



The Washington Post

Term Saw High Court Move to The Right

Advertisement » Your Ad Here

Roberts-Led March Likely to Continue

By Robert Barnes
Washington Post Staff Writer
Wednesday, July 1, 2009

For the Supreme Court, it was the year of living on the verge.

On the verge of declaring the key provision of the Voting Rights Act unconstitutional, but then stepping back.

Looking hard at whether some protections of minorities amount to violations of the Constitution, then leaving the topic for another day. Appearing sympathetic to school officials for their decision to strip-search a 13-year-old student, but shielding them only from any liability for their actions.

The court's term avoided the blockbuster decisions that at one point seemed inevitable. But its path was clear: a patient and steady move to the right led by Chief Justice John G. Roberts Jr., one that is likely to continue even if President Obama is successful in adding Judge Sonia Sotomayor to the high court -- and perhaps two others like her.

The court's conservatives made it harder for those pressing civil rights claims to get into court, and the same for environmentalists. Conservative justices raised the bar for those alleging age discrimination, a decision that liberal Justice John Paul Stevens called "an unabashed display of judicial lawmaking." They declined to find a constitutional right to DNA testing for prisoners who say the tests could prove their innocence.

While there were lopsided majorities on some high-profile cases near the end of the term, the court remained extremely divided, deciding nearly a third of its cases by 5 to 4 votes. Liberals won a few, although sometimes in cases where ideology seemed it should not matter.

Over Roberts's strenuous dissent, for instance, the court decided that excessive campaign contributions to a judge create an unconstitutional threat to a fair trial. And justices said drugmakers could not rely on federal regulation to shield them from lawsuits brought under state consumer-protection laws.

The justices' seemingly genial relations -- retiring Justice David H. Souter received a warm send-off Monday, and Justice Ruth Bader Ginsburg has spoken of their concern after her successful cancer surgery -- come in spite of passionate disagreements.

"It's more divided now than at any point in its modern history -- by far," lawyer Thomas C. Goldstein, founder of the popular [Scotusblog.com](http://www.scotusblog.com), said at a briefing yesterday at the Washington Legal Foundation.

It is a familiar ideological split: Roberts, Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. on one side; Stevens, Ginsburg, Stephen G. Breyer and Souter on the other. Justice Anthony M. Kennedy remains in the role of the decider, finding himself in the majority more than any other justice and siding twice as often in 5 to 4 votes with conservatives as he did with liberals.

Ilya Shapiro, a senior fellow at the Cato Institute, sees the incrementalism that marked this term's decisions as a sign of respect from Roberts.

"One thing I think is going on is that the chief justice has a devotion to the institution of the Supreme Court, and not wanting to get it out on a limb in front of public opinion," Shapiro said.

"But Roberts is, after all, a conservative," Shapiro said. "You know what his instincts are."

Roberts received praise from more than his usual supporters this term for the court's decision on the Voting Rights Act. It concerned Section 5, which requires political jurisdictions in nine mostly Southern states, and parts of seven others, to have any changes in their electoral procedures and laws approved in advance by federal authorities. It is an unprecedented intrusion into state sovereignty that is also widely acknowledged as the key to the political advancement of minorities since the civil rights movement.

From oral arguments, it seemed clear that the court's conservatives thought that Congress's reauthorization of the law in 2006 was so broad as to violate the Constitution. But a showdown was averted when the court ruled 8 to 1 to make it easier for local jurisdictions to exempt themselves from the law, with only a stern warning to Congress that it was likely to find Section 5 unconstitutional if it was not changed before the next challenge.

Yale law professor Jack M. Balkin, who runs a popular liberal blog on the court, wrote that the court's decision to stop short of finding the provision unconstitutional -- as well as its decision to put aside equal-protection questions about Title VII of the Civil Rights Act -- was due to the country's changing political climate.

"If I am correct, what put the conservative Justices (and especially Justice Kennedy) on the defensive was the assumption that they would risk sacrificing the Court's legitimacy in a climate in which neither the President nor the Congress would support their gambit and would in fact do everything possible to undermine their legitimacy," he wrote.

Roberts's supporters were disappointed that the court did not go further -- especially in the Voting Rights Act case -- but attributed the decision to the chief justice's stated belief in minimalism, the theory that cases should be decided as narrowly as possible, avoiding constitutional questions when possible.

And others see the court's conservatives as merely patient. Roberts is 54, Alito 59, Thomas 61, Kennedy 72, Scalia 73. Stevens, however, will turn 90 during the court's next term; Ginsburg is 76. "The jurisprudence of actuarialism," Goldstein calls it. Even if Obama serves two terms, he may not be able to replace one of the conservative justices with a liberal, the move that would really change the court's dynamic.

"This court can afford to be quite patient," Goldstein said. "It will get there eventually."

And maybe sooner rather than later.

On the last day of decisions, Roberts announced that the court was delaying its ruling about whether a film about former senator and Democratic presidential candidate Hillary Rodham Clinton produced by the conservative group Citizens United ran afoul of the McCain-Feingold campaign finance reform act. Instead, the court will take the highly unusual step of hearing oral arguments in September about whether the act's restrictions on corporate and union spending on electioneering in advance of an election is constitutional, as well as revisiting a 1990 decision that upheld a ban on corporate spending on federal elections.

It was a differently composed Supreme Court that decided in 2003 that the McCain-Feingold legislation, known formally as the Bipartisan Campaign Reform Act, met constitutional standards. Scalia, Kennedy and Thomas disagreed at the time.

Since they have joined the court, Roberts and Alito have endorsed each challenge to the act that the court has considered. But they have resisted deciding the broader question until now.

"I think the court will keep going in the same direction," Shapiro said, "and *Citizens United* will be a good first test of that."

Post a Comment

[View all comments](#) that have been posted about this article.

Comments that include profanity or personal attacks or other inappropriate comments or material will be removed from the site. Additionally, entries that are unsigned or contain "signatures" by someone other than the actual author will be removed. Finally, we will take steps to block users who violate any of our posting standards, terms of use or privacy policies or any other policies governing this site. Please review the [full rules](#) governing commentaries and discussions. You are fully responsible for the content that you post.

© 2009 The Washington Post Company

Ads by Google

[Symantec Storage Software](#)

Reduce cost and improve utilization No additional hardware. Learn how.

www.Symantec.com