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# The Death of Justice Ruth Bader Ginsburg: Procedural Issues on an Eight-Justice Court

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## The Death of Justice Ruth Bader Ginsburg: Procedural Issues on an Eight-Justice Court

On September 18, 2020, Justice Ruth Bader Ginsburg passed away at the age of 87, vacating a Supreme Court seat she held for 27 years. Prior to the death of Justice Antonin Scalia in February 2016, the last Supreme Court vacancy that occurred during a presidential election year happened in 1968, when Chief Justice Earl Warren submitted a resignation letter less than six months before the general election, but later agreed to remain on the Court until his successor was named. 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 Justice Oliver Wendell Holmes's retirement in January 1932 was filled by Justice Benjamin Cardozo two months later.

The Supreme Court's October 2020 Term is set to begin on October 5; thus, it is likely the Term will at least begin with only eight Justices. While the Supreme Court is composed of nine Justices, it does not require nine Justices to decide a case. Instead, Congress established that any six Justices constitute a quorum for the Court, and agreement among the majority of a quorum is generally necessary for the Court to act. Congress has also delineated procedures to follow if the Supreme Court cannot hear or decide a case because of the absence of a quorum.

A Supreme Court consisting of an equally divided number of sitting Justices raises the possibility that the Court may be equally divided as to a given case's outcome. In the absence of a full Court, when the quorum of Justices is evenly divided, the Court has generally taken one of two approaches. First, if the participating Justices are equally divided on a case's merits, the Court's practice has been, at times, not to issue an opinion but instead to enter a judgment affirming the lower court's judgment (i.e., a summary affirmance) without indicating the Court's voting alignment. Second, in lieu of issuing a summary affirmance of the lower court opinion, the Court could instead order reargument of the case.

The Supreme Court possesses inherent authority to order the reargument of a case *sua sponte* (i.e., of its own volition). The Court has exercised this authority after identifying additional issues for consideration or determining that more time is needed to resolve a case. 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. It is also 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 Justices, as in cases of special import or significance. In addition, as evident from the recently concluded October 2019 Term, the Court has authority to postpone arguments, as it did for all arguments scheduled for March and April 2020 due to the COVID-19 pandemic.

The Supreme Court is scheduled to hear a number of cases during the upcoming term of interest to Congress, and the nation as a whole, but in light of Justice Ginsburg's passing, the details of how the Term will proceed remain unclear. To the extent the Court proceeds with eight Justices, raising the possibility of cases resulting in a split vote, the statutes, rules, and practices governing the High Court give it significant authority and discretion to determine whether to issue an order summarily affirming a lower court's ruling, or to allow a case to be reargued with a new Justice participating in the ruling and settling the split on the Court.

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## Introduction

On September 18, 2020, Justice Ruth Bader Ginsburg, the second woman to serve on the Supreme Court of the United States, passed away at the age of 87, vacating a Supreme Court seat she held for 27 years.<sup>1</sup> Article II of the U.S. Constitution gives the President<sup>2</sup> the authority to appoint judges to the Supreme Court with the Senate’s advice and consent.<sup>3</sup> In a statement issued shortly after Justice Ginsburg’s passing, Senate Majority Leader Mitch McConnell stated that “President Trump’s nominee will receive a vote on the floor of the United States Senate.”<sup>4</sup>

Prior to the death of Justice Antonin Scalia in February 2016—creating a vacancy filled by Justice Neil Gorsuch in April 2017<sup>5</sup>—the last Supreme Court vacancy that occurred during a presidential election year happened in 1968, when Chief Justice Earl Warren submitted a resignation letter less than six months before the general election, but later agreed to remain on the Court until his successor was named.<sup>6</sup> Chief Justice Warren’s seat was filled the following year by Chief Justice Warren Burger.<sup>7</sup> 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 Justice Oliver Wendell Holmes’s retirement in January 1932<sup>8</sup> was filled by Justice Benjamin Cardozo two months later.<sup>9</sup>

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<sup>1</sup> Press Release, Supreme Court of the U.S., Press Release Regarding Justice Ginsburg (Sept. 18, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_09-18-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20).

<sup>2</sup> For a discussion of the President’s selection of Supreme Court justices, see CRS Report R44235, *Supreme Court Appointment Process: President’s Selection of a Nominee*, by Barry J. McMillion; *id.* at 8 (“Virtually every President is presumed to take into account a wide range of political considerations when faced with the responsibility of filling a Supreme Court vacancy. For instance, most Presidents, it is assumed, will be inclined to select a nominee whose political or ideological views appear compatible with their own.”).

<sup>3</sup> U.S. CONST. art. II, § 2, cl. 2. For a detailed examination of the Senate’s role in the confirmation process, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion; CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; *id.* at 2 (“While the U.S. Constitution assigns explicit roles in the Supreme Court appointment process only to the President and the Senate, the Senate Judiciary Committee, throughout much of the nation’s history, has also played an important, intermediary role. . . . Since the late 1960s, the Judiciary Committee’s consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.”).

<sup>4</sup> Derek Hawkins, et al., *Trump, Clinton and Obama Respond to Ginsburg’s Death As Political Fight Looms*, WASH. POST (Sept. 19, 2020), <https://www.washingtonpost.com/politics/2020/09/18/reaction-ruth-bader-ginsburg-death/>.

<sup>5</sup> CRS Report R44778, *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court*.

<sup>6</sup> See Ronald Ostrow, *Chief Justice Warren Submits Resignation*, BOS. GLOBE, June 22, 1968, at 1.

<sup>7</sup> After the Senate did not act on President Lyndon 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*, WASH. POST, Dec. 5, 1968, at A1. On June 23, 1969, Chief Justice Burger succeeded Chief Justice Warren. See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) [hereinafter *Members of Supreme Court*].

<sup>8</sup> See *Justice Holmes, Near 91, Quits Supreme Bench*, N.Y. HERALD TRIB., Jan. 13, 1932, at 1.

<sup>9</sup> See Genevieve Forbes Herrick, *Benjamin N. Cardozo Is Sworn as U.S. Supreme Court Justice*, CHI. DAILY TRIB., Mar. 15, 1935, at 5. Justice Sherman Minton’s retirement in September 1956 resulted in President Dwight D. 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, Sept. 30, 1956, at 1. The Senate confirmed Justice Brennan via a voice vote the following March. See Willard Edwards, *Two Confirmed for High Court*, CHI. DAILY TRIB., Mar. 19, 1957, at B3.

The Supreme Court’s October 2020 Term is set to begin on October 5,<sup>10</sup> with oral arguments proceeding telephonically due to the ongoing COVID-19 pandemic.<sup>11</sup> Thus, it is likely that the Term will at least begin with only eight Justices. This report provides an overview of the Supreme Court’s procedural rules and requirements when the Court is staffed with fewer than nine Justices. 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 in its composition.

## Supreme Court Composition

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.<sup>12</sup> Although the Constitution creates the Supreme Court, it is silent as to the Court’s composition and design. Congress has generally exercised its constitutional authority to define the Court by statute.<sup>13</sup> The first Congress, for example, enacted the Judiciary Act of 1789, providing that the Supreme Court consists of “a chief justice and five associate justices.”<sup>14</sup> The Court’s size varied during the 19th century,<sup>15</sup> shrinking to five Justices with the passage of the Judiciary Act of 1801<sup>16</sup> and growing to as many as 10 Justices after the enactment of the Judiciary Act of 1863.<sup>17</sup> In 1869, Congress reduced the number of Supreme Court Justices to nine,<sup>18</sup> where it remains today.<sup>19</sup> In contrast to the federal courts of appeals, which often decide cases with three-judge panels, the Supreme Court has, perhaps because of the constitutional establishment of “one” court, “always functioned as a single body, without dividing into panels.”<sup>20</sup>

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<sup>10</sup> Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 13, 2020, 4:22 PM), <https://www.scotusblog.com/2020/07/court-releases-october-calendar-3/>. All oral arguments scheduled for October 2020 were originally scheduled for March or April 2020, but were postponed due to the pandemic. *Id.*

<sup>11</sup> Press Release, Supreme Court of the U.S., Press Release Regarding October Oral Argument Session (Sept. 16, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_09-16-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20) (“The Court will hear all oral arguments scheduled for the October session by telephone conference, following the same format used for the May teleconference arguments.”).

<sup>12</sup> 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.”).

<sup>13</sup> See WRIGHT & MILLER, 16B FED. PRAC. & PROC. JURIS. *Supreme Court—Introduction* § 4001 (3d ed.).

<sup>14</sup> See Act of September 24, 1789, ch. 20, § 1, 1 Stat. 73.

<sup>15</sup> See John V. Orth, *How Many Judges Does it Take to Make a Supreme Court*, 19 CONST. COMMENTARY 681, 684–85 (2002).

<sup>16</sup> See Act of February 13, 1801, ch. 4, § 3, 2 Stat. 89.

<sup>17</sup> See Act of March 8, 1863, ch. 100, § 1, 12 Stat. 794.

<sup>18</sup> See Act of July 23, 1869, ch. 22, § 1, 16 Stat. 44.

<sup>19</sup> 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 . . .”).

<sup>20</sup> See WRIGHT & MILLER, *supra* note 13, § 4001. 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; see also *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (stating that an individual Supreme Court Justice’s authority extends to “granting stays, arranging bail, and providing for other ancillary relief,” but an individual Justice “has no power to dispose of cases on the merits”).

## Quorum Requirements

While the Supreme Court consists of nine Justices, it does not require nine Justices to decide a case. Instead, Congress established that any six Justices “shall constitute a quorum” for the Court,<sup>21</sup> and agreement among the majority of a quorum is generally necessary for the Court to act.<sup>22</sup> If the Court is scheduled to hold a session, but a quorum of Justices is not present, the Court may announce that it will not meet until there is a quorum.<sup>23</sup>

Congress has delineated procedures to follow if the Supreme Court cannot hear or decide a case because of the absence of a quorum.<sup>24</sup> These procedures differ depending on a case’s procedural history. While the majority of cases before the Supreme Court are direct appeals from the lower *appellate* courts or are filed pursuant to the Court’s original jurisdiction,<sup>25</sup> a small number of cases, mostly involving redistricting and campaign finance, come to the Court through a direct appeal after being heard by a three-judge district court.<sup>26</sup> If the High Court cannot meet to rule on

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<sup>21</sup> 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, any six of whom shall constitute a quorum.”).

<sup>22</sup> See *Fed. Trade Comm’n 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 GRESSMAN, *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 19th century, the Court followed a rule in cases involving constitutional questions under which the Court would not deliver a 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). The Court seemingly 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”).

<sup>23</sup> SUP. CT. R. 4.2 (“Six Members of the Court constitute a quorum. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.” (citing 28 U.S.C. § 1)).

<sup>24</sup> 28 U.S.C. § 2109 (“If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose . . . . In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.”).

<sup>25</sup> For example, during the 2019 Term, of the Court’s 66 merit cases that were released with signed opinions, summary reversals, or summary affirmances by an equally divided court, 54 (82%) were appeals from the U.S. Courts of Appeals and 12 (18%) were appeals from state courts; none came from three-judge district court decisions or were filed pursuant to the Court’s original jurisdiction. *Final Stat Pack for October Term 2019*, at 1, 5, SCOTUSBLOG (July 20, 2020), <https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf> [hereinafter *Stat Pack 2019*]. Similarly, during the 2018 Term, of the Court’s 77 merit cases that were released with signed opinions, summary reversals, or summary affirmances by an equally divided court, 59 (82%) were appeals from the U.S. Courts of Appeals; 11 (15%) were appeals from state courts; 2 (3%) were appeals from three-judge district court decisions; and none was filed pursuant to the Court’s original jurisdiction. *Final Stat Pack for October Term 2018*, at 1, 7, SCOTUSBLOG (July 30, 2019), [https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack\\_OT18-7\\_30\\_19.pdf](https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf) [hereinafter *Stat Pack 2018*].

<sup>26</sup> 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 three-judge panels 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); *id.* § 2000e-6

a case on *direct appeal* from a district court because of the absence of a quorum, 28 U.S.C. § 2109 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.<sup>27</sup> Upon remittance to the appellate court, the court hears the case, sitting en banc or with a panel of three senior circuit judges, and renders a “final and conclusive” decision.<sup>28</sup> 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 next ensuing term, the court shall enter its order affirming the judgment of the court from which it was brought for review.”<sup>29</sup> Such an order has no precedential value.<sup>30</sup>

## The Court with Fewer Than Nine Justices

A common reason a Justice might be unavailable to participate in a Court proceeding, leading to the Court hearing cases with fewer than nine Justices presiding, is if the Justice determines a recusal is necessary because he or she has a personal or financial interest in the case.<sup>31</sup> During more recent terms, another reason for recusal has been when a new Justice refrains from hearing appeals from the court upon which he or she formerly served, such as when Justice Gorsuch joined the Supreme Court from the U.S. Court of Appeals for the Tenth Circuit and Justice Brett Kavanaugh joined from the U.S. Court of Appeals for the D.C. Circuit.<sup>32</sup> Similarly, recusals may occur due to a Justice’s former governmental position, such as Justice Elena Kagan’s former role as the U.S. Department of Justice’s Solicitor General.<sup>33</sup> Still, recusals are somewhat infrequent.<sup>34</sup>

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(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”).

<sup>27</sup> 28 U.S.C. § 2109.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 22-401 MOORE’S FEDERAL PRACTICE—CIVIL § 401.03.

<sup>32</sup> For example, after he was appointed to the Supreme Court in April 2017, Justice Gorsuch recused himself three times during the 2017 Term. *Final Stat Pack for October Term 2017*, at 14, SCOTUSBLOG (June 29, 2018), [https://www.scotusblog.com/wp-content/uploads/2018/06/SB\\_Stat\\_Pack\\_2018.06.29.pdf](https://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf) [hereinafter *Stat Pack 2017*]. Similarly, after Justice Kavanaugh was appointed to the Court in October 2018, he recused himself eight times during the 2018 Term. *See Stat Pack 2018*, *supra* note 26, at 15.

<sup>33</sup> Justice Kagan recused herself from 28 cases during her first term on the Court because of her work in the Solicitor General’s office. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan’s Recusals*, SCOTUSBLOG (Oct. 9, 2012, 9:50 PM), <https://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/> (During Justice Kagan’s first term beginning in October 2010, “the Court issued full, signed opinions after briefing and oral argument in seventy-five cases. Justice Kagan sat out twenty-eight of those cases, just over one-third of the total. But two of the cases from which she was recused ended with the Court deadlocked four to four after briefing and oral argument.”).

<sup>34</sup> For example, in 2015, there were four recusals: Alito (two), Kagan (one), Sotomayor (one); in 2016, there were four: Kagan (two), Roberts (one), Sotomayor (one); in 2017, there were seven: Gorsuch (three), Kagan (three), Kennedy (one); in 2018, there were eight: all Kavanaugh; in 2019, there were four: Gorsuch (one), Kagan (one), Kavanaugh (one), Sotomayor (one). *Stat Pack for October Term 2015*, at 18, SCOTUSBLOG (June 29, 2016), [https://www.scotusblog.com/wp-content/uploads/2016/06/SB\\_stat\\_pack\\_OT15.pdf](https://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf) [hereinafter *Stat Pack 2015*]; *Stat Pack for October Term 2016*, at 14, SCOTUSBLOG (June 28, 2017), [https://www.scotusblog.com/wp-content/uploads/2017/06/SB\\_Stat\\_Pack\\_2017.06.28.pdf](https://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf) [hereinafter *Stat Pack 2016*]; *Stat Pack 2017*, *supra* note 32, at 14; *Stat Pack 2018*, *supra* note 25, at 15; *Stat Pack 2019*, *supra* note 25, at 16. *See also* Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 84–94 (2005)

Prior to Justice Scalia's death in February 2016—roughly midway through the October 2015 Term—there were only a handful of opinions released by an eight-Justice Court during each of the prior five Supreme Court terms (an average of four per term); *none* of those five prior terms saw an opinion released by only seven or six Justices.<sup>35</sup> Because Justice Scalia's seat remained vacant for 14 months (from February 2016 to April 2017), however, these statistics shifted significantly during the October 2015 Term, which saw 61 cases<sup>36</sup> decided by an eight-Justice Court (including four cases<sup>37</sup> resulting in 4-4 split votes) and three cases<sup>38</sup> decided by a seven-Justice Court. The October 2016 Term then had 49 cases<sup>39</sup> decided by an eight-Justice Court (although no 4-4 split votes); two by a seven-Justice Court,<sup>40</sup> and one by a six-Justice Court.<sup>41</sup> And, as noted, with the arrival of new Justices Gorsuch and Kavanaugh, who were recused from a number of cases, there continued to be eight-Justice cases decided during the 2017 Term (six cases<sup>42</sup> with one resulting in a 4-4 split vote<sup>43</sup>), the 2018 Term (eight cases<sup>44</sup>), and the recently concluded 2019 Term (two cases<sup>45</sup>).

## Legal Consequences of an Equally Divided Court

A Supreme Court consisting of an equally divided number of sitting Justices (i.e., eight or six Justices) raises the possibility that the Court may be equally divided as to a given case's outcome. In the absence of a full Court, when the quorum of Justices is evenly divided (i.e., 4-4 or 3-3), the Supreme Court generally has taken one of two approaches. First, if the participating Justices are equally divided on a case's merits, the Court's practice has been, at times, not to issue an opinion

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(arguing that Justices are reluctant to recuse themselves because of the risk that the remaining eight Justices could split evenly on a case's outcome).

<sup>35</sup> See *Stat Pack Archive*, SCOTUSBLOG, <https://www.scotusblog.com/reference/stat-pack/> (reporting one eight-Justice case in 2015; two eight-Justice cases in 2014; five eight-Justice cases in 2013; six eight-Justice cases in 2012; and seven eight-Justice cases in 2011).

<sup>36</sup> See *Stat Pack 2015*, *supra* note 34, at 5 (listing "Merit Cases by Vote Split").

<sup>37</sup> See *id.* at 7. The cases were: *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016); *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016); *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 1083 (2016); and *United States v. Texas*, 136 S. Ct. 2271 (2016).

<sup>38</sup> See *Stat Pack 2015*, *supra* note 34, at 5 (listing "Merit Cases by Vote Split"). The cases were: *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016) (5-2); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (4-3); and *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (4-3).

<sup>39</sup> See *Stat Pack 2016*, *supra* note 34, at 5.

<sup>40</sup> See *id.* The cases were: *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017) (7-0); and *Beckles v. United States*, 137 S. Ct. 886 (2017) (7-0).

<sup>41</sup> See *Stat Pack 2016*, *supra* note 34, at 5. The case was: *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (4-2).

<sup>42</sup> See *Stat Pack 2017*, *supra* note 32, at 5. The cases were *Montana v. Wyoming*, 138 S. Ct. 758 (2018), *as revised* (Feb. 20, 2018) (8-0); *Rubin v. Iran*, 138 S. Ct. 816 (2018) (8-0); *Dahda v. United States*, 138 S. Ct. 1491 (2018) (8-0); *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018) (5-3); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (5-3); and *Washington v. United States*, 138 S. Ct. 1832 (2018) (4-4).

<sup>43</sup> See *Stat Pack 2017*, *supra* note 32, at 3 n.\*\*. The case was *Washington*, 138 S. Ct. 1832.

<sup>44</sup> See *Stat Pack 2018*, *supra* note 25, at 5 (listing "Merits Cases by Vote Split"). The cases were *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018) (8-0); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (8-0); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (8-0); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019) (7-1); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (7-1); *Lorenzo v. Sec. & Exch. Comm'n*, 139 S. Ct. 1094 (2019) (6-2); *Madison v. Alabama*, 139 S. Ct. 718 (2019) (5-3); and *Gundy v. United States*, 139 S. Ct. 2116, *reh'g denied*, 140 S. Ct. 579 (2019) (5-3).

<sup>45</sup> See *Stat Pack 2019*, *supra* note 25, at 17 (listing "Merits Cases by Vote Split"). The cases were *Opati v. Sudan*, 140 S. Ct. 1601 (2020) (8-0); and *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082 (2020) (5-3).

but instead to enter a judgment affirming the lower court’s judgment (i.e., a summary affirmance) without indicating the Court’s voting alignment.<sup>46</sup> In such a case, the lower court’s judgment stands, but the Supreme Court’s summary affirmance would not be accorded any value as precedent.<sup>47</sup> 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.”<sup>48</sup>

Second, in lieu of issuing a summary affirmance of the lower court opinion, the Court could instead order reargument of the case.<sup>49</sup> The Court possesses inherent authority to order reargument *sua sponte* (i.e., of its own volition),<sup>50</sup> and has exercised this authority after identifying additional issues for consideration or determining that more time is needed to resolve a case.<sup>51</sup> 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.<sup>52</sup> For example, the abrupt resignation of Justice Abe Fortas in May 1969 created a Court vacancy that was not filled until Justice Harry Blackmun took the oath of office on June 9, 1970.<sup>53</sup> When several cases that were heard during the 1969 Term resulted in an equally divided Court, the Court “reschedul[ed] an inordinate number of cases for reargument during the 1970 term.”<sup>54</sup> 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 directing reargument of cases that were previously heard by an eight-Justice Court.<sup>55</sup>

An interesting scenario occurred in the recent case *Carpenter v. Murphy* (later renamed *Sharp v. Murphy*), a case for which Justice Gorsuch was recused.<sup>56</sup> *Murphy* was argued during the 2018 Term before eight Justices, but the Term ended without an opinion in the case;<sup>57</sup> commentators surmised that the eight Justices had split 4-4.<sup>58</sup> *Murphy* was then restored to the calendar for

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<sup>46</sup> See GRESSMAN, *supra* note 22, at 6.

<sup>47</sup> *Id.*

<sup>48</sup> See *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

<sup>49</sup> The term *reargument* is often used interchangeably with the term *rehearing*. See Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI. KENT. L. REV. 919, 919 n.3 (1989). 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. *Id.*

<sup>50</sup> See *id.* at 930–32.

<sup>51</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (restoring case for reargument and asking the parties additional questions).

<sup>52</sup> See GRESSMAN, *supra* note 22, 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), <http://joshblackman.com/blog/2016/02/23/rearguments-and-4-4-affirmances-on-the-short-handed-supreme-court-1945-2006/>.

<sup>53</sup> See *Members of the Supreme Court*, *supra* note 7.

<sup>54</sup> See *The Supreme Court, 1970 Term: The Statistics*, 85 HARV. L. REV. 344, 344 (1971) (noting that 17 cases were reargued during the 1970 term).

<sup>55</sup> 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).

<sup>56</sup> *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

<sup>57</sup> See CRS Legal Sidebar LSB10527, *This Land Is Whose Land? The McGirt v. Oklahoma Decision and Considerations for Congress*, by Mainon A. Schwartz.

<sup>58</sup> See *id.*

reargument during the 2019 Term.<sup>59</sup> However, the Court then granted certiorari in another case during the 2019 Term that raised a similar question—*McGirt v. Oklahoma*—in which all nine Justices could participate.<sup>60</sup> Justice Gorsuch not only participated in *McGirt*, but also authored the 5-4 majority opinion.<sup>61</sup> *Murphy* was then summarily “affirmed for the reasons stated in *McGirt*.”<sup>62</sup>

Even short vacancies on the Court have resulted in reargument in closely divided cases. For example, at least one case that was originally argued before an eight-Justice Court in October 1991 after Justice Thurgood Marshall’s retirement was reargued so that newly appointed Justice Clarence Thomas could cast the decisive vote.<sup>63</sup> And, 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 William H. Rehnquist and the swearing-in of Justice Samuel Alito.<sup>64</sup>

It is also 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 Justices. Following the retirements of Justices Hugo Black and John Marshall Harlan II in 1971, for example, the Court’s remaining seven Justices heard oral argument in *Roe v. Wade* and *Doe v. Bolton*.<sup>65</sup> After the confirmations of Justices Lewis Powell and Rehnquist, Chief Justice Burger led an effort to have the cases reargued so the two new Justices could participate.<sup>66</sup> 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.”<sup>67</sup> 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,<sup>68</sup> 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 cases’ outcomes. Evidently then, in cases of special import or significance, reargument to allow a new Justice to participate in the case is a possibility, regardless of the probability of a tie vote.

In addition, as evident from the recently concluded October 2019 Term, the Court has authority to postpone arguments, as it did for all arguments scheduled for March and April 2020 due to the COVID-19 pandemic.<sup>69</sup> And the Court routinely decides cases without oral argument when

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<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

<sup>62</sup> *Murphy*, 140 S. Ct. at 2412.

<sup>63</sup> *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 Grp.*, 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 another Justice changed his or her vote after reargument.

<sup>64</sup> *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).

<sup>65</sup> *See Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>66</sup> *See John A. Jenkins*, *THE PARTISAN* 140–41 (2012).

<sup>67</sup> *Id.* at 141.

<sup>68</sup> *See Roe*, 410 U.S. 113; *Bolton*, 410 U.S. 179.

<sup>69</sup> Press Release, Supreme Court of the U.S., Press Release Regarding Postponement of April Oral Arguments (Apr. 3, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-03-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20); Press Release, Supreme Court of the U.S., Press Release Regarding Postponement of March Oral Arguments (Mar. 16, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_03-16-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20). *See also* Tom Goldstein, *What Next for Oral Arguments?*, SCOTUSBLOG (Mar. 19, 2020, 1:53 PM), <https://www.scotusblog.com/2020/03/what-next-for-oral-arguments/> (stating, in the context of the ongoing COVID-19 pandemic, that the Court can “continue to defer oral arguments indefinitely—including into the fall”).

“further briefs and oral arguments would not materially assist in [the] disposition of the case”<sup>70</sup> (i.e., when it issues summary reversals).<sup>71</sup>

Finally, 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 that the Court rehear the matter.<sup>72</sup> Supreme Court Rule 44 permits an unsuccessful party to submit a petition for rehearing within 25 days of the entry of an adverse decision, judgment on the merits, or denial of certiorari.<sup>73</sup> In the context of a summary affirmance resulting from an equally divided Court, the petitioner, who sought to have the lower court’s ruling reversed, may seek rehearing of the matter. Despite this option’s availability, 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.<sup>74</sup>

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.<sup>75</sup> This principle generally adheres even when there is a change in the Court’s composition, 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.”<sup>76</sup> Put another way, only if a Justice who agreed with the underlying decision now decides rehearing is appropriate, and if a Court majority agrees with that decision, will rehearing be granted upon request. As a result, the Court generally will grant a petition for rehearing only in “exceptional situations” when the Court 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.”<sup>77</sup> 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, when the Court is equally divided among its Justices, is for the Court to order a rehearing *sua sponte*.

## The Term Ahead

The combination of Justice Ginsburg’s death, the November 2020 presidential election, and the ongoing COVID-19 pandemic and attendant changes in Supreme Court procedures,<sup>78</sup> makes it difficult to anticipate how the October 2020 Term might proceed. However, the Court has released its argument calendars for October, November, and December 2020, and confirmed that

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<sup>70</sup> *United States v. Indrelunas*, 411 U.S. 216, 218 (1973).

<sup>71</sup> *See Stat Pack 2019*, *supra* note 25, at 2 (noting six summary reversals—cases decided with per curiam opinions without briefing or argument—during the October 2019 Term).

<sup>72</sup> *See SUP. CT. R.* 44.

<sup>73</sup> *Id.*

<sup>74</sup> *See GRESSMAN*, *supra* note 22, at 814.

<sup>75</sup> *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.”).

<sup>76</sup> *See SUP. CT. R.* 44.1.

<sup>77</sup> *See GRESSMAN*, *supra* note 22, at 817.

<sup>78</sup> *See Press Release*, *supra* note 11.

at least the October arguments will proceed by telephone using “the same format used for the May teleconference arguments,” with the Justices questioning the litigants in order of seniority.<sup>79</sup>

All of the cases scheduled for argument in October 2020 were originally scheduled for oral argument in March or April, but were postponed due to the COVID-19 outbreak, including, among others, *Google v. Oracle America*,<sup>80</sup> a copyright case that may determine whether copyright protection extends to software interfaces; *Rutledge v. Pharmaceutical Care Management Ass’n*,<sup>81</sup> a case involving prescription drug reimbursement rates; and *Pereida v. Barr*,<sup>82</sup> an immigration case involving the deportation of a noncitizen convicted of a state crime. Scheduled for November are some arguably higher-profile cases, including a case involving Philadelphia’s attempt to require a faith-based foster care agency to comply with the City’s antidiscrimination policy (*Fulton v. City of Philadelphia*)<sup>83</sup> and two consolidated cases challenging the Affordable Care Act’s constitutionality in light of Congress’s elimination of the tax penalty associated with the individual mandate (*California v. Texas* and *Texas v. California*)<sup>84</sup>. Finally, the December argument calendar includes two cases of particular interest to Congress. *Department of Justice v. House Committee on the Judiciary*<sup>85</sup> involves access to grand jury materials from Special Counsel Robert Mueller’s investigation, and whether an impeachment trial is a “judicial proceeding” for purposes of an exception to the general rule of grand jury secrecy. And the consolidated argument in *Collins v. Mnuchin*<sup>86</sup> involves whether the Federal Housing Finance Agency’s (FHFA’s) leadership structure is constitutional, and whether Fannie Mae and Freddie Mac shareholders can challenge an agreement between the FHFA and the Treasury.

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<sup>79</sup> Press Release, Supreme Court of the U.S., Press Release Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-28-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20) (“The Court will hear oral arguments by telephone conference . . . in a limited number of previously postponed cases. . . . Following the usual practice, the Court generally will not question lead counsel for petitioners and respondents during the first two minutes of argument. . . . At the end of this time, the Chief Justice will have the opportunity to ask questions. When his initial questioning is complete, the Associate Justices will then have the opportunity to ask questions in turn in order of seniority.”).

<sup>80</sup> *Google LLC v. Oracle Am., Inc.*, cert. granted, 140 S. Ct. 520 (2019) (No. 18-956, 2020 Term). *Google* is scheduled for argument on October 7, 2020. *Argument Calendar for the Session Beginning October 5, 2020*, SUPREME COURT OF THE U.S. (July 13, 2020), [https://www.supremecourt.gov/oral\\_arguments/calendars/MonthlyArgumentCalOctober2020.html](https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalOctober2020.html).

<sup>81</sup> *Rutledge v. Pharm. Care Mgmt. Ass’n*, cert. granted, 140 S. Ct. 812 (2020) (No. 18-540, 2020 Term). *Rutledge* is scheduled for argument on October 6, 2020. *Argument Calendar for the Session Beginning October 5, 2020*, supra note 80.

<sup>82</sup> *Pereida v. Barr*, cert. granted, 140 S. Ct. 680 (2019) (No. 19-438, 2020 Term). *Pereida* is scheduled for argument on October 14, 2020. *Argument Calendar for the Session Beginning October 5, 2020*, supra note 80.

<sup>83</sup> *Fulton v. Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123, 2020 Term). *Fulton* is scheduled for argument on November 4, 2020. *Argument Calendar for the Session Beginning November 2, 2020*, SUPREME COURT OF THE U.S. (Aug. 19, 2020), [https://www.supremecourt.gov/oral\\_arguments/calendars/MonthlyArgumentCalNovember2020.html](https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalNovember2020.html).

<sup>84</sup> *California v. Texas*, cert. granted, 140 S. Ct. 1262 (2020) (No. 19-840, 2020 Term); *Texas v. California*, cert. granted, 140 S. Ct. 1262 (2020) (No. 19-1019, 2020 Term). The consolidated argument is scheduled for argument on November 10, 2020. *Argument Calendar for the Session Beginning November 2, 2020*, supra note 83.

<sup>85</sup> *Dep’t of Justice v. House Comm. on the Judiciary*, cert. granted, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020). *House Committee on the Judiciary* is scheduled for argument on December 2, 2020. *Argument Calendar for the Session Beginning November 30, 2020*, SUPREME COURT OF THE U.S. (Sept. 16, 2020), [https://www.supremecourt.gov/oral\\_arguments/calendars/MonthlyArgumentCalDecember2020.html](https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalDecember2020.html).

<sup>86</sup> *Collins v. Mnuchin*, cert. granted, No. 19-422, 2020 WL 3865248 (U.S. July 9, 2020); *Mnuchin v. Collins*, cert. granted, No. 19-563, 2020 WL 3865249 (U.S. July 9, 2020). The consolidated argument is scheduled for argument on December 9, 2020. *Argument Calendar for the Session Beginning November 30, 2020*, supra note 85.

## Conclusion

While the Supreme Court is scheduled to hear a number of cases during the upcoming term, Justice Ginsburg's passing means that, for at least part of the term, the Supreme Court will have eight Justices presiding. The details of how the term will proceed, however, remain unclear. To the extent that the Court proceeds with eight Justices, with the possibility of cases resulting in a split vote, the relevant statutes, rules, and practices give the Court significant authority and discretion to determine whether (1) to issue an order summarily affirming a 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.

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