

10 Things To Look For This Supreme Court Term

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This term of the U.S. Supreme Court will probably be one of the oddest in our history. This article lists some of the dynamics to look for between now and the end of June 2017.

1. The usually reliable commentators are vague about what the U.S. Supreme Court will do this term because the number of justices prevents their annual forecasts. Eight justices sit on the court. Another major factor makes forecasting impossible: the person who will nominate the ninth justice has not yet been selected.

2. Judge Merrick Garland is unlikely to be selected. Donald Trump will not select him. Hillary Clinton will want her own stamp on the court; the Senate, following a Clinton victory, would not hurriedly confirm him. If they did, it would tell you a lot about how a Republican majority in the Senate believes Judge Garland would vote. Out of deference to a victorious Clinton, President Obama should withdraw the nomination the day after the election. There is little evidence that Judge Garland would be a leading light of the court. His overly careful legal career raises important questions about whether he would be too cautious and quiet on the court.

3. Four-to-four decisions leave the lower courts' decisions in place and are not precedent. Chief Justice John Roberts and all of the justices will do what they can to avoid split decisions. The chief will lose some control over the decisional flow because of the split court. His power over assignment of decision-writing could be lessened in some cases.

4. Justice Antonin Scalia's passing in February itself has, to some extent, changed the approaches of the remaining justices. It's almost as though the absence of Justice Scalia's barking at the other justices allows them to move in slightly different directions. Most of the important cases were announced after Scalia's passing. A case can be made that the remaining justices have aligned themselves slightly differently. In several cases, Justices Clarence Thomas and Samuel Alito uttered lonely dissents. Over the last three or four years, the number of 5-4 decisions decreased. Justice Anthony Kennedy on the death penalty and Justice Roberts on health care expanded the number of "progressive" decisions. Has the fact of Justice Scalia's passing changed the remaining justices? This might be the most interesting question in this term.

5. At this writing, there is Donald Trump. Who would he appoint? If you are reading this you probably



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care about the court. Perhaps he would nominate his real estate, bankruptcy or divorce lawyer. In fairness, anyone he nominates could turn out to be a great and independent justice. But the nominee could be so bad that the Republican Senate experiences a bipartisan coalition that votes no. It is the wild possibilities in Trump's nominees that should unsettle us. The issues with a Clinton nominee would be more focused. The court passes upon every issue over which a President Clinton has committed, whether it is immigration, health care, civil rights, diversity, women's rights or economic rights. Who matches up with those vital, often-declared Clinton imperatives? To what extent will she compromise to get a nominee confirmed? Will she go to the middle? There is a rare opportunity to form a five-member progressive majority.

6. Justice Roberts is in the most interesting situation. He cannot lead the court from the dissenting position. He believes in government power. He is a federalist in the Hamiltonian sense. When he was on the District of Columbia Court of Appeals, all of his decisions but one upheld government power. He found a way to uphold the health care statute. He has a strong moral streak that governs some of his decisions. Gay marriage is his most prominent manifestation of using morality to decide cases. With a Clinton nominee added to the court, he must go to the middle. What middle is that? He is very intelligent and perhaps the most scholarly justice by temperament. In the last term, he ruled for defendants in three criminal cases. Is this the first robin of a liberal spring? No. Because the court is one of the greatest spectator sports, keep your eye on Justice Roberts' decisions this term.

7. One other wild card is the possible emergence of Justice Sonia Sotomayor. Judicial energy and societal commitment abound in this justice. With a five-member progressive majority, look to her as an emerging leader.

8. Some of the articles I have seen discussing the upcoming term share a tone of dismissiveness about the court's pending cases. The writers look for blockbusters. But there are important cases already pending. How will the new justice vote in *Trinity Lutheran Church of Columbia v. Pauley*? Can churches be excluded from a neutral and secular program? Justice Scalia would have voted for the churches. Will the new justice vote to uphold the lower court decision in *Bethune-Hill v. Virginia State Board of Elections*, which involves the use of race in redistricting. What will be the new justice's views on race? Race has never ceased to be a national, and therefore judicial, concern. *McCrary v. Harris* is another pending race-redistricting case. In the streets of America, race is an urgent concern. *Moore v. Texas* is an Eighth Amendment case involving the death penalty and the intellectual capacity of the prisoner. In earlier cases, Justice Kennedy revitalized the Eighth Amendment as a moratorium on executions of juveniles and mentally impaired defendants. In *Visa v. Osborn* and *Visa v. Stoumbos*, what is the scope of antitrust conspiracy? In *Jennings v. Stephens*, the question involves the mandatory detention of aliens seeking admission. Not much doubt about what a Trump nominee would do. The court has taken *Salman v. U.S.* to determine the extent of insider-trading liability. These and other pending cases are not minor matters.

9. Lifting our view above this term and looking to the future, we see a gray cloud hanging over the court. *Citizens United v. FEC* created an enormously increased political power for the truly wealthy. When the case came down, there was understandable analysis about which political party that decision helped the most. There is a more important consideration; politicians must now go to the rich like honeybees to the hive. Once inside the hive, bees cannot see the outside world. Who attends the \$30,000 cocktail parties? There is, on the part of many Americans, alienation and a sense of exclusion from the political process. Resistance to the decision has grown. Will the new justice combine with four other justices to overrule the 5-4 *Citizens United* decision?

10. There will probably not be a ninth justice appointed to the court in time to affect many cases this term. The first nominee could be rejected. Cases may have been argued before the new justice arrives. The new justice may have conflicts similar to those of former Solicitor General Elena Kagan and former Second Circuit Judge Sotomayor. My point? The U.S. Supreme Court is in play, like so many other things in the world today.

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