

Legal Sidebar

Dressed to the Nines: What's Next for the Nine-Justice Supreme Court?

04/10/2017

Following the Senate's [confirmation](#) of Judge Neil Gorsuch to serve on the Supreme Court, the nominee is expected to be [sworn in](#) as the 101st Associate Justice of the Supreme Court, marking the first time in over a year that the Supreme Court will be fully staffed with nine Justices. Before Judge Gorsuch becomes Justice Gorsuch and can “perform[] the duties” of his new office, he must take two oaths— (1) an [oath](#) to swear and support the Constitution that is required for all Members of Congress and “all executive and judicial” officers under [Article VI](#) of the Constitution (constitutional oath); (2) a [separate oath](#) that derives from the Judiciary Act of 1789 and requires federal judges to swear to “administer justice without respect to persons, and do equal right to the poor and to the rich” (judicial oath). In two separate ceremonies on April 10, 2017, Chief Justice John Roberts [will administer](#) the constitutional oath, while Justice Anthony Kennedy, for whom Judge Gorsuch clerked, [will administer](#) the judicial oath. But what awaits Justice Gorsuch and the nine-Justice Supreme Court after its newest Member takes the two oaths of office?

Three days after Justice Gorsuch is sworn in, the Justices are [scheduled](#) to have their first private conference following their March sitting, in which the Justices will review pending petitions for certiorari that the Court could hear in the October 2017 term. Pursuant to the Supreme Court's practices, [four votes](#) are needed to hear a case, and Justice Gorsuch could potentially provide the fourth vote in a number of cases pending for review. [Several petitions](#) for review have been “relisted” (or carried over from the Justices' last conference), an [indication](#) that the Court may be seriously considering hearing a given case or may be awaiting a fourth vote for certiorari grant. One notable relisted petition up for consideration is [Masterpiece Cakeshop v. Colorado Civil Rights Commission](#), which examines whether a state public accommodations law can be enforced against a bakery whose owner refuses for religious reasons to make a cake for a same-sex couple's wedding. Other notable cases the nine-Justice Court could consider at the April 13 conference include a [petition](#) seeking review of a lower court's invalidation of a North Carolina voting law and a [petition](#) regarding whether the Second Amendment provides a right to “concealed carry” of a handgun.

Following the April 13, 2017 conference, between April 17 and April 26, the Justices are scheduled to begin their final slate of oral arguments for the October 2016 term. News accounts [have speculated](#) that the newest Justice will participate in the oral arguments for the 13 cases scheduled during the Court's April sitting. A short interval between when a Justice is sworn in and when he participates in his first oral argument is not unusual. Justice Alito, who is the most recent example of a Justice joining the Court mid-term, joined in arguments and decisions in two cases that were heard on February 21, 2006, about 3 weeks [after](#) he joined the Court ([Rapanos v. United States](#) and [S. D. Warren Co. v. Maine Board of Environmental Protection](#)). Before Justice Alito, the most recent example of a Justice joining the Court during the middle of the term was Justice Thomas, who was [sworn in](#) on October 23, 1991. Twelve days later, Justice Thomas joined in arguments and decisions in four cases ([Foucha v. Louisiana](#), [Wyoming v. Oklahoma](#), [INS v. Elias-Zacarias](#), and [Molzof v. United States](#)). Among the notable cases in the April 2017 sitting of the Court is [Trinity Lutheran Church v. Comer](#), a case concerning the constitutionality of a state ban on providing financial aid to a religious institution.

Beyond these cases, it is possible that Justice Gorsuch could influence cases *already* under consideration by the Court. Ordinarily the newest Justice will not participate in a decision if he or she did not participate in oral argument. Justice

Alito, for example, did not join a notable 2006 [decision](#) on religious liberty that was argued before *but* issued after he joined the Court. While it is not unheard of for a Justice to join an opinion in which he did not participate in oral argument (e.g., Chief Justice Rehnquist did not attend oral argument for, but did join a dissent in [Gonzales v. Raich](#)), the more typical practice with a new Justice is for the new member of the Court to recuse himself or herself in consideration of a pending case that has already been argued. However, if the Court is evenly divided with regard to a pending matter and if a new Justice is available to break a tie vote, then the Court, without the new Justice's input, will decide whether to reargue the case. In reargument, the new Justice will participate in the case. As discussed in more detail in this [CRS report](#), the Court has regularly had cases reargued after a new Justice joins the Court. While the Justices' conferences are private and it is unclear what cases from this term were divided 4-4 in initial votes, Court observers [have suggested](#) that two immigration-related cases ([Hernández v. Mesa](#) and [Jennings v. Rodriguez](#)), as well as a major housing discrimination case on allegedly predatory lending practices ([Bank of America v. City of Miami](#)) could be candidates for reargument.

In addition to any cases the Court may hear reargument on in Fall 2017, the Court has already granted certiorari to several other potentially important cases, including [Epic Systems Corporation v. Lewis](#), a case regarding whether contracts requiring individual arbitration of labor disputes prevent class and collective action proceedings to enforce provisions of the National Labor Relations Act. Moreover, it is [expected](#) that the litigation surrounding the Trump Administration's revised executive order regarding certain travel restrictions and refugee resettlement may reach the Supreme Court in the near the future. In other words, while Supreme Court watchers have noted the [low volume](#) of cases on the Court's current docket and the [relative dearth of high-profile cases](#) currently before the Court, it appears that, with a ninth Member, the nature of the Court's work may soon change.

Posted at 04/10/2017 09:10 AM