How a Supreme Court Vacancy Actually Works and Its Implications
Part 1 of 2

Justice Scalia’s unexpected passing has created political upheaval, judicial uncertainty, and a procedural anomaly for the Supreme Court. The entire nation is receiving a crash course in Civil Procedure as the Court responds to the vacancy created by Scalia. Barring any massive changes in the political situation, it seems this vacancy is one we’re all going to live with for a while. It seems prudent, then, to analyze and talk to Supreme Court litigation experts about expectations of this extended vacancy, how it might impact the Court, the cases before the Court, and the country.

There is every indication that Scalia’s vacancy will have a big impact on some major issues. Boris Bershteyn of Skadden Arps,¹ says, “Indeed, some of the most anticipated cases of this Term—including those involving Texas's regulation of abortion clinics and the Obama Administration's immigration initiatives—have been or will be heard after Justice Scalia's death. “With that in mind, Tejinder Singh of Goldstein & Russell, P.C.,² says, “Until a replacement Justice is confirmed, cases will either be decided by an eight-member Court or rescheduled for hearing later,
depending on what the Court decides would be best for that particular case. There is no rule that the Court has to follow; it can do what it wants.”

**What Happens to Cases Currently Before the Court that had Scalia’s Involvement Prior to his Death?**

Scalia’s death affects any case where the court had not issued an opinion before he died. As Andy Pincus of Mayer Brown says, “Justice Scalia’s death impacts every undecided case on which he sat – because the Court will now have to decide the case without Justice Scalia’s participation. If he had responsibility for drafting a majority opinion or dissent, another Justice must take over that role. If his vote was critical to the decision in the case, the Court will have to reconsider the matter and figure out how to decide it – or divide 4-4.” This will have a greater impact as time goes on. Any votes Scalia had cast in cases where the opinion had not been issued do not count. Wilmer Hale Appellate Partner Daniel Volchok says, “At the time of Justice Scalia’s death, the Court had decided more cases from the October sitting than from any of the later sittings, so in that sense the impact on the later sittings is greater.”

**What Happens to Cases During the Vacancy, Where the Court Issues a Ruling but is Divided Evenly?**

In the instance where the court is divided evenly, and they agree there is no narrow interpretation they can all agree with, they can ask the case be reargued, or they can issue a short order stating that “the judgment under review is affirmed by an equally divided Court.” This is known as a per curiam opinion, and it is usually issued under the court’s name, instead of a majority and a minority opinion. This split effectively holds up the decision of the lower court, and it does not establish any sort of precedent. According to Volchok, “Whichever option the Justices take for any particular case, they can do so on their own timetable; they do not have to choose immediately after a 4-4 vote.”

Another option, according to Volchok is “The Court has in the past ordered that cases be re-argued following the appointment of a new Justice. That occurred, for example, when Justice Samuel Alito succeeded Justice Sandra Day O’Connor. There’s no reason that couldn’t happen again here.” Less likely, is that a case is just held in limbo after the Court has decided to hear it. Volchok thinks, “It seems more likely that the Court would simply decide those cases—by a 4-4 tie if necessary—and then take the same issues up again in different cases once the vacancy was filled.”

Some evidence suggests that the court might be taking steps to avoid 4-4 ties. In Zubik v Burwell, the challenge to the contraceptive mandate in the Affordable Care Act, the court took the somewhat unconventional step of asking for supplemental briefs detailing possible compromises to the case. Bershteyn says, “the Court’s recent, highly unusual order in Zubik v. Burwell . . . heard during the March sitting—may well be an effort to resolve the case in a way that avoids a 4-4 tie.”

Looking ahead, the case selection might be impacted by the vacancy, especially the longer the vacancy persists. According to Singh, “the Court itself may become more
reticent to take on issues that it believes are likely to end in 4-4 ties. So it may eschew cases raising some of the more controversial constitutional issues until it has a ninth Justice.”

How Does Scalia’s Vacancy Impact Certiorari?

Another area that will be impacted by the vacancy on the court is how the court grants certiorari, or decides which cases to hear. Every year, the court is asked to hear around 7,000 cases. And every year, the court hears between 75-80 of those cases. Four justices must vote “yes” to grant certiorari for a case, and it is very difficult to get a case in front of the court. Now, there is some speculation that it will become herculean to put a case before the Supreme Court. Volchok says, “four votes are required for a petition to be granted, and now those four votes must now be found among eight Justices rather than nine. So just as a statistical matter it will be more challenging for any party seeking Supreme Court review.” Pincus agrees, saying, “it could well be more difficult to obtain four votes to grant certiorari, because there is one fewer Justice to vote on that issue.”

How will Scalia’s Absence Impact the Decision to Seek Appeal?

Other factors complicate the picture further. Scalia was often among the majority when cases were decided 5 to 4, and this record could impact some litigants desire to seek a hearing by the court. Singh hypothesizes, “any litigant who has a case where they were relying on Justice Scalia as the fifth vote may now be reluctant to try to take the case up, because winning may now be impossible.” Additionally, possibly, the decision making process of the court might change when it comes to granting certiorari. Volchok says, “this is highly speculative, but some or all of the Justices will be less willing to vote to grant a petition if they think there is a good chance the Court will ultimately divide 4-4. To the extent that phenomenon does exist, it is another reason that securing Supreme Court review in the coming months will be even more difficult than usual.”

Additional Supreme Court Procedural Questions and their Implications will be Addressed in Part Two: Scalia’s Supreme Court Vacancy - Impact on the 5th Circuit and Circuit Court Splits

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1 Boris Bershteyn is a litigation partner in Skadden, Arps, Slate, Meagher & Flom LLP’s New York office and practices before the Supreme Court of the United States and other appellate courts. He has also held various government positions including: Acting Administrator, Office of Information and Regulatory Affairs; General Counsel, White House Office of Management and Budget; Special Assistant to the President and Associate White House Counsel and Deputy General Counsel, White House Office of Management and Budget.

2 Tejinder Singh is a Lecturer on Law at Harvard Law School’s Supreme Court Litigation Clinic and a partner at Goldstein & Russell, P.C. in Washington D.C. Mr. Singh has represented various parties and amici before the Supreme Court and lower courts. In 2014, Tejinder argued and won the Supreme Court case *Lane v. Franks*, establishing that the First Amendment protects the subpoenaed testimony of public employees.
Andrew J. Pincus is a litigation partner at Mayer Brown LLP's Washington D.C. office. Mr. Pincus has argued 25 cases before the Supreme Court of the United States. He has also authored more than 250 appellate briefs. Andrew is also a former Assistant to the Solicitor General in the United States Department of Justice and co-founded and serves as co-director of the Yale Law School's Supreme Court Advocacy Clinic.

Daniel Volchok is a partner in Wilmer Cutler Pickering Hale and Dorr LLP’s Litigation/Controversy Department, and a member of the Appellate and Supreme Court Litigation Practice Group located in Washington D.C. Mr. Volchok has filed numerous merits and amicus briefs in the US Supreme Court as well as in state and federal appellate courts, and has also participated in successful efforts to obtain or oppose certiorari.