

# The Supreme Court Vacancy And An Equally Divided Court

Law360, New York (October 21, 2016, 5:16 PM EDT) -- The seat on the United States Supreme Court left vacant by the death of Justice Antonin Scalia has been empty now for more than six months. As a result, the ability of the remaining eight-justice court to decide cases is impaired. This is nowhere more apparent than in the number of recent cases that have deadlocked on a 4-4 tie vote.



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When, because of a vacancy (or a recusal), the court is evenly divided on a case that has been accepted for review, the long-standing procedure of the court is to uphold the decision of the lower court because “no affirmative action can be had in a cause where the judges are equally divided in opinion ... .” *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868). When the lower court is thus “affirmed by an equally divided court,” the court provides no guidance on the issues presented by the case. As the court explained long ago, “[i]t is unnecessary to state the reasons in support of the affirmative or negative answer to [the question presented], because the court is divided on it, and, consequently, no principle is settled.” *The Antelope*, 23 U.S. (10 Wheat.) 66, 126 (1825). Nor can litigants cite the court’s order as any kind of precedent because the decision of an equally divided court is not “authority for other cases of like character.” *Durant*, 74 U.S. (7 Wall.) at 113.

By the end of the most recent term, in June 2016, the court had deadlocked in five cases, a number considered very high in a court where historically the number of tie votes has averaged only two per year. See Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 Minn. L. Rev. Headnotes 107 (2016).

Equally divided courts “take up precious space on the Court’s plenary docket, waste the time and energy of the justices and their clerks, as well as tap the time, energy and resources of lawyers, litigants, and any amici curiae.” *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. App. Prac. & Process 75, 83 (2005). Moreover, the “non-decision” of the case may perpetuate confusion in the law, if not an open split among the lower appellate courts, on the issues that the Supreme Court was to have addressed. Since Justice Scalia’s passing, these problems have come into sharp focus, as the court has been unable to provide guidance on a number of significant issues:

## 1. *Deferred Action Immigration Reform*

On June 23, an equally divided court affirmed the Fifth Circuit Court of Appeals’ decision in *United States v. Texas*, 136 S. Ct. 906 (2016)(mem.)(per curiam). The Fifth Circuit upheld a preliminary injunction blocking implementation of the deferred action immigration reforms of the Obama administration. As a result of the Supreme Court’s tie vote, the challenge to nationwide immigration reforms has succeeded based solely upon the views of one intermediate appellate court.

## 2. *Indian Tribal Courts*

On June 23 as well, the court reached a 4-4 impasse in *Dollar General Corporation v. Mississippi*

Band of Choctaw Indians, 135 S. Ct. 2833 (2016)(mem.)(per curiam), concerning the scope of Indian tribal courts' jurisdiction over civil tort claims against nonmembers of the tribe. A divided lower appellate court, applying the decision in *Montana v. United States*, 450 U.S. 544 (1981), held that, by agreeing to take on a tribe member as an intern in a youth jobs program, Dollar General entered into a consensual relationship with a tribe or tribe member and was therefore subject to tribal court jurisdiction for tort claims of harm the intern allegedly suffered during his employment.

### **3. Sovereign Immunity**

In *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), the court issued an opinion on a constitutional issue arising under the Full Faith and Credit Clause, but divided equally on a broad issue affecting relations among the states — whether the court should overrule its decision in *Nevada v. Hall*, 440 U.S. 410 (1979), that sovereign immunity is no bar to one state being sued in the courts of another state.

### **4. Union Fees**

On March 29, the court affirmed by a 4-4 tie, the lower court judgment in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016)(mem.)(per curiam). By doing so, the court failed to address whether public unions may collect fees from workers who choose not to join the union and do not want to pay for the union's collective bargaining activities.

### **5. Bank Loan Guarantees**

And in *Hawkins v. Community Bank of Raymore*, 135 S. Ct. 1492 (2016)(per curiam), the court affirmed by a tie vote a decision by the Eighth Circuit addressing whether spouses can be held liable as guarantors for bank loans. This result leaves conflicting interpretations of the law on this issue in the states governed by the Sixth, Seventh and Eighth Circuits.

In order to avoid the deadlock of a 4-4 split vote, the court has apparently agreed to issue opinions in certain cases that avoid deciding major issues. A prime example is *Zubik v. Burwell*, 136 S. Ct. 15 (2016)(per curiam). There the court granted certiorari to determine whether the Affordable Care Act burdens the free exercise of religion in violation of the First Amendment by requiring employer health plans to "cover certain contraceptives ... unless [the health plans] submit a form ... stating that they object on religious grounds to providing contraceptive coverage." (Id. at 1559.) Following oral argument and the death of Justice Scalia, the court asked for supplemental briefing to determine whether contraceptive coverage could be provided in a manner that would eliminate the need to give the objectionable notice. (Id. at 1559-60.)

The answer was that employers could simply contract for a health plan that does not include contraceptive coverage, and their employees could then receive cost-free contraceptive coverage from the same insurer. (Id.) The court therefore sent the case back to the lower courts to give the parties an opportunity to negotiate a compromise that accommodates religious beliefs and women's healthcare coverage needs. The court found this resolution "more suitable" than squarely addressing the First Amendment issue that prompted the court to accept the case in the first place. (Id. at 1560.) Thus, the court expressed "no view on the merits of the cases" and did "not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." Id. As one commentator explained, "[a]lmost certainly because it was unable to muster a five-Justice majority, and wanted to avoid another four-to-four split, the Supreme Court avoided answering *Zubik's* central question." Caroline M. Corbin, Symposium: Punting on substantial religious burden, the Supreme Court provides no guidance for future RFRA challenges to anti-discrimination laws, SCOTUSblog (May 17, 2016).

The courts have increasingly become the forum of last resort for the resolution of all manner of disputes. But only the U.S. Supreme Court can definitively interpret the Constitution, the vast body of federal statutory law, and the principles of the federal common law. Impairment of the Supreme Court's ability to decide cases diminishes the ability of the court to perform this essential function. While the public's attention thus far has focused on speculation concerning the effect of the presidential election on the current vacancy, continued uncertainty concerning the court's

decision-making ability means there are litigants whose cases are before the court, but may never be decided, litigants who may refrain from seeking Supreme Court review, and countless litigants and judicial officers awaiting key decisions that may be delayed or may never be made at all.

If, for lack of a ninth justice, the court is unable to say what the law is, our nation under law is weakened. We must all hope that the court is soon returned to its full strength.

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