

Supreme Court: Length of the Scalia Vacancy in Historical Context

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This CRS Insight provides data and analysis related to the potential length of the current vacancy on the Supreme Court caused by the death of Antonin Scalia on February 13, 2016. Specifically, this Insight provides the number of days the Scalia vacancy will have existed on specified future dates if a nominee has not been confirmed. To provide historical context, it then identifies for three periods of time (1791-2010; 1900-2010; and 1945-2010), how many other Supreme Court vacancies would be of longer duration than the Scalia vacancy if it were to remain unfilled on each specified future date. Prior to the Scalia vacancy, the last vacancy on the Court occurred in 2010 (and was filled by the appointment of Elena Kagan).

As shown by [Figure 1](#), for example, the Scalia vacancy will have existed for 201 days on September 1, 2016. Of the 105 vacancies on the Court since 1791, 17 vacancies (or 16%) existed for more than 201 days. Of the 59 vacancies since 1900, 2 vacancies (or 3%) existed for more than 201 days. And of the 30 vacancies during the post-War period, i.e., since 1945, 2 (or 7%) existed for more than 201 days. The analogous statistics are provided for the Scalia vacancy if it were to remain unfilled on October 1, 2016; November 1, 2016; December 1, 2016; January 1, 2017; February 1, 2017; and March 1, 2017.

Some Senators have [called on the Senate to wait to fill the vacancy](#) created by Antonin Scalia's death until after a new President is inaugurated (i.e., after January 20, 2017), while other Senators have [called on the Senate to confirm a nominee](#) during President Obama's final year in office. Note that this Insight does not take a position as to when the Senate should confirm a nominee to the Scalia vacancy.

As of this writing, the Scalia vacancy has existed for 196 days.

Vacancies Since 1791

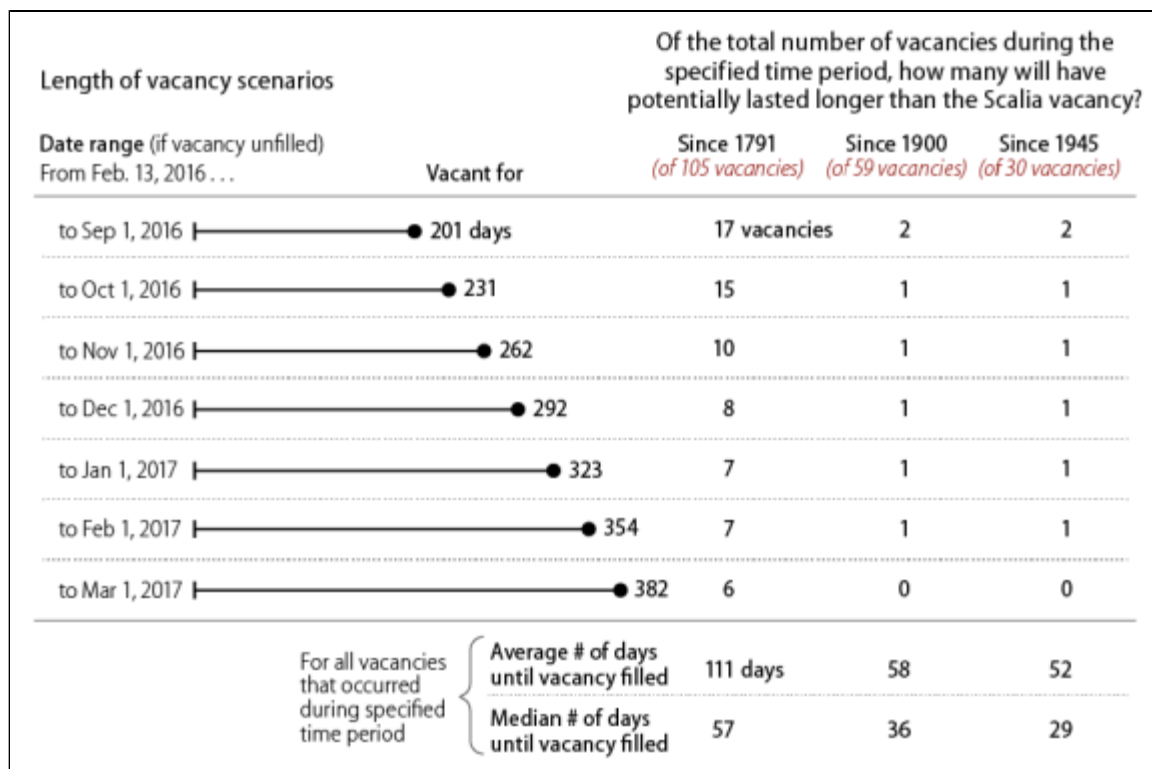
Of the 105 vacancies on the Court since 1791 (not including the Scalia vacancy), the average number of days a vacancy existed was 111 days, whereas the median number of days a vacancy existed was 57 days. These statistics are reported in the corresponding column at the bottom of [Figure 1](#).

The number of vacancies since 1791 that will have potentially existed longer than the Scalia vacancy ranges from a

maximum of 17 (as of September 1, 2016) to a minimum of 6 (as of March 1, 2017; note, however, that the vacancy may not be filled until after this date).

As shown by the figure, when including all vacancies since 1791 (rather than including just the relatively recent vacancies since 1900), there are a greater number of vacancies that lasted longer than the Scalia vacancy on each of the specified dates. Some of the long-lasting vacancies during the 19th century reflected the political circumstances in which several vacancies arose during the "Second Party System" of the 1840s and 1850s (years during which the [Whig Party](#) existed), as well as during the Civil War era. For example, at present, the longest vacancy on the Court since 1791 lasted 835 days (following the death of [Justice Henry Baldwin](#) in 1844). [As discussed previously by CRS](#), the length of this particular vacancy was due, in part, to President Tyler's strained relations with the majority Whig Party in the Senate (Tyler had previously been expelled from the party in 1841). Additionally, the [Senate was not as frequently in session](#) during the 19th century. Consequently, the Senate was not always available to exercise its advice and consent role relatively quickly when a vacancy on the Court occurred.

Figure 1. The Length of the Scalia Vacancy in Historical Context



Source: Congressional Research Service.

Vacancies Since 1900

Of the 59 vacancies on the Court since 1900 (not including the Scalia vacancy), the average number of days a vacancy existed was 58 days, whereas the median number of days a vacancy existed was 36 days. These statistics are reported in the corresponding column at the bottom of [Figure 1](#).

The number of vacancies since 1900 that will have potentially existed longer than the Scalia vacancy ranges from a maximum of 2 (as of September 1, 2016) to none (as of March 1, 2017). At present, the longest vacancy on the Court since 1900 lasted 363 days (following the resignation of [Justice Abe Fortas](#) in 1969). The Scalia vacancy, if unfilled prior to February 9, 2017, will also have been vacant for 363 days.

Vacancies Since 1945

Of the 30 vacancies on the Court since 1945 (not including the Scalia vacancy), the average number of days a vacancy existed was 52 days, whereas the median number of days a vacancy existed was 29 days. These statistics are reported in the corresponding column at the bottom of [Figure 1](#).

The number of vacancies since 1945 (i.e., vacancies during the post-War period), that will have potentially existed longer than the Scalia vacancy ranges from a maximum of 2 (as of September 1, 2016) to none (as of March 1, 2017). As discussed above, the longest vacancy since 1945, at present, was the Fortas vacancy.

Data in [Figure 1](#) measures the length of time from when a vacancy occurred to when a new Justice received his or her commission for that particular vacancy. Additionally, the vacancies included in the figure were actual vacancies on the Court that were created after a Justice died, resigned, or retired from office. Consequently, the figure does not include anticipated vacancies on the Court. [As discussed previously by CRS](#), such a vacancy might be anticipated by a President but ultimately not occur on the originally anticipated timetable.