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Upcoming Supreme Court cases are weighty, if not numerous

By Robert Barnes

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By the numbers, the Supreme Court is headed for a great fallow period.

Over the approximately next 100 days, it will hear oral argument in only 25 cases. Despite taking eight new pleas Friday, the court's workload this term might reach a new low: In its March sitting, it will consider only half its usual number of cases.

And yet, as recent days have shown, the court is as central as ever to the national debate.

During their holiday break, justices stopped a federal judge's order allowing same-sex marriages in Utah. They considered anew the Affordable Care Act and whether the Obama administration has made proper accommodations for religiously affiliated groups.

The court could decide any day whether to further loosen restrictions on political campaign contributions. Affirmative action is once again on the agenda, as is a separate look at Obamacare that has elements of Citizens United redux — this time about whether corporations are entitled to rights of religious expression.

And the justices return from their holiday break Monday to review restrictions on abortion protesters and to referee an unprecedented constitutional conflict between the president and the Congress about the appointment of high-level government officials.

"We're in the middle of a quite remarkable period in the court's history," said Kannon Shanmugam, a Washington lawyer who argues before the court. "The court has had several cases implicating major issues of national debate each of the last few years. What that shows is that this is a court that's not at all shy about tackling hot-button issues."

Of course, the involvement is not always up to the court. For instance, justices might have thought they had done all they wanted to on the subject of same-sex marriage last June.

The court struck down the portion of the Defense of Marriage Act that prevented federal recognition of same-sex marriages performed in states where they are legal, and allowed such unions to resume in California without ruling on the basic question of whether states may ban gay marriage.

But gay rights advocates around the country went to work trying to convince federal judges that the reasoning of the court's DOMA decision meant that state bans on same-sex marriage cannot stand, even where voters made them part of state constitutions.

That is what happened in Utah, where U.S. District Judge Robert J. Shelby declared that state's ban unconstitutional. He and the appeals court refused to stay the ruling, so the Supreme Court stepped in to put the marriages on hold while appeals played out.

"In the context of same-sex marriage, it seems clear that many of the justices affirmatively wish to delay deciding the question for a number of years," said Justin Driver, a law professor at the University of Texas.

"But it seems equally clear that the justices will in effect be unable to avoid this spotlight for very long."

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, agreed that the court is not always seeking a role.

"I don't think that the court is necessarily looking to be 'in the middle of everything,' " he said in an e-mail, repeating a reporter's wording. "[Chief Justice] John Roberts especially would probably prefer not to be." But as the court's docket shrinks, "the high-profile cases stand out more in contrast."

The court has great discretion over its docket in some ways, but when subjects such as same-sex marriage arise or parts of major legislation such as the Affordable Care Act are challenged as unconstitutional, "it sort of has to be" involved, Shapiro said.

The marquee case on the court's agenda as it returns to work is a good example. For 200 years, the court has not had to rule on the meaning of the constitutional provision that allows the president to make "recess appointments" of high-level government officials when the Senate is not in session to provide consent.

The clause states that the president "shall have power to fill up all vacancies that may happen during the recess of the Senate."

Nearly every president has used the power, and the executive and legislative branches, no matter which party was in control, have made grudging accommodations. But an extraordinary level of political gridlock between Senate Republicans and President Obama has forced the issue.

Republicans used the filibuster to block a vote on Obama appointments to the National Labor Relations Board to the extent that the board could not function. Then, borrowing a procedure pioneered by Senate Democrats when George W. Bush was president, they forced the Senate into pro forma sessions when most senators were out of town to keep Obama from making recess appointments.

Obama responded equally brazenly. Unlike Bush, Obama in January 2010 made the appointments anyway. He declared that despite the pro forma sessions, the Senate was not really available to conduct business by voting on his nominees.

Lawsuits followed, and a decision by a panel of the U.S. Court of Appeals for the D.C. Circuit ratcheted the dispute, bypassing the question of the pro forma sessions. Under the appellate court's view, the president may make recess appointments only during the annual breaks between sessions of Congress — sometimes those last only minutes — and the vacancies must occur during those breaks in order for the president to fill them.

Such a scenario would virtually eliminate a president's power to make recess appointments.

The Democratic majority in the Senate recently changed the filibuster rule to make it easier for the president to secure a vote for his nominees, diminishing the urgency of the case. But that would change if the Senate and the White House were not controlled by the same political party.

If the court had little choice on the recess appointments case, it still in recent years has taken on controversial subjects — affirmative action, the constitutionality of parts of the Voting Rights Act, punishment of juvenile offenders — where it might have declined.

"Notwithstanding the reduced docket, I agree that the court has not suddenly become shy about granting certiorari to resolve disputes involving high-visibility issues the public cares about," said Irving L. Gornstein, director of the Supreme Court Institute at Georgetown Law Center.

"It is taking those cases just as much as it ever did, if not more."