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From: (b)(6)
Date: Monday, Feb 15, 2016, 9:23 AM
To: Simon, David A.
Subject: Re: Rachel Maddow is right

No way. No how. I have a better chance of being elected Pope.

From: Simon, David A. [mailto:david.simon@sidley.com]
Sent: Monday, February 15, 2016 09:18 AM
To: (b)(6)
Subject: Rachel Maddow is right

You'd be an amazing Justice! Brilliant! And no one better premicred to steer the court and a time when the balance between security and liberty has never been more delicate.
DAS

http://www.realclearpolitics.com/video/2016/02/13/maddow_jeh_johnson_possible_replacement_for_scalia_could_get_through_gop_senate.html

Maddow: Jeh Johnson Possible Replacement For Scalia, Could Get Through GOP Senate

408 words

Feb 15, 2016 10:13 AM

Reacting to the death of Supreme Court Justice Antonin Scalia, aged 79, MSNBC anchor Rachel Maddow said people making predictions of how President Obama will handle the vacancy will be "embarrassed."

"This is kind of as big a jolt as we can get," Maddow said about Scalia's death and the vacancy left behind. "I think anybody who's going to predict exactly what's going to

happen here is going to be embarrassed by those predictions just within the next few weeks."

Maddow came up with an interesting scenario where President Obama would nominate someone who "effectively has already been vetted," such as a cabinet level official. Maddow suggested the "very reserved and non-ideological" Secretary of Homeland Secretary Jeh Johnson.

"If I had to throw one scenario into the mix, this might be the kind of time when the president would choose a nominee who effectively has already been vetted, somebody who can kind of jump the line in terms of the United States Senate, somebody who has recently been through a rigorous confirmation process, somebody who, for example, is a cabinet level official in the Obama administration already," Maddow proposed.

"The first person who springs to mind for that kind of a scenario is Homeland Security Secretary Jeh Johnson, who is a very reserved and non-ideological person but has served in several administrations as a top Pentagon lawyer, as a very trusted national security expert and legal mind and is now running the biggest agency in the government outside of the Pentagon or the Veterans Affairs department," Maddow suggested.

"Somebody like that could conceivably be so non-objectionable to the United States Senate that maybe they would allow that sort of confirmation process to go ahead, even when another judicial nominee, who might more typically be on the short list would get held up by this Republican Senate trying to hold out for the hope of a Republican president to pick a nominee," Maddow also said.

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Subject: The SL: This Week Only!	
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Type: Note	

The Speaker's Lobby: This Week Only!
By: Chad Pergram, FOX News
15 February 2016

You've heard the breathless ads on TV.

Car dealerships trying to unload inventory. Appliance stores hawking refrigerators, washers and dryers. Deals at fast-food restaurants.

"This week and this week only!" bark the announcers.

And believe it or not, such limited options may exist for the President when there's a vacancy on the Supreme Court and the Senate is out of session.

For a time over the weekend, it appeared as though President Obama could have a rare opportunity to make what's called a "recess appointment" to succeed the late Justice Antonin Scalia.

To be clear, the President gave few signals Saturday that he would expedite the selection of a nominee, let alone execute a rare recess appointment to the High Court.

"I plan to fulfill my Constitutional responsibilities to nominate a successor in due time. There will be plenty of time for me to do so," said Mr. Obama.

On Sunday, White House spokesman Eric Schultz declared that President Obama would "approach this nomination with the time and rigor required. Given that the Senate is currently in recess, we don't expect the President to rush this through this week, but instead will do so in due time once the Senate returns from their recess."

But consider for a moment *why* the President may have pondered this option as he looked to fill Scalia's slot.

Just hours after Scalia's death, Senate Majority Leader Mitch McConnell (R-KY) said Mr. Obama would face a battle royale should he try to nominate someone to the High Court during the remaining time on his term — close to a year.

"The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President," said McConnell.

Other Republican senators followed McConnell's lead.

"It only makes sense that we defer to the American people who will elect a new President to select the next Supreme Court Justice," said Senate Judiciary Committee Chairman Chuck Grassley (R-IA).

And it wasn't just what GOP senators *thought* should happen. Republicans command the Senate majority with 54 seats. Sixty votes are necessary to clear a Senate filibuster. It might take a lot to overcome Republican efforts to clog consideration of any Supreme Court nominee – even though it is unprecedented for the Senate to filibuster such a nomination.

The Senate filibustered the nomination of Associate Justice Abe Fortas to become Chief Justice of the United States in 1968. But Fortas was already on the Supreme Court. Nominees have withdrawn. President George W. Bush nominated Harriet Miers in 2005 before she pulled out, anticipating a rocky confirmation process. President Ronald Reagan tapped Douglas Ginsburg for the Court in 1987. But Ginsburg withdrew over his marijuana use. The Senate has never filibustered a nominee before a final confirmation vote. Twelve nominees lost on the Senate floor. The most recent Supreme Court nominee to stumble at confirmation came in 1987 when Reagan selected Robert Bork. Bork only garnered 42 ayes for confirmation and the nomination failed.

So, if you're President Obama, you may search for any possible pathway to get your nominee seated on the Supreme Court. And something very routine unfolded on Capitol Hill last Friday which gave (and still gives) Mr. Obama a route to circumnavigate the Senate and possibly install a Justice on the Supreme Court.

Both the House and Senate planned to abandon Washington this week for the President's Day recess. On Friday, the Senate agreed to what's known as an "adjournment resolution." Article I, Section 5 of the Constitution says that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." In other words, the House and Senate must earn the blessing of the other before taking off for more than three days. If they don't, the House and Senate sometimes meet for just a few seconds at a time at three-day intervals with skeleton staff. These are called "pro-forma" sessions and constitute a "meeting" of the House or Senate.

However, when the Senate adjourned on Friday, it did so "conditionally until Monday, February 15, 2016." But the contingency was that the Senate wouldn't meet at all this week if the House also approved the adjournment resolution. The House did so before leaving Friday. Thus, the House and Senate were in sync. So the Senate automatically scrapped its plans for at least two pro-forma sessions this week.

It was clear. Both the House and Senate had voted to go on recess.

The Founders anticipated periodic Congressional recesses. So to maintain the operation of government, the Founders grafted a clause onto Article II, Section 2 of the Constitution. It states that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate."

In 2012, President Obama made four recess appointments during a three-day respite between two pro-forma sessions. Opponents of the effort challenged the President's appointments to the Supreme Court. Justices ruled Mr. Obama's ploy to be unconstitutional. In *National Labor Relations Board v. Canning*, Supreme Court Justice Stephen Breyer wrote that it was out of bounds for the executive branch to tell the legislative branch what constitutes a recess.

"The Senate is in session when it says it is," wrote Breyer in the majority opinion.

Moreover, the Court also determined that a recess between three and ten days is too abbreviated for a recess appointment. In other words, the Senate will be back soon and there's ample time to consider a nomination then.

Two points. The Senate left town Friday, February 12 and returns on February 22. That's right on the cusp of ten days. But perhaps more importantly, the House and Senate are truly in the perfect parliamentary posture where a recess appointment could be applicable. The 2012 circumstances which prompted the NLRB case truly wasn't really a recess. These circumstances are different. This *is* a recess.

Recess appointments to the Supreme Court aren't rare. President Dwight Eisenhower advanced two individuals to the High Court via recess appointments: William Brennan in 1956 and Potter Stewart in 1958. However, all recess appointments are temporary. The Senate later confirmed both Brennan and Stewart.

It may be ambitious to advance a recess appointment during this recess – even if President Obama wanted to. If McConnell sticks to his guns to block a nominee, why couldn't the President just wait until the next, *true* Senate recess?

That would be logical. McConnell's already thrown down the gauntlet. However, with a seat on the Supreme Court at stake, there is *no way* that McConnell and House Speaker Paul Ryan (R-WI) would approve a joint adjournment resolution for the rest of Mr. Obama's presidency. Expect the House and Senate to revert to holding abbreviated meetings every three days when they face lengthy recesses. Thanks to the ruling in *National Labor Relations Board v. Canning*, the President can't make a recess appointment when the Senate huddles every three days.

That's why this rare opportunity exists only now for the President.

There's another issue. Say the President was going to make a recess appointment during *this* Senate vacation. All adjournment resolutions include emergency clauses. They grant the leaders of both bodies (with consultation of the minority) the right to bring the Senate and/or House back to deal with an issue "if, in his opinion, the public interest shall warrant it."

Thus, the House and Senate carry a failsafe should there be a national emergency. The House and Senate came back to approve money for FEMA in dramatic, post-witching hour sessions in early September, 2005 after Hurricane Katrina. However, the key to the exigency clause is "concurrence with the Minority Leader of the Senate."

One wonders if Senate Minority Leader Harry Reid (D-NV) would agree to summoning the Senate back to session to block the possibility of a Supreme Court recess appointment. Moreover, senior Senate Republican sources say the Senate would only ever schedule pro forma sessions this week if President Obama forged ahead with a recess appointment.

A Senate effort to block that person via scheduling a Senate meeting could be dubious at best. The Senate is *now* in recess and the appointment would be made during *this* recess. But the ten-day issue

prescribed in the National Labor Relations Board case could kick in. That could nullify the recess appointment option.

It doesn't appear as though Mr. Obama will go the recess appointment route to immediately succeed Scalia at the Supreme Court. And even if the President tried, the window is narrow at best.

It's available only for this week. And for this week only.

Chad Pergram
Senior Producer for Capitol Hill
FOX News

(b)(5)

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From: Breasseale, Todd </O=DHS/O=EXCHANGES ADMINISTRATIVE GROUP (b)(6)>
To: (b)(6)
Subject: RE: Supreme Court
Date: 2016/02/14 15:20:27
Priority: Normal
Type: Note

Ha!
Yes. Yes you do.
And, you know - it's pretty fun.

From: (b)(6)
Sent: Sunday, February 14, 2016 2:59:26 PM
To: Breasseale, Todd
Subject: Re: Supreme Court

To state the obvious, I have a greater chance of being elected Pope, but the buzz is always nice just the same. Washington revels in "lists" of "those under consideration." Love Rachel.

From: Breasseale, Todd
Sent: Sunday, February 14, 2016 02:57 PM
To: (b)(6)
Subject: RE: Supreme Court

This is reminiscent of a couple Thanksgivings ago.

Points to Doina for trying. I suppose.

From: (b)(6)
Sent: Sunday, February 14, 2016 2:41:04 PM
To: (b)(6)
Cc: Breasseale, Todd
Subject: RE: Supreme Court

OK, thank you anyways.

From: (b)(6)
Sent: Sunday, February 14, 2016 2:40 PM
To: Chiacu, Doina (Reuters News)

Cc: Breasseale, Todd
Subject: Re: Supreme Court

Doina: thanks for contacting me. I have no comment on or off the record.

From: (b)(6)
Sent: Sunday, February 14, 2016 02:34 PM
To: (b)(6)
Subject: Supreme Court

Hi Secretary Johnson,
Can Reuters have five minutes of your time today to discuss the next Supreme Court nominee? We've heard your name mentioned as a possibility and want to discuss that and/or what you think the strategy might be for President Obama's decision on this. What kind of criteria and background would stand the best chance of getting through the Senate, if any?

It can be an off the record conversation.

You and I could speak or I can put you in touch with our main Supreme Court reporter/editor, Joan Biskupic, who has written a definitive biography of Scalia, for a background conversation on the next Supreme Court nominee. Joan, who you may remember meeting at the White House Correspondents Association dinner, will be coordinating our coverage of the Scalia replacement.

Please let me know if that is at all possible.

Hope you are well and thank you,
Doina

Doina Chiacu
Breaking News
Reuters Washington

(b)(6)

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Sent Date:	2016/02/14 15:20:26
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