BY MARCIA COYLE **PUBLISHED:** JUN 22, 2017

The Roberts Court Hasn't Reargued Many Cases. That Could Change

(http://images.law.com/contrib/content/uploads/sites/292/2017/06/Immigration-Detention-Article-201706221127.jpg) Illegal immigrants are transferred out of the holding area after being processed at the Tucson Sector of the U.S. Customs and Border Protection headquarters in Tucson, Ariz. (Photo: Ross D. Franklin/AP)

The possibility that the U.S. Supreme Court will rehear a set of cases—including several immigration disputes—looms over the justices as the term moves into its final weeks.

Reargument is rare—the justices would prefer, of course, to resolve matters when they first arrive—and it has been especially so under the tenure of Chief Justice John Roberts Jr. The competing pressure is the **court's desire to avoid any tie (https://www.nytimes.com/2016/04/05/us/politics/supreme-court-is-working-hard-to-avoid-deadlocks-elena-kagan-says.html)** that leaves in place, without confronting the merits, the lower court decision.

"If you look at the data, the Roberts court has been the least likely to have reargument," said Timothy Johnson, professor of political science and law at the University of Minnesota. "Even under [Chief Justice William] Rehnquist, there were sometimes between three-to-five cases they would set over each term, even with nine justices sitting. That number dropped zero-to-one with Roberts."

From 1946 to 1985, **Johnson's research shows (http://users.polisci.umn.edu/%7Etjohnson/MyPapers/PRQ2003.pdf)** the Burger court reargued 66 cases; the Warren court, 47; and the Vinson court, 59. Johnson **studied the high court's reargument history (https://asu.pure.elsevier.com/en/publications/delaying-justice-the-supreme-courts-decision-to-hear-reargruments)** with Arizona State University's Valerie Hoekstra. The landmark decisions in *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973) are among the most famous of cases to be reargued.

The Roberts court has nine cases left unresolved—and that number will fall on Friday morning, when the justices are expected to release at least one opinion.

There are five cases that could fit the bill for reargument. These are matters that the court heard after the death of Justice Antonin Scalia last year but before **the arrival of Justice Neil Gorsuch in April (http://www.nationallawjournal.com/id=1202778088446/Trump-Chooses-Neil-Gorsuch-Ivy-League-Conservative-for-Supreme-Court)**. Of the five cases that pose a potential for deadlock, four of them raise important questions related to immigration or undocumented immigrants.

The oldest of the group (https://twitter.com/steve_vladeck/status/877897214877605888) is *Jennings v. Rodriguez*, **argued on Nov. 30 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2(1204_k536.pdf)**. The case asks the justices whether immigrants awaiting deportation—often for very long times and without having committed crimes—are entitled to bond hearings. The justices ordered supplemental briefing in the case, which ended Feb. 21. The Supreme Court in *Lynch v.*


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Dimaya, **argued on Jan. 17 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2(1498_m647.pdf)**, was asked to decide whether the phrase "crime of violence" is impermissibly vague in immigration law.

In the case *Lee v. United States*, **argued on March 28 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2(327_d18e.pdf)**, a lawful permanent resident argued he had ineffective assistance of counsel when his lawyer said he would not be deported if he pleaded guilty to possession of ecstasy.

The case *Hernandez v. Mesa*, **which the court heard on Feb. 21 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2(118_3e04.pdf)**, asked whether the Fourth Amendment ban on the use of excessive force applies to the shooting of a Mexican teen in Mexico by a U.S. border patrol officer. The court **appeared divided (https://www.washingtonpost.com/politics/courts_law/justices-divided-on-cross-border-shooting-that-left-mexican-teenager-dead/2017/02/21/1f517838-f871-11e6-bf01-d47f8cf9b643_story.html?utm_term=.49ab79b36583)** at argument.

"The immigration cases really jumped out at me as possible reargruments because the [Trump administration] travel ban just got to the court," Johnson said. The justices, he continued, could be thinking: "We should have something to say more generally about immigration before we get to the minutia of cases about border shootings, plea bargaining and the others."

The remaining case that could be reargued is *Murr v. Wisconsin*, a Fifth Amendment **regulatory takings challenge (https://www.pacificlegal.org/case---murr-4-1540)** involving adjacent parcels of land. The justices **heard argument on (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2(214_l6hn.pdf)** March 20.

If any of the five cases does create a 4-4 deadlock, the court's liberal wing has no incentive to push for reargument because Gorsuch, a likely conservative vote, would participate in a new decision. "The incentive would be with the conservative wing," Johnson said.

A vacancy that occurs in the middle of a term—where the vote of the absent justice, who'd earlier heard arguments, will no longer count—creates the highest probability that the court will order reargument, according to Johnson's research.

In the October 2015 term, that period would have been before Justice Antonin Scalia died on Feb. 13, 2016. But the court ordered no reargruments in the cases that deadlocked 4-4 from that period: the union-fee case *Friedrichs v. California Teachers Association*; an Indian tribal court challenge, *Dollar General v. Mississippi Band of Choctaw Indians*; and an Equal Credit Opportunity Act case, *Hawkins v. Community Bank of Raymore*.

The most high-profile reargument during the Roberts court was the campaign finance case *Citizens United v. Federal Election Commission*. The court first heard that case in March 2009 and then a second time in September 2009.

The justices in 2012 heard reargruments in *Kiobel v. Royal Dutch Petroleum*. Just as in the *Citizens United* case, the justices added a new question for decision.

When Justice Samuel Alito Jr. joined the court in January 2006, succeeding Justice Sandra Day O'Connor, the court reargued in the same term *Hudson v. Michigan*, a Fourth Amendment case, and *Kansas v. Marsh*, a death-penalty challenge.

O'Connor had participated in both of those cases. Alito's vote apparently was needed to break a 4-4 tie that arose after O'Connor had left the bench.

If the Supreme Court does decide to order reargument for a set of cases from this term, don't expect any explanation.

Stephen Wermiel of American University Washington College of Law, **writing at SCOTUSblog three years ago (http://www.scotusblog.com/2014/10/scotus-for-law-students-reargruments/)**, put it like this: "Few procedures at the Supreme Court are more mysterious than the decision to reargue a case. Reargruments are rare among the approximately 70 cases that are argued each term. Even rarer is any discussion or explanation of the process by the court or its members, present or past."

Supreme Court Practice (https://www.amazon.com/Supreme-Court-Practice-Stephen-Shapiro/dp/161746337X/ref=pd_cp_14_1?_encoding=UTF8&pd_rd_i=161746337X&pd_rd_r=FZ4K9YDGF7F9C15Q0I
the "bible" for appellate practitioners, said in cases where the presence of a new justice makes a majority decision possible, the traditional practice has been for the incoming justice not to participate in consideration of whether to order reargument, but to take part subsequently in deciding the reargued case.

William Rehnquist and Lewis Powell Jr., who were at the time new associate justices, did vote in 1972 to reargue the abortion case *Roe v. Wade*, and they gave their reasons in letters to then Chief Justice Warren Burger. Those letters are archived in Justice Harry Blackmun's papers.

It is believed that five votes are generally needed to order reargument, although sometimes there is a consensus for reargument. No such consensus was reached in *Roe*. The four dissenters in a case always need someone in the original majority to get reargument, "but that flies out the window when you have eight justices sitting," Johnson said.

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