

Shorthanded High Court Risks Deadlock on Google, Delaware Cases

Kimberly Strawbridge Robinson

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Ruth Bader Ginsburg's death leaves the Supreme Court shorthanded heading into a new term with Obamacare and a blockbuster copyright case involving Google in early argument sessions, and more election-related matters likely to come.

Conservatives now hold a 5-3 majority on what's usually a nine member court, although the justices don't always stay in their lanes.

The possibility of evenly split decisions could complicate last-minute election-related challenges and potentially lead to further delay in cases already postponed due to the pandemic. There are two business cases in the new term's first three days—*Carney v. Adams*, which has implications for Delaware's outsized role in American corporate law, and *Google v. Oracle*, called the copyright case of the century.

The court operated with eight members for 18 months following Antonin Scalia's death in 2016 and managed just fine during that period, said Berkeley Law Dean Erwin Chemerinsky. "Sometimes they wrote narrower opinions, occasionally they put cases over or split 4-4," Chemrinsky said. But ultimately they were able to come to a decision in most cases, he added.

President Donald Trump says he expects to nominate a conservative successor this week and favors confirmation before the Nov. 3 election, a much narrower window than the average 70 days between nomination and confirmation. Republicans hold the Senate at least until January.

A pitched battle is expected even if Democrats, reeling from Ginsburg's death on Friday at 87 from cancer complications, can do little to halt Trump's third high court appointment. Trump says he's likely to select a woman and complimented shortlisters Amy Coney Barrett, one of his early circuit appointments, and Barbara Lagoa, who was seated less than a year ago, Bloomberg reports.

Long Conference, First Sittings

The first test for the justices will come Sept. 29 when they sit remotely for what's called the long conference. That's when they sift through cases that have piled up since wrapping up the last term in July, and decide which to add to the 2020 docket.

It takes four justices to grant a case for review. That means the liberal wing must convince at least one conservative to agree to take up a case they want to hear. However, the more liberal justices may not push forcefully for consideration of particular cases given a likely conservative outcome.

The justices could also decide to grant fewer cases while the court awaits a ninth justice. The argument calendar is filled until the January sitting, barring unexpected political or other developments.

“I don’t think we should expect a lot of big dramatic changes from the court until it’s up to nine justices again,” said Case Western constitutional law professor Jonathan Adler.

The term begins Oct. 5. The first sitting includes 10 arguments by phone before ending Oct. 14. The court could decide to rehear these cases with a new justice, which would further delay arguments originally scheduled for last term.

This includes the multibillion dollar copyright clash between Oracle Corp. and Alphabet Inc.’s Google, and Carney v. Adams, the fight over political loyalties in state judiciaries that could upend the bulk of U.S. corporate law.

Google is appealing a ruling that the software giant improperly used Oracle’s copyrighted programming code in the Android operating system. Oracle has said it’s entitled to at least \$8.8 billion in damages.

In the Delaware case, an independent voter is challenging state laws that require many Delaware state courts to be bipartisan, split more or less evenly between Democrats and Republicans. The voter challenging the requirements argues that those rules effectively punish him for his political beliefs in violation of his First Amendment right to freedom of association.

The justices traditionally rehear 4-4 decisions in bigger cases once a new justice is in place, and an evenly split decision in other cases affirms the lower court ruling without setting nationwide precedent. A 4-4 ruling and any delay associated with a rehearing would aggravate uncertainty for corporations needing to plan for the future, especially given the ambiguity surrounding the impact on the economy and business of the coronavirus.

Obamacare

Another eight cases are on tap Nov. 2-10. Texas v. California, the court’s seventh challenge to the Affordable Care Act, is the most likely to wind up 4-4, said Supreme Court lawyer Paul Smith, vice president of litigation and strategy at the Campaign Legal Center.

Previous cases involving the Obama administration over medicaid expansion, insurance reimbursements, the so-called contraceptive mandate, and even the constitutionality of the health act itself have largely been decided by narrow margins.

But Adler said that might not be the case here because the case largely revolves around “severability”—namely, whether unconstitutional portions of a law can be separated from the rest of the legislation, or whether the entire act must fall. The justices confronted that issue in two cases last term, so we already know their positions, Adler said.

In particular, the latest ACA case before the justices looks at the effect of the elimination by congressional Republicans of the tax penalty associated with the requirement that individuals obtain health coverage. The case threatens the validity of hundreds of other healthcare-related provisions in the act unattached to the “individual mandate,” if the justices find that the mandate can’t be severed.

In an effort to avoid delays in these cases, the justices could try to come to a compromise by deciding cases on narrow grounds that avoid, or at least defer, deciding the major legal questions.

Finally, the court also is considering the Food and Drug Administration's emergency pandemic-era request to continue enforcing a longtime requirement that women seeking a medical abortion must meet with a doctor in person. The court has so far deferred to government on safety measures amid Covid.

Emergency Challenges

In addition to evenly split decisions in cases the court has already agreed to hear, 4-4 outcomes could complicate emergency election challenges.

Such challenges, over things like ballot harvesting, voter deadlines, and mail-in ballots, frequently reach the justices in election season. The court has already heard several related to 2020 disputes and concerns around the Covid crisis, and any new cases could arrive prior to or after Nov. 3.

The potential for an evenly divided court introduces a "potentially dangerous wrinkle," in the context of election challenges, said Ilya Shapiro, director of the Cato Institute's Robert A. Levy Center for Constitutional Studies and author of "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court."

Ginsburg, along with her Democratic-appointed colleagues, voted largely to expand voting opportunity and curtail requirements she saw as making it harder for certain voters to cast their ballots. That often made Roberts the swing vote, Common Cause attorney Sylvia Albert said.

Then there's the scenario of a disputed presidential election due to potential technical glitches and controversies around ballot counting, voter registration, and vote-by-mail. The court ultimately decided the 2000 election, and some believe it might be required to do so again.

Republican senators are already invoking a possible election deadlock as a justification for pushing ahead with confirming Ginsburg's replacement quickly.

"We risk a constitutional crisis if we do not have a nine-justice Supreme Court, particularly when there is such a risk of a contested election," said Sen. Ted Cruz (R-Texas), who serves on the Judiciary Committee that will vet a nominee.

Precedent at 8

This isn't the first time the court has been shorthanded in recent terms.

Justice Anthony Kennedy's vacancy, occurring as a result of a planned retirement rather than a sudden death, only resulted in a eight member court for a week.

But Scalia's seat was left open following his sudden death in 2016 for more than a year before filled by Trump's first nominee, Neil Gorsuch.

Ultimately, the eight-member court split evenly—presumably— in a handful of cases. In one, the fight over deferred deportation for young immigrants known as Dreamers and their families, the justices let the split vote stand, leaving the lower court's decision in place without setting binding precedent for other courts."

It isn't particularly satisfying for the highest court in the land to be hamstrung such that the lower courts get the final word, said Shapiro, whose new book, "Supreme Disorder," details the growing dysfunction of the modern confirmation process.

But in two cases at the intersection of criminal and immigration law, *Sessions v. Dimaya* and *Jennings v. Rodriguez*, the justices agreed to rehear the case, with Gorsuch eventually providing the decisive vote.

The court has the tools to deal with this kind of situation, said South Texas College of Law Houston constitutional law professor Josh Blackman.

Invoking Cruz' concerns about a possible constitutional crisis, Blackman said the "only way a crisis could arise is if Trump or Biden refuses to abide by a 4-4 tie."