

New Supreme Court Term Could End Roberts's Dominant Role

The possible addition of Judge Amy Coney Barrett could create “the Trump court,” pushing it rightward. Cases on the Affordable Care Act and religious objections to gay rights could offer early clues.



By Adam Liptak

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WASHINGTON — A short-handed Supreme Court — driven from its courtroom by the pandemic, grieving over the loss of a colleague and awaiting the outcome of a divisive confirmation battle — will return to the virtual bench on Monday to start a term that will present Chief Justice John G. Roberts Jr. with a daunting test.

“The chief’s leadership of the court, which just a few weeks ago appeared to be at its zenith, is now in peril,” said Richard J. Lazarus, a law professor at Harvard who has taught courses on the Supreme Court with Chief Justice Roberts. “An addition of yet another very conservative justice could quickly eliminate the chief’s ability to steer the court toward moderation.”

The court will again hear arguments by telephone, starting with a timely case on the role of partisanship in judging, a subject that will also figure in Senate hearings on the Supreme Court nomination of Judge Amy Coney Barrett, which are scheduled to start a week from Monday. President Trump and Senate Republicans have been working hard to speed her path to the seat left vacant by the death last month of Justice Ruth Bader Ginsburg.

If Judge Barrett is confirmed before Election Day, she is expected to participate in the two biggest arguments on the docket so far: the latest challenge to the Affordable Care Act and a clash between claims of religious freedom and gay rights in the context of foster care.

Justice Ginsburg would almost certainly have voted to uphold the health care law and government programs that prohibit discrimination against gay couples. Judge Barrett’s votes in those cases could provide a telling early sense of how her appointment could shift the direction of the court.

The term that ended in July included a few liberal surprises in cases on abortion, immigration and L.G.B.T. rights. It also included the rejection of Mr. Trump’s categorical claims that he could defy subpoenas for his financial returns and a string of victories for religious groups. Chief Justice Roberts was in the majority in all of those cases, and he dissented only twice in argued cases in the entire term.

A court that includes Judge Barrett would thrust Chief Justice Roberts from his spot at the court’s ideological center and empower Mr. Trump’s three appointees, including two current justices, Neil M. Gorsuch and Brett M. Kavanaugh, said Lee Epstein, a law professor and political scientist at Washington University in St. Louis.

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“We’d expect the center of power to shift from the chief justice to Justices Kavanaugh, Gorsuch and Barrett, effectively transforming the Roberts court into the Trump court,” Professor Epstein said.

The new term may include “far fewer blockbusters and far fewer unexpected results” than the last one, said Irv Gornstein, the executive director of Georgetown Law’s Supreme Court Institute. “But lurking in the background is the possibility that this could become the most tumultuous and divisive term since the Supreme Court decided *Bush v. Gore* 20 years ago and effectively determined who would be president of the United States.”

The court has already ruled on many disputes arising from the 2020 election, and there will be more. Mr. Trump has said he is eager for Judge Barrett to be seated in time to hear postelection challenges.

Professor Lazarus said the court’s last term had reassured the public that “there was some truth to the chief justice’s admonition that the justices, while on balance very conservative, were not political partisans.”

“All that hard-earned good will may soon be in tatters because of how President Trump has responded to Justice Ginsburg’s passing,” he added. “No matter how hard the chief and his colleagues try to stay above the political fray, it is a battle they cannot win when the president treats his nominees to the court as political loyalists.”

Even if she is confirmed by Election Day, Judge Barrett will miss the court’s October sitting, which will include significant cases on police violence, abuse of the no-fly list and a \$9 billion copyright dispute between Google and Oracle. Under the court’s usual practices, new justices do not participate in cases if they were not present for the arguments.

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The justices are still adjusting to hearing arguments by telephone. They ask questions one at a time, in order of seniority, a practice that has robbed the arguments of their dynamic quality in the courtroom, where justices respond to and build on their colleagues’ points.

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“There are pluses and there are minuses,” Justice Stephen G. Breyer, now the senior justice of the court’s liberal wing, said in remarks last month at George Washington University.

The forced march of serial questioning imposes a kind of order, he said. “Everybody hears what everybody else is saying and what the answers are, and they pay close attention,” he said.

“The minus is, I sometimes think it’s less fun,” he said. “You can’t get the dialogue.”

The last time the court had eight members, after the death of Justice Antonin Scalia in 2016, it set a modern record for consensus. But that court was evenly divided between Republican and Democratic appointees and may have been more inclined to compromise.

Justice Scalia’s seat was vacant for more than a year, while Justice Ginsburg’s seat may be filled in short order, creating a 6-to-3 majority for Republican appointees.

How that majority acts may depend on the election, Professor Epstein said, noting proposals from liberals to expand the size of the court if Democrats win the White House and control of both houses of Congress.

“On the one hand, should the Democrats take control of government, the right side of the court might be wary of doing too much too fast out of fear of court packing, in which case they could lose their majority or worse,” Professor Epstein said. “On the other hand, a Republican win in November might well empower the conservatives to pursue their projects with speed.”

Those projects, she said, include bolstering the role of religion in public life, expanding gun rights, restricting abortion and cutting back on the power of the administrative state.

In the short term, the justices will try to avoid controversy, said Allison Orr Larsen, a law professor at William & Mary.

“In periods of transition, many of the justices — and the chief justice in particular — will try to keep a low profile and stay out of the political spotlight as much as possible,” she said. “It may not always be possible this term, particularly with election disputes on the horizon, but I do think in transition years we should expect the justices to keep their heads down, even if it may not be indicative of long-term behavior.”

Gregory G. Garre, a lawyer with Latham & Watkins who served as solicitor general in the George W. Bush administration, said the court always took time to adjust to a new justice, causing it to be cautious.

“It is likely that the justices will want to get a better sense of where their new colleague lines up on issues before taking on particular cases,” Mr. Garre said. “In addition, the court as a whole is likely to be sensitive to political fallout from the latest confirmation saga, especially if there is a progressive administration and Congress waiting in the wings.”