



For Supreme Court, the term that just ended was the calm before the storm

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The sleepy term of cases and controversies just completed by the Supreme Court may have been the calm before the storm.

Left shorthanded for 14 months while the White House and Congress battled over its membership, the high court defied expectations during its 2016 term mostly for what hasn't happened — yet.

President Barack Obama didn't get to turn a closely divided court liberal for the first time in decades. Nor did President Trump get to make it decidedly conservative.

After five consecutive years dominated by landmark cases — think Obamacare, same-sex marriage, voting rights, abortion — the docket dwindled both in size and status. Perhaps the biggest case, on transgender rights, was swept away following a policy change by the Trump administration.

Stuck at eight members for most of the term, the court did not devolve into even-numbered deadlock and acrimony. Chief Justice John Roberts and his troops managed to keep a lid on the third branch while the other two tangled, emerging with unanimous rulings on some of the more contentious cases.

The April arrival of Justice Neil Gorsuch, the court's first new member in seven years, merely restored the conservative tilt lost with the death of Justice Antonin Scalia in February 2016. To read some of Gorsuch's acerbic opinions and dissents, it was as if Scalia never left.

And on the last day of the term, the oft-rumored retirement of Justice Anthony Kennedy, the court's swing vote, turned out to be just a rumor.

Fast forward to October, when the court's 2017 term is slated to start with a debate over Trump's travel ban, move to divisive issues such as gay rights, government surveillance and the way election districts are drawn, and end, possibly, with Kennedy's retirement and a titanic battle over his successor.

“What this term wasn't,” said Stephen Vladeck, a University of Texas law professor, “next term will be in spades.”

'Home run' for conservatives

When the 2016 term began nine months ago, it looked like the end of the court's conservative era.

Obama's nomination of federal appeals court Judge Merrick Garland was dormant in the Republican-controlled Senate, but Hillary Clinton was leading in the polls and, as president, was expected to name Garland or someone to his left as Scalia's replacement.

Instead, Trump's election led to a list of 21 potential conservative successors, eventually winnowed to one. From Colorado came Gorsuch, 49, a close follower and fishing buddy of Scalia's, whose sharp questioning from the bench and clever writing style came close to filling the void.

"He looks like a home run for conservatives," said John Malcolm, senior legal fellow at the Heritage Foundation, which helped assemble Trump's list of high court candidates. Back at full strength, he said, "the court is now no longer going to steer clear of controversial cases."

That was the case this term, when the justices heard five patents cases and addressed mundane topics such as civil procedure, personal jurisdiction and standing. As a result of the non-controversial calendar, the justices deadlocked only twice, half as many as last term. Those two immigration cases will be reheard in the fall.

By contrast, the court emerged unanimous on some important issues, including the standard for defining insider trading and the First Amendment rights of trademark holders. Roberts corralled all eight to bolster the Individuals with Disabilities Education Act, arguing that "a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all." That was no small feat, considering the quoted language had been written by Gorsuch at the 10th Circuit Court of Appeals.

In those cases and others, the court sought to "thread the needle and reach unanimity," said Kristen Clarke, president of the Lawyers' Committee for Civil Rights Under Law. "This does appear to be a court that is working hard to restore integrity."

It helped that the court decided many of its cases on the narrowest of grounds. Faced with a multi-million dollar dispute between Samsung and Apple, for instance, the court ruled that Samsung's violations of design patents could involve individual components, rather than the entire phones — then sent the case back to a lower court to decide.

The court's interim decision on Trump's immigration travel ban was another example of compromise. Whereas most lower courts had struck down the ban and two had upheld it, the justices said that for now travelers with U.S. connections can enter the country, but not others — then scheduled the case for argument in October.

Even this term's top cases paled compared to "five or six consecutive terms of the century," said Ilya Shapiro, a Supreme Court expert at the libertarian Cato Institute. That included the marquee [separation-of-church-and-state](#) case decided Monday, when the court ruled 7-2 that religious institutions can receive public funds for secular purposes.

With the court back to full strength, however, the 2017 term's docket is being decorated with bigger cases. The court will decide whether congressional and state legislative [election districts](#) can be drawn with overwhelming precision to benefit one political party. It will decide if police can use [cellphone location data](#) to track suspects without a warrant. It will decide if merchants can refuse to serve [same-sex couples](#), if companies can bar employees from class-action lawsuits, and if a federal ban on [sports betting](#) in most states violates their regulatory powers.

Then there's the matter of a famously litigious president, whose effort to bar travelers from six predominantly Muslim nations became the first of what may be many policies to trigger lawsuits. "SEE YOU IN COURT," Trump tweeted back in February, and the Supreme Court has obliged.

"Trump himself attacks the courts whenever they rule in a way that he doesn't like," said Elizabeth Wydra, president of the liberal Constitutional Accountability Center. "That puts the Supreme Court in a place that it's not used to being, and where it certainly doesn't like to be."

Another place it does not like to be is at the center of a political fight over its membership, as it was for most of the past 16 months. But that, too, is likely to happen in the near future. [Kennedy will turn 82](#) next summer, and with the 2018 Senate elections putting Republicans' narrow majority at risk, he may choose to retire. Justice [Clarence Thomas](#), 70 by then, also could call it quits in the next few years.

What's unclear is whether the justices can maintain their sense of comity through a term with tougher cases and a bruising confirmation battle.

"They got in the habit of deciding cases on narrow grounds so that there would be more agreement among themselves, and they seem to have toned down their rhetoric a bit, too," said David Strauss, a University of Chicago law professor. "You have to hope that will last, now that there are nine justices. But we can't be sure it will."