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The Retirement of Justice O'Connor: Quorum Requirements, Rehearings and Vote Counts in the Supreme Court

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Summary

Justice Sandra Day O'Connor's announcement that she will retire from the Supreme Court of the United States effective upon the confirmation of her successor has raised questions regarding the conditions under which her vote may or may not be counted in certain cases. This report provides an overview of quorum requirements, rehearing procedures and vote count practices in the Supreme Court, with a focus on their application in relation to Justice O'Connor's pending retirement.

Introduction

On July 1, 2005, Justice Sandra Day O'Connor announced her decision to retire from her position as an Associate Justice of the Supreme Court of the United States, "effective upon the nomination and confirmation" of her successor.[1] Given the possibility that Justice O'Connor's successor may be confirmed prior to the end of the current term of the Supreme Court, questions have arisen regarding the conditions under which her vote may or may not be counted in certain cases. This report will provide an overview of Supreme Court quorum requirements, rehearing procedures and vote count practices generally, with a focus on traditional Court practice in response to a change in the composition of the Court during a term.

[1] Sandra Day O'Connor, letter to President George W. Bush, July 1, 2005, available at [http://www.supremecourtus.gov/publicinfo/press/pr_07-01_05.html]. President George W. Bush originally nominated John G. Roberts to take Justice O'Connor's seat on the bench. Subsequent to the death of Chief Justice William H. Rehnquist this nomination was withdrawn and Roberts was re-nominated to the Chief Justice position. *See* CRS Report RL32821, *The Chief Justice of the United States: Responsibilities of the Office and Process for Appointment*, by Denis Steven Rutkus.

Term and Quorum Requirements

Pursuant to 28 U.S.C. § 2, the Rules of the Supreme Court of the United States establish that the Court is to hold a "continuous annual Term commencing on the first Monday in October and ending on the day before the First Monday in October of the following year."[2] Congress likewise determines the number of Justices that are to comprise the Supreme Court, currently providing at 28 U.S.C. § 1 that the Court is to "consist of a Chief Justice of the United States and eight associate justices."[3] Congress has further established quorum requirements for the Court, providing that any six Justices "shall constitute a quorum."[4] This requirement is reflected in Supreme Court Rule 4.2, which further provides that "in the absence of a quorum on any day appointed for holding a session of the Court," the attending Justices (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."[5] While not specified in statute or rule, the general practice of the Court is that a majority of the quorum may act for the Court.[6] In the event that the participating Justices are equally divided on the merits of a case, no opinion is issued and the judgment of the lower court is affirmed but not accorded any value as precedent.[7] This practice of affirmance adheres generally in the event of a deadlock. However, as is discussed below, the Court may hold

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[2] Sup. Ct. R. 3.

[3] Congress has altered the number of Justices on the Court six times since the beginning of the Republic. The Judiciary Act of 1789 set the number of Justices at six. *See* 1 Stat. 73 (1789). This number was decreased to five in 1801. *See* 1 Stat. 89 (1801). The number of Justices was increased to seven in 1807 (2 Stat. 421(1807)), with subsequent legislation in 1837 increasing the number to nine. *See* 5 Stat 176 (1837). The number of Justices reached a historical apex of ten in 1863 (12 Stat. 794 (1863)), with subsequent legislation reducing the number back to nine in 1869. *See* 16 Stat. 44 (1869); 36 Stat. 1152 (1911) (currently codified at 28 U.S.C. § 1).

[4] 28 U.S.C. § 1.

[5] Sup. Ct. R. 4.2

[6] *See* Stern & Gressman, *Supreme Court Practice*, Bureau of National Affairs, Eighth Edition at 3-4 (2002). *See also, United States v. Du Pont & Co.*, 353 U.S. 586 (1957) (4-2 decision); 366 U.S. 316 (1961) (4-3 decision); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (4-3 decision). This practice accords with "the almost universally accepted common-law rule" that "a majority of a quorum constituted of a collective body is empowered to act for that body." *FTC v. Flotill Products Inc.*, 389 U.S. 179, 183 (1967).

It is interesting to note that the Court followed a different rule in cases involving constitutional questions until the advent of the modern era. In *Briscoe v. Commonwealth's Bank of Kentucky*, 33 U.S. 98 Pet) 118 (1834), Chief Justice Marshall (in the context of a seven member Court) declared: "[t]he practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision that of a majority of the whole court." The cases cited above, arising in the context of a nine member Court, indicate that this maxim does not currently adhere. *But see, North Georgia Finishing, Inc. V. Di-Chem, Inc*, 419 U.S. 601, 616-617 (1975) (Blackmun, J., *dissenting*) ("Announcing [a] constitutional decision, with a four-Justice majority of a seven-Justice shorthanded Court, [does] violence to Mr. Chief Justice Marshall's wise assurance...that the practice of the Court 'except in cases of absolute necessity' is not to decide a constitutional question unless there is a majority 'of the whole court.'").

[7] *See* Stern & Gressman, n.6, *supra*, at 4.

such cases for reargument under a variety of circumstances, including the appointment of a new Justice.

Congress has likewise delineated procedures to be followed in the event that a quorum of qualified Justices is unavailable to decide a case or controversy before the Court. If no quorum is available to hear and determine a direct appeal from a federal district court, the Chief Justice may order the remittal of the case to the appropriate court of appeals, whereupon the court of appeals (sitting *en banc* or through a specially composed panel of three senior circuit judges) hears the case and renders a "final and conclusive" decision.[8] 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 the case was brought for review with the same effect as upon affirmance by an equally divided court."[9]

Petitions for Rehearing

Supreme Court Rule 44 permits an unsuccessful party to submit a petition for rehearing within 25 days of the entry of an adverse decision or judgment on the merits or denial of ceritiorari. Despite the existence of this option, it has been noted that "the Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision."[10] The infrequency with which petitions for rehearing are granted would appear to be generally attributable to the fact that the Court engages in a thorough consideration of each case before it prior to issuing a decision.[11] Thus, a petition for rehearing is unlikely to be successful due to the presentation of improved arguments, or the fact that the Court was closely divided in reaching a decision.[12] This principle generally adheres even in instances where a change in the composition of the Court makes a change in the outcome likely, largely due to the operation of Rule 44.1 which provides that a petition for 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." Thus, apart from instances where the full bench is able to rehear a case originally decided by an equal division, the Court will grant a petition for rehearing only in "exceptional situations" where the Court itself has "substantial doubts as to the correctness of what it has decided, or where the unanticipated consequences of the Court's decision are clearly explained only in the rehearing petition."[13] This dynamic seems attributable, in turn, to the fact that the Court is more likely to order a rehearing *sua sponte* prior to issuing a decision on the merits in instances where the filling of a vacancy or a change in the composition of the Court has implications for the outcome of a particular case.

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[8] 28 U.S.C. § 2109.

[9] *Id.*

[10] *See* Stern & Gressman, n.6, *supra*, at 726.

[11] *See* Stern & Gressman, n.6, *supra*, at 727.

[12] *See* Stern & Gressman, n.6, *supra*, at 727.

[13] *See* Stern & Gressman, n.6, *supra*, at 728-29.

Reargument *Sua Sponte*

While not mentioned in rule or statute, the Court possesses inherent authority to order the reargument of a case.[14] Such orders may be issued as a result of the Court's identification of additional issues for consideration, or a determination that more time is needed to resolve the questions that have been presented.[15] The Court may also order reargument in instances where it is equally divided. As noted above, the Supreme Court has traditionally followed the principle that "no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made."[16] Thus, in instances where an equal division occurs due to the recusal or unavailability of a Justice or by virtue of a vacancy, the Court may hold a case for reargument. This practice is particularly prevalent when the installment of a new Justice makes a majority decision possible.[17] Supreme Court practice in this context is especially pertinent in light of Justice O'Connor's announcement that she will retire upon the confirmation of her successor. Additionally, the potential that Justice O'Connor will sit for only part of the term raises related questions regarding how, and under what circumstances, her vote will be counted in the disposition of cases before the Court.

An example of Court practice in this context may be found in actions taken during the Supreme Court's terms in 1969 and 1970. Supreme Court Justice Abe Fortas resigned abruptly and amidst scandal on May 19, 1969. The vacancy created by his resignation was not filled until over one year later when the oath of office was administered to Harry A. Blackmun on June 9, 1970.[18] In the absence of a ninth Justice for its entire 1969 Term, the Court avoided reaching the merits in several controversial cases "through an extraordinary number of jurisdictional or justiciability holdings."[19] Additionally, the Court "reschedul[ed] an inordinate number of cases for reargument during the 1970 Term."[20]

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[14] 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).

[15] *See* Stern & Gressman, n.6, *supra*, at 313 (citing *Sony Corp. v. Universal Studios*, 464 U.S. 417 (3d par.) (1984)).

[16] *Durant v. Essex Co.* 74 U.S. (7 Wall.) 107, 110 (1868). As noted by Professor Edward A. Hartnett, the "rule of four," which empowers four Justices to grant certiorari, is an exception to this general principle. *See* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm. & Mary L. Rev. 643, 646 n.14 (2002).

[17] *See* Stern & Gressman, n.6, *supra*, at 728. 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 the consideration of whether or not to order a reargument, but to take part in the consideration and judgment of a case subsequent to such an order. *Id*.

[18] *See, The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 247, n.1 (1970).

[19] *See, The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 344 (1971).

[20] *Id*.

In all, the Court heard reargument in seventeen, presumably deadlocked, cases from the 1969 Term upon the installment of Justice Blackmun in 1970.[21]

A similar approach seems to have been followed with the installment of Justice Anthony M. Kennedy on the Court subsequent to his confirmation on February 3, 1988.[22] Justice Lewis F. Powell had retired on June 26, 1987, and Justice Kennedy was President Ronald Reagan's third choice to fill the Powell vacancy, subsequent to the Senate's rejection of nominee Robert H. Bork, which was followed in turn by Judge Douglas H. Ginsburg's decision to withdraw his name from consideration prior to actually being nominated.[23] Consequently, the Court operated with only eight Justices for the first several months of its 1987 Term. According to former Solicitor General Walter Dellinger, in most instances where there was an equal division over cases argued during this period, the Court simply listed the cases for reargument so that Justice Kennedy could cast the deciding vote.[24] Likewise, it would appear that the installment of Justice Clarence Thomas on the Court resulted in orders for reargument. Justice Thomas replaced Justice Thurgood Marshall, who had retired on October 1, 1991, leaving the Court with eight members until Justice Thomas took his seat on October 23, 1991.[25] Subsequently, the Court ordered reargument in three cases that were originally heard during the period between Justice Marshall's retirement and the seating of Justice Thomas. It has been speculated that at least one of these cases was reargued due to an equal division among the Justices.[26]

It should be noted that it is not unprecedented for the Court to order reargument in the event of the installment of new Justices even when there is not an equal division between the sitting members. Subsequent to the retirement of Justice Hugo Black and Justice John Marshall Harlan II (shortly before the start of the 1971 Term), the Court's remaining seven members heard oral argument in *Roe v. Wade* and *Doe v. Bolton*.[27] After the confirmation of Justices Powell and William H. Rehnquist, Chief Justice Burger led an effort to have the cases reargued so the two new Justices could participate in the decision.[28] Justice Blackmun concurred, stating that "I believe, on an issue so sensitive

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[21] *Id.*

[22] *See* CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee and Senate*, by Denis Steven Rutkus.

[23] *Id.* at 44.

[24] *See* Walter Dellinger, Remarks Before the American Constitution Society for Law and Policy's Supreme Court Preview, Sept. 28, 2005. Available at [http://www.ituprising.com/video2005/].

[25] *See, The Justices of the Supreme Court*, Supreme Court of the United States, available at [http://www.supremecourtus.gov/about/biographiescurrent.pdf].

[26] *See*, Suzanne Pence Ferguson, *The Latest Battleground - Abortion Groups Meet at the Clinic*, 11 N.Y.L. Sch. J. Hum. Rts. 127, 128 n.3 (1993) (discussing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)). *See also*, *Doggett v. United States*, 505 U.S. 647 (1992) (5-4 decision).

[27] *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

[28] *See*, *The Countermajoritarian Paradox*, 93 Mich. L. Rev. 1433, 1445 (1995) (citing David J. (continued...)

and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court."[29] The Court heard reargument in both cases on October 11, 1972, ultimately issuing a 7-2 decision in favor of abortion rights.[30] The decision to order reargument in theses cases indicates that the Court may use its inherent authority in this context to allow new Justices to participate in cases of special import or significance, in addition to the more common practice of ordering reargument to enable the breaking of a deadlock.

Conclusion

In light of the aforementioned statutes, rules and precedents, it would appear that the Supreme Court possesses significant authority and discretion in determining whether a case merits reargument. Indeed, as illustrated above, the Court may respond not only to a formal petition for rehearing, but may also exercise its inherent authority to order reargument under a wide variety of circumstances, including a change in the composition of the Court. Applying prior Court practice to the pending retirement of Justice O'Connor, the governing principles identified above appear to establish that her vote will be counted in any case where a judgment is issued while she remains on the bench. Conversely, if a decision in any case on which Justice O'Connor voted has not been issued prior to her retirement, her vote will not be counted, with the subsequently issued decision resting upon the majority vote of the remaining Justices. Finally, in the event of an equal division among the remaining Justices in a case argued prior to, but handed down after, Justice O'Connor's retirement, the Court may order the case to be reargued, with the newly installed Justice participating.

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[28] (...continued)
Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, at 552-53. Macmillan Publishing Co. (1994).

[29] *Id.*

[30] Justices Rehnquist and White dissented in both opinions, while Justice Powell joined the majority.