

October 8, 2020

Dear Friends,

Negotiations over a fourth Coronavirus recovery package came to an abrupt halt earlier this week after a presidential tweet, and the hopes of another large stimulus bill, or other targeted relief, before the election probably ended along with them. Though we're not sure these discussions had a serious shot of succeeding anyway – even before Trump's tweet. See more below.

At the moment, most of Washington D.C., and in particular, the Senate, is focused on the nomination of Judge Amy Coney Barrett to the U.S. Supreme Court. Senate Republicans are committed to moving the nomination ahead, despite calls from Senate Democrats to wait until after the election. There were concerns that the announcement of three GOP senators – two of whom sit on the Senate Judiciary Committee – testing positive for COVID-19 could disrupt the timeline. Indeed, Senate GOP Leader McConnell announced that the Senate, which was supposed to be in session this week, would be out for two weeks and not return until Monday, October 19. But, despite the positive tests, and the delay in the session schedule, it appears the Judiciary Committee will keep to its announced timeline. See below for additional insights on Judge Barrett's nomination.

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¹ The month-ahead policy review is provided by *PolticoPro's* monthly "CEO Report," a "high-level outlook on the policy issues driving the month and beyond." Judge Amy Coney Barrett's nomination to the Supreme Court will be front and center in Washington, D.C. over the next few weeks, so this month's report attempts to project how Judge Barrett would influence the nine-member high court, should she be confirmed by the Senate.

I. Congressional schedule and ongoing stimulus negotiations?

Even before President Trump's tweet on Tuesday evening instructing his representatives to "stop negotiating until after the election," the two sides were still hundreds of billions of dollars apart in their respective positions. Speaker Pelosi was reportedly insisting on a deal in the neighborhood of \$2 trillion, while the administration's final offer was around \$1.6 trillion. But, in the Senate, GOP Majority Leader McConnell had already demonstrated that he was going to have tremendous difficulty coalescing his majority around anything bigger than what they had proposed earlier in September in a bill that received majority Republican support, but was blocked on the Senate floor (the bill was around \$650 billion, though in reality it was closer to \$300 billion as it was offset by \$350 billion in other savings).² While many GOP senators, particularly those in difficult races, are eager to pass another bill before the election, others continue to be concerned about additional spending and deficits. It was highly unlikely the majority leader would put anything on the floor that would split his caucus. In addition, while there was a great deal of focus on the aggregate size of the package and its various components, there were still some very real substantive policy issues that would have needed to be worked out – in particular, over liability reforms and additional state and local support.

In terms of House action, last Friday, October 2, the House finished its business for the week, likely its last before the election. With the status of COVID relief negotiations uncertain at that point, and before the President's tweet, Speaker Pelosi put yet another, scaled-back version of COVID relief legislation on the floor on October 1. It was billed as an updated HEROES Act, a smaller version of what House Democrats had passed in May. The bill passed on a mostly party-line vote, [214-207](#) – a section-by-section is [here](#) – but a party-line bill had no chance of passing the Senate or of changing the dynamic of the negotiations. It did, however, enable Democratic House members to coalesce behind a policy position and show voters back home that they were still working to move a package forward.

Assuming, then, that nothing happens before November 3, what does that mean for additional relief efforts? And is there a chance that something could happen in the "lame duck" session, e.g., after the election and before the new 117th Congress, begins? Whether there is movement after the election (November-December) is very unclear, and will depend in large part on the election results. If Democrats see significant political gains, they could very well wait until the beginning of the next Congress when they'll have an even stronger hand to develop a relief package that addresses all of their policy priorities.

II. SCOTUS nomination

All eyes are on the Senate and [President Trump's nominee](#) to the Supreme Court, Judge Amy Coney Barrett. The President made the nomination official on September 26. That same day, Senate Judiciary Chairman Lindsey Graham [announced](#) that hearings will begin on October 12.

Chairman Graham later [reiterated](#) that there would be no change in the schedule despite the Senate being out of session until October 19. While it is assumed Majority Leader McConnell will hold a floor vote prior to November 3, he hasn't officially announced that. He did, however, hint at that outcome in comments he made last week, [saying at a local event](#) in Kentucky that he would bring her nomination to the floor "as soon as it comes out of committee." [Public polling indicates](#) support is growing for her nomination.

[Here](#) is an interesting infographic, courtesy of *PoliticoPro*, that lays out the steps in the confirmation process and provides the timelines of prior confirmations.

²You'll recall that an earlier proposal, the Senate "HEALS Act," was around \$1 trillion, and it never saw a floor vote, reportedly because McConnell couldn't secure enough GOP support.

III. Issue to watch – the deductibility of business expenses covered by PPP loans

The Internal Revenue Service (IRS) issued a notice in late April, [Notice 2020-32](#), ruling out tax deductions for small business expenses paid with forgivable Paycheck Protection Program (PPP) loans. There is fairly broad, bipartisan support in Congress for doing something legislatively to reverse that decision and allow small business to deduct PPP expenses, but questions remain whether they can find a legislative vehicle, and if so, when.

As a sign of political support, in early May, three congressional tax committee leaders sent a [letter](#) to Treasury Secretary Mnuchin arguing that Congress intended to make PPP grants tax neutral, and therefore, the expenses covered by PPP should be tax deductible. They asked Treasury to reverse their earlier ruling. Unfortunately, the letter, though signed by several heavyweights in the tax world, didn't move the needle with Treasury. The agency apparently remains steadfast in its position that Congress needs to change it legislatively.

Though there is bipartisan support for doing so, it's extremely difficult to pass anything COVID-related stand alone. There is support, however, for including something in a larger COVID relief package. To that end, a [provision](#) was included in the HEROES Act the House passed in May. It was also included in the [updated HEROES Act](#) passed by the House last week. However, as discussed above, Congress remains at an impasse on another COVID relief package.

Given the level of support in the business community and among the heavy weights on the tax-writing committees, there is reason to be optimistic that Congress will take action to address this issue – however, the questions are when and through which legislative vehicle.

IV. Policy look-ahead – October

A. Quick Fix

The biggest and most politically volatile case of the new Supreme Court term is the challenge to the Affordable Care Act brought by the Trump Administration that will be argued on November 10. In addition, the vacancy left by Ginsburg's death increases the chances the court could undercut Obamacare's popular insurance protections for preexisting conditions.

The fate of the President's latest attempt to exclude undocumented immigrants from the census count could land before the Supreme Court later this year, and Barrett could weigh in if she's on the bench.

The high court also has ample room to consider hot-button questions about transgender rights in American schools.

B. Health Care

Obamacare, abortion cases add drama: Health care is looming over the Supreme Court's new term even before Barrett's nomination moves through the Senate as justices are set to quickly weigh the future of Obamacare in a marquee case shortly after Election Day. The Justice Department is asking the high court for an emergency stay that would restore federal rules restricting access to medication abortions after they had been halted for the Coronavirus pandemic. The decision – which would mark the first time the court weighs reproductive rights since the death of Ginsburg – could come this week.

On Tuesday, the eight justices weighed whether states can regulate pharmacy benefit managers (PBMs) – key middlemen in the health supply chain who administer drug benefits for employers and insurers – in a [case](#) held over from last term's pandemic shortened

docket. The biggest lobby for PBMs is fighting Arkansas' effort to set rates on the companies in arguments that take up if ERISA preempts state oversight of the firms' pricing practices.

The biggest and most politically volatile case of the term, however, is *California v. Texas* — a challenge to the Affordable Care Act's constitutionality brought by the Trump Administration and a group of conservative-led states that will be argued on November 10. While the case pivots around the individual mandate, it raises questions about the entire law's survival. And the vacancy left by Ginsburg's death increases the chances the court could undercut Obamacare's popular insurance protections for preexisting conditions, especially if the President can quickly install Barrett, or just drag out the legal fight. The way the case could jeopardize access to health coverage during the Coronavirus pandemic has made it a leading Democratic talking point, with Joe Biden and congressional candidates assailing the GOP for trying to strike the law during a public-health crisis without having a backup plan. Even if the law survives, the addition of another conservative justice would make it more likely the court could rule on other key issues surrounding the health law, including whether states can impose work requirements on Medicaid recipients.

Abortion could also reappear on the high court's agenda if justices decide to consider any of a series of restrictions that would effectively eliminate access to the procedure for most of the country. Several cases in the legal pipeline could allow the justices to effectively cut back access to the procedure without having to directly confront the landmark *Roe v. Wade* decision that legalized the procedure. The court could also soon consider bans on a common second-trimester abortion procedure, known as dilation and evacuation, that at least 10 states have sought to outlaw. — *Adriel Bettelheim*

C. Employment and Immigration

Census countdown: The fate of Trump's latest attempt to exclude undocumented immigrants from the census count could land before the Supreme Court later, with Barrett weighing in if she's confirmed by the Senate. After the high court in 2019 blocked the administration's attempt to add a citizenship question to the 2020 census, the President instructed the Commerce Department to exclude undocumented immigrants from the census count for the purpose of congressional reapportionment, by using government data. In September, a federal court halted that effort, finding that excluding the immigrants would violate the 14th Amendment, which requires the number of House seats each state is allotted to be based on "counting the whole number of persons in each state," and federal law, which permits the commerce secretary to include only census figures in his report to the President. The Trump Administration has since appealed the ruling in *New York Immigration Coalition v. Trump* to the Supreme Court and requested it decide the case before December 31, when the Commerce Department is required by statute to deliver the census count to the President.

The Supreme Court has issued a mixed bag of decisions on Trump's immigration actions. Last year, it gave his administration permission to implement a sweeping ban on asylum seekers who pass through another country en route to the U.S. while challenges to the policy played out. In June, however, Chief Justice John Roberts sided with the court's liberals in rejecting Trump's decision to end the Obama program protecting so-called "Dreamers," those who were brought to the U.S. as children without documentation. Barrett, though, voted to uphold Trump's immigration policies during her tenure as a federal appellate court judge, a sign that she could tip the high court in the President's favor on the issue. In June, she was the lone judge to dissent in a decision blocking Trump's public charge rule, which was written to make it harder for immigrants who rely on Medicaid, food stamps, and other programs to get green cards and visas. — *Rebecca Rainey and Eleanor Mueller*

D. Education

Transgender student rights: The court's recent [Bostock v. Clayton County decision](#) leaves ample room for justices to consider hot-button questions about transgender rights in American schools. Infuriated social conservatives fumed this summer after Trump's first Supreme Court nominee, Justice Neil Gorsuch, wrote the majority opinion that protects LGBTQ Americans from workplace discrimination. Employers feared the Bostock decision would sweep away "sex-segregated bathrooms, locker rooms, and dress codes," Gorsuch wrote. But, he stressed the majority opinion does not "purport to address bathrooms, locker rooms, or anything else of the kind." Ginsburg played a key role in the [June ruling](#) — just one example of how she swayed the court toward expanding LGBTQ rights and narrowing religious exemptions. However, with a new 6-3 conservative majority, the scale may tip back the other way, leading the court to rule more frequently in favor of religious exemptions and, thus, diluting the impact of Bostock.

In November, the justices are slated to hear the case of *Fulton v. City of Philadelphia*, in which a Catholic adoption agency is suing the city over its exclusion from the public foster-care system. Because the agency doesn't accept same-sex parents, Philadelphia said, it was in violation of the city's anti-discrimination policy. The agency contends that this is a violation of its freedom of religion. Should a newly conservative court rule in favor of the agency, it could have widespread implications in weakening the newly imposed protections for LGBTQ workers because it would strengthen employers' case for religious exemptions.

This summer, the Fourth Circuit Court of Appeals said barring students from using the bathroom that matches their gender identity is unconstitutional and a violation of education anti-sex discrimination laws. The 11th Circuit Court of Appeals ruled in favor of a transgender teen who sued to force his Florida high school to allow him to use the boy's restroom. A federal judge in Idaho blocked a state law that barred transgender women from participating in women's sports. Meanwhile, the Education Department threatened Connecticut's high school sports authority and a half dozen local school boards with legal action or a loss of funding after concluding their adherence to a state transgender athlete policy violated federal sexual discrimination laws. The Bostock decision, government lawyers argued last month, "does not control" the department's interpretation of Title IX rules. — *Juan Perez, Jr.*

E. Technology

Tech industry readies for Google v. Oracle: Google and Oracle will finally argue their decade-long copyright battle before the Supreme Court — a case that could fundamentally alter how intellectual property law applies to software. The hearing was scheduled for this past spring but delayed due to the Coronavirus pandemic. The issue is whether Google violated copyright law when it lifted Oracle-owned code to create its Android mobile operating system. Google says the code is not subject to copyright, and, if it is, that it qualifies as fair use. The tech rivals have each argued they must win or the industry standard for sharing code will be forever changed. Some have already speculated that Ginsburg's absence on the high court could shift the balance in Google's favor. She was among the court's most ardent supporters of intellectual property protections and may have been sympathetic to Oracle's argument that it should have been compensated when Google used its code. — *Steven Overly*

F. Financial Services

Fintech fight: Barrett's ascendance to the high court could create new complications for technology-driven financial startups seeking federal banking licenses that could provide a major breakthrough for the emerging industry. At issue is a legal fight over an [attempt](#) by the Office of the Comptroller of the Currency (OCC), a top banking regulator, to establish a so-

called fintech charter that would provide a new regulatory pathway for online lenders and other financial technology firms to operate across the country without complying with state-by-state rules. As a “textualist” who clerked for the late Justice Antonin Scalia, Barrett may not be willing to give the OCC deference to proceed with the charter based on a strict reading of the National Bank Act.

No deference? More generally, Barrett's presence on the court could jeopardize a legal doctrine that many conservatives believe unconstitutionally empowers regulators, known as Chevron Deference. Named after a 1984 ruling, the doctrine holds that when a statute about a regulator's power is ambiguous, judges should defer to the agency's reasonable interpretation of the law. Any number of cases could potentially lead the justices to revisit Chevron Deference, with Trump's two other appointees to the high court eager to rein in the doctrine. Although Barrett's views are by no means certain, indeed, her mentor, Scalia, long championed Chevron Deference, writing that “broad delegation to the Executive is a hallmark of the modern administrative state.”

Barrett has advocated that the Supreme Court be more willing to overturn precedents. Last year, the court narrowly upheld a similar precedent, the Auer Deference, which holds that courts should defer to an agency's own interpretation of its regulations when the regulations themselves are ambiguous. Conservatives are also gunning for that precedent.

Who's in charge? The Supreme Court is set to hear a case on the constitutionality of the Federal Housing Finance Agency (FHFA) in a challenge brought by shareholders of Fannie Mae and Freddie Mac, the government-controlled companies that stand behind about half of the country's mortgages. The case is the culmination of a long-running legal dispute over changes that Treasury and the FHFA made to a shareholder agreement in 2012 requiring Fannie Mae and Freddie Mac to pass all their profits to the government's coffers. The companies have since been permitted to start retaining capital again, as the Trump Administration prepares to release them from conservatorship. The justices combined that case with a related shareholder challenge to the FHFA's leadership structure. The agency, like the Consumer Financial Protection Bureau (CFPB), is headed by a director appointed to a five-year term who can only be fired for cause. The high court this year ruled 5-4 in a [similar case](#) that a law stipulating that the CFPB's director could only be dismissed for cause is unconstitutional. All the court's conservative appointees backed eliminating restrictions on the President's ability to fire an agency head, and Barrett would likely join them if confirmed. An eight-member court would probably produce a 5-3 decision similar to the ruling in the consumer bureau case. — *Zachary Warmbrodt, Victoria Guida and Katy O'Donnell*

G. Tax

Regulation precedents in the crosshairs: A case on the Supreme Court's docket for December could have major ramifications for the IRS's regulatory and tax collection authority. The justices have been asked to decide between two laws that affect the agency's freedom to maneuver in those areas. The case was brought by CIC Services, which challenged IRS reporting requirements for “micro-captive” insurance transactions, a complex procedure that some taxpayers use to reduce their taxable income. The IRS says the requirements are protected by the Anti-Injunction Act, a law that prohibits legal challenges to a tax before it is collected, since there are potential tax penalties for failing to report such transactions. CIC Services, a company that provides advisory services for micro-captive deals, argues the reporting rules are more like regulations. So, the company says, the IRS should have followed the Administrative Procedure Act, which spells out procedures required for creating new regulations, including hearings. Businesses, tax experts, and others will be watching to see whether the court narrows the Anti-Injunction Act or puts more limits on the agency's rule-making authority. Oral arguments in the case, [CIC Services, LLC v. Internal Revenue Service](#), are scheduled for December 1.. — *Toby Eckert*

H. Defense

Border wall fight: Defense and national security issues haven't been high on the Supreme Court's docket lately, but the justices have already dealt Trump a win on his diversion of Pentagon money to help construct his border wall with Mexico. The Supreme Court has twice voted 5-4, along ideological lines, to let border wall construction continue as lawsuits play out in the lower courts. Replacing the liberal Ginsburg, the conservative Barrett is unlikely to change that outcome. Several groups, including 19 states, are challenging the legality of Trump's diversion of Pentagon funds that were appropriated by Congress. And the D.C. Circuit Court of Appeals has ruled that House Democrats have standing to pursue a lawsuit over Trump's border wall spending.

Transgender troops: Barrett could also bolster the Trump Administration's defense of his transgender troop ban if the case heads to the Supreme Court. Several lawsuits are challenging the constitutionality of restrictions on transgender troops, which overturned the Obama-era policy allowing transgender people to serve openly. Without ruling on its legality, the Supreme Court voted 5-4 in January 2019 to allow the new policy to take effect while it is argued in lower courts. The new policy formally went into effect in April 2019. Challenges to both border wall spending and the transgender troop ban would likely be moot, however, if Trump loses reelection, Democratic presidential nominee, Joe Biden, has pledged to overturn both policies if he prevails. — *Connor O'Brien*

I. Cannabis

The high court may hear marijuana lawsuit: It's been 15 years since the Supreme Court last took up a marijuana case — *Gonzalez v. Raich* — when a majority of the justices ruled against California medical marijuana patients and growers who got raided by the Drug Enforcement Administration. On Friday, the Supreme Court is scheduled to consider whether to take up *Washington v. Barr*, a case challenging the constitutionality of marijuana's federal illegality. Lower courts have ruled the plaintiffs have yet to exhaust their administrative remedies. Yet, they're asking the high court to hear their case, arguing administrative remedies are not a sufficient solution. If the court's past record on marijuana cases is any indication, it seems unlikely that the plaintiffs would see any success before the high court. However, lawyers for the plaintiffs say times have changed, with a majority of Americans now living in a state that has legalized medical or recreational marijuana, the current federal-state conflict is untenable. — *Mona Zhang*

J. Agriculture

Ag hopes for an environmental break: Agriculture industry leaders are hopeful that a Barrett confirmation would create a solid conservative majority that could help beat back environmental rules they dislike and protect some of the Trump Administration's deregulatory reforms that have been challenged. Barrett doesn't have much of a record on environmental decisions, but green groups are very concerned about how she might rule on issues related to the Endangered Species Act, Clean Water Act, and Clean Air Act. The court is scheduled to hear [arguments in December on a combined case](#) involving Nestlé USA, Cargill Inc., and a group of Malian citizens who claim they were subjected to child slavery on cocoa farms in Ivory Coast. A U.S. District Court in California previously ruled that the companies couldn't be held liable, but an appellate court overturned the ruling, prompting Nestlé and Cargill to appeal to the Supreme Court. — *Helena Bottemiller Evich*