October 1, 2015), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2015/10/supreme_court_2015_cases_on_affirmative_action_unions_abortion_voting_rights.html; Richard Wolf, *On High Court's Docket: Race, Labor, Politics – and Abortion?*, USA TODAY (October 5, 2015), available at <http://www.usatoday.com/story/news/2015/10/04/supreme-court-race-immigration-labor-abortion/73033868/>.

⁵⁶ See Richard Wolf, *Here's How Scalia's Death Affects Supreme Court Rulings This Year*, USA TODAY (February 15, 2016), available at <http://www.usatoday.com/story/news/politics/2016/02/14/scalia-death-supreme-court-abortion-immigration-race-labor-voting-conservative/80372440/>; *Scalia's Death Could Change Court on Abortion, Race, Climate*, POLITICO (February 13, 2016), available at <http://www.politico.com/story/2016/02/scalia-death-how-will-the-supreme-court-change-219256>.

known to the public.⁵⁷ Nonetheless, based on the current eight Justices' past voting practices and written opinions, several cases have been widely seen as having the potential to result in 4-4 splits in the absence of Justice Scalia.⁵⁸ **Table 1** provides a list of cases that *could* result in a 4-4 tie at the Court this year, including the outcome in the lower court, which would stand if five votes do not exist at the Supreme Court to reverse the lower court's ruling.

Notably, absent from the list is *Fisher v. University of Texas*, a case challenging the use of racial preferences in college admissions at the University of Texas. When this case first reached the Court in 2013, Justice Kagan recused herself from the matter.⁵⁹ Her recusal in the case currently before the Court will result in a seven-member Court deciding *Fisher*. While the Court's practice from *Roe v. Wade* and *Doe v. Bolton* may suggest that *Fisher* could be held over for reargument pending the appointment of a new Justice,⁶⁰ the Court's willingness to opine on the underlying constitutional ruling two years ago in *Fisher I*⁶¹ with an eight-member Court may indicate that the Court could be willing to issue a ruling on the merits with a seven-member Court, as well.

If the cases listed in **Table 1** or others result in a 4-4 vote split, the Court will then have to decide between issuing a summary affirmance of the lower court ruling or having the case reargued when a new appointee fills Justice Scalia's seat on the Court.⁶²

⁵⁷ See Oliver Roeder, *Why the Best Supreme Court Predictor in the World is Some Random Guy in Queens*, FIVETHIRTYEIGHT (November 17, 2014), available at <http://fivethirtyeight.com/features/why-the-best-supreme-court-predictor-in-the-world-is-some-random-guy-in-queens/> (“But if a Supreme Court opinion is tough to decipher when held in one’s hands, can we ever hope to predict decisions before they happen? The issues are complex and diverse, and justices have unique and evolving ideologies, outlooks and interpretations—and they don’t provide polling data.”).

⁵⁸ See Wolf, *supra* note 56; see also POLITICO, *supra* note 56; Erwin Chemerinsky, *How Scalia’s Death Could Upend America*, CNN (February 14, 2016), available at <http://www.cnn.com/2016/02/13/opinions/scalia-supreme-court-future-chemerinsky/>; Adam Liptak, Larry Buchanan, and Alicia Parlapiano, *How Scalia’s Death Could Affect Major Supreme Court Cases in the 2015-16 Term*, N.Y. TIMES (February 14, 2016), available at <http://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html>; Jordyn Phelps, *How Antonin Scalia’s Death Could Affect the Outcome of These 5 Cases*, ABC NEWS (February 22, 2016), available at <http://abcnews.go.com/Politics/antonin-scalias-death-affect-outcome-cases/story?id=37101008>; Libby Nelson, *Antonin Scalia’s Death Could Lead to More 4-4 Ties. Here’s What Happens If It Does*, VOX (February 13, 2016), available at <http://www.vox.com/2016/2/13/10987116/scalia-supreme-court-tie>; Oliver Roeder, *A 4-4 Supreme Court Could Be Good for Unions and Voting Rights Advocates*, FiveThirtyEight (February 15, 2016), available at <http://fivethirtyeight.com/features/a-4-4-supreme-court-could-be-good-for-unions-and-voting-rights-advocates/>.

⁵⁹ In 2013, the first time the *Fisher* case was at the Supreme Court, Justice Kagan recused herself from participating in the matter. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

⁶⁰ See *supra* “An Equally Divided Court,” at 5.

⁶¹ See 133 S. Ct. at 2421 (holding that a “university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity....”).

⁶² For an argument that tie votes will likely result in reargued cases, see Tom Goldstein, *Tie votes will lead to reargument, not affirmance*, SCOTUSBLOG (February 14, 2016), available at <http://www.scotusblog.com/2016/02/tie-votes-will-lead-to-reargument-not-affirmance>.

Table I. Potential 4-4 Cases on the 2015 Docket

Arranged Alphabetically by Case Name

Case Name	Case Number	Central Issue Presented	Lower Court Ruling (Which Would Be Affirmed with a 4-4 Vote)
<i>Bank Markazi v. Peterson</i>	14-770	Separation of Powers: Whether the Iran Threat Reduction and Syria Human Rights Act of 2012 effectively directs a court to issue a particular ruling against an Iranian Bank in a single pending case.	The Second Circuit ruled against the Iranian Bank, holding that the Iran Threat Reduction and Syria Human Rights Act of 2012 did not violate the Constitution.
<i>Birchfield v. North Dakota</i>	14-1468	Criminal Procedure: Whether, in the absence of a warrant, a state may criminalize the refusal to take a chemical test to detect the presence of alcohol in the person’s blood.	The North Dakota Supreme Court ruled in favor of the state, concluding that North Dakota’s criminal refusal statute did not violate the Fourth Amendment. (In two companion cases, the government also won in the lower courts.)
<i>Evenwel v. Abbott</i>	14-940	Voting Rights: Whether the “one person, one vote” standard under the Equal Protection Clause allows state voting districts to be based on roughly equal total populations, as opposed to requiring states to use voter population when apportioning legislative districts.	The three-judge panel ruled in favor of the State of Texas, holding that state legislative districts could be based on total population alone.
<i>Foster v. Chatman</i>	14-8349	Jury Selection: Whether Georgia prosecutors, by striking four prospective black jurors in a death penalty case, did so on the basis of race in violation of the Equal Protection Clause.	The Georgia Supreme Court and lower courts ruled in favor of the State of Georgia, rejecting the prisoner’s challenge to the prosecutor’s conduct under <i>Batson v. Kentucky</i> .
<i>Franchise Tax Board of California v. Hyatt</i>	14-1175	Federalism and State Sovereign Immunity: Whether <i>Nevada v. Hall</i> should be overturned and whether a state, without its consent, is immune from being sued in another state’s courts.	The Nevada Supreme Court ruled against the State of California’s tax collecting agency, allowing a monetary damages award to be levied against California in a Nevada court.
<i>Friedrichs v. California Teachers Association</i>	14-915	Public Employee Unions: Whether <i>Abood v. Detroit Board of Education</i> should be overruled and public sector “agency shop” arrangements—which require nonmembers represented by a union to pay dues to that union—violate the First Amendment.	In light of <i>Abood</i> , the Ninth Circuit summarily ruled in favor of the California Teachers Association, holding that agency shop arrangements are constitutional.
<i>Harris v. Arizona Ind. Redistricting Commission</i>	14-232	Redistricting: Whether the desire to gain partisan advantage or the desire to obtain favorable preclearance review by the Justice Department under the Voting Rights Act justifies departures from the one-person, one vote standard.	The three-judge district court opinion upheld the map drawn for state legislative districts by the Arizona Independent Redistricting Commission.
<i>RJR Nabisco, Inc. v. The European Community</i>	15-138	Criminal Law: Whether the Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially.	The Second Circuit ruled in favor of the plaintiffs, holding that RICO can apply to a foreign enterprise or to extraterritorial conduct.
<i>Spokeo v. Robins</i>	13-1339	Standing to Sue: Whether Congress has the power to authorize a private right of action based on a bare violation of a federal statute without a separate concrete harm.	The Ninth Circuit ruled in favor of the plaintiffs, holding that Article III of the Constitution does not require a plaintiff to suffer actual damages if there is an alleged violation of a statutory right.

Case Name	Case Number	Central Issue Presented	Lower Court Ruling (Which Would Be Affirmed with a 4-4 Vote)
<i>Tyson Foods v. Bouaphakeo</i>	14-1146	Class Actions: Whether a class action can be maintained for violations of the overtime requirements of the Fair Labor Standards Act when the class is certified by relying on statistical formulas to establish what is owed, instead of having each class member establish damages individually.	The Eighth Circuit ruled in favor of the workers bringing the class action, holding that the class can be certified without each class member establishing damages individually.
<i>United States v. Texas</i>	15-674	Immigration: Whether Department of Homeland Security guidance that calls for granting relief from removal and work authorization to certain aliens who entered or remained in the United States in violation of federal immigration law is “not in accordance with the law.”	The Fifth Circuit ruled against the federal government, holding that the guidance violates the Administrative Procedure Act.
<i>Utah v. Strieff</i>	14-1373	Criminal Procedure: Whether evidence seized incident to an arrest on an outstanding warrant should be suppressed because the evidence was discovered during an investigatory stop later found to be unlawful.	The Utah Supreme Court ruled against the state, concluding that the illegal investigatory stop was not sufficiently attenuated from the search incident to the arrest to prevent the application of the exclusionary rule.
<i>Whole Women’s Health v. Hellerstedt</i>	15-274	Abortion: Whether Texas’s law requiring doctors to have admitting privileges at a hospital no more than 30 miles away and setting clinical standards for abortion clinics that are similar to those of surgical centers imposes an “undue burden” on a woman’s right to terminate a pregnancy.	The Fifth Circuit ruled in favor of the State of Texas, upholding Texas’s regulations of abortion clinics.
<i>Williams v. Pennsylvania</i>	15-5040	Judicial Ethics: Whether the refusal of the Chief Justice of a state Supreme Court to recuse himself in a capital case where the judge, in his prior capacity as a district attorney, approved of the decision to pursue capital punishment against the petitioner violates the petitioner’s due process rights.	The Pennsylvania Supreme Court ruled in favor of the state, upholding the conviction and sentence of the petitioner.
<i>Wittman v. Person-huballah</i>	14-1504	Redistricting: Whether the Virginia legislature relied too greatly on race in redrawing the boundaries of a Virginia congressional district.	A three-judge panel ruled against the legislature, finding that race was the predominant factor in redrawing Virginia’s Third Congressional District.
<i>Zubik v. Burwell</i>	14-1418	Contraceptive Requirement: Whether the accommodation available to employers with religious objections to a requirement to provide contraceptive coverage in their group health plan (under which the employer certifies its objection and a third party provides coverage instead of the employer) violates the Religious Freedom Restoration Act of 1993 (RFRA).	<i>Zubik</i> is the first case among seven that have been consolidated in a single appeal to the Supreme Court. In the lower court in <i>Zubik</i> , the Third Circuit ruled for the government in holding that the accommodation did not violate RFRA. While the Fifth, Sixth, Seventh, Tenth Eleventh, & D.C. Circuits have agreed with the Third, the Eighth Circuit has ruled against the government in similar litigation.

Source: Created by CRS based on petitions for *certiorari* granted by the Supreme Court.

Note: Absent from the list is *Fisher v. University of Texas*, a case challenging the use of racial preferences in college admissions at the University of Texas, as Justice Kagan has recused herself from participating in the decision, resulting in a seven-member Court for that case following the death of Justice Scalia.

Conclusion

Justice Scalia's death occurs in the midst of a busy term at the Supreme Court, with dozens of pending cases remaining on the High Court's docket. Given the possibility that Justice Scalia's successor may not be confirmed in the near future, many of the Court's pending cases may result in a split vote between the current Justices. If such a situation arises, in light of the statutes, rules, and practices governing the Supreme Court, it appears the Court possesses significant authority and discretion in determining whether either (1) to issue an order summarily affirming the lower court's ruling; or (2) to allow a case to be reargued so that a new Justice can eventually participate in the ruling and settle the split on the High Court. The potential of many pending split decisions on the Court underscores the significance of Justice Scalia's death for the 2015 term and the important role Justice Scalia's successor will serve on the Supreme Court.

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