

The Majority Of One: How Roberts Is Shaping The Court

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The 2019 term has removed all doubt: Chief Justice John Roberts Jr. is the power broker on the U.S. Supreme Court. But unlike past swing justices, the nation's top jurist puts the reputation of the court before his own conservative instincts and is willing to compromise when he needs to.

In 53 signed opinions this term, Justice Roberts found himself in dissent only twice. In most of the biggest cases, the 65-year-old Republican appointee not only voted with the majority, but authored the decisions himself, employing his trademark narrow approach that often left both his fellow liberal and conservative justices unsatisfied.

Justice Roberts has long had a reputation for considering the reputation of the Supreme Court in his approach to deciding cases. But experts say his "institutionalist" instincts were even more apparent this term as he sought to steer the court through the rocky political landscape of a bitter impeachment, upcoming presidential election and a global pandemic. Against that fraught backdrop, Justice Roberts struck middle ground on explosive issues like the Obama-era protections for young immigrants, abortion regulations, and separation-of-powers battles between the president and Congress.

"He's being strategic," said Ilya Shapiro of the [Cato Institute](#). "His goal is not to empower some theory of interpretation. His goal is to preserve the court's institutional legitimacy and popular confidence in the court, to depoliticize it, to make it seem less partisan, less ideological than the rest of our discourse."

The chief justice's measured strategy differs starkly from past swing justices on the Supreme Court like Justice Anthony Kennedy, who used his position at the center of the court's ideological spectrum to fashion major victories for the LGBTQ community and juvenile defendants, among other issues.

Where Justice Kennedy had "powerful convictions" about gay rights, federalism and the First Amendment, Justice Roberts is "much more of a lawyer's lawyer," said Carolyn Shapiro, a law professor and founder of the Supreme Court clinic at Chicago-Kent College of Law.

Symbolic Victories, Narrow Rulings

When Justice Roberts handed down some of the biggest rulings this term, the prevailing parties declared major victories. But a closer reading revealed just how narrow many of his opinions were. Far from settling these cases, the chief justice teed up more litigation in the lower courts.


According to Caroline Fredrickson, a fellow at the Brennan Center for Justice, those narrow rulings often belie a more conservative bent.

"He's very careful to write opinions that oftentimes have an impact that is much more conservative than is credited, but have the appearance being moderate," she said.

Such was the case, Fredrickson said, in perhaps **his most surprising vote of the term**, in which he sided with the liberal justices and ruled against the Trump administration's efforts to shut down the Deferred Action for Childhood Arrivals program, which gives legal protections to roughly 700,000 immigrants who arrived in the country as children.

Cast as a victory for the DACA recipients known as "dreamers," Justice Roberts' opinion was nevertheless exceedingly narrow. The chief justice acknowledged that President Donald Trump's Department of Homeland Security had the authority to rescind DACA but said that the agency did not follow the proper administrative procedures in doing so. As a result, the program survived, but the court provided a road map for the DHS to rescind it legally.

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Justice Roberts crafted a **similarly narrow opinion** in the court's major abortion case this term, June Medical Services LLC v. Russo .

The Republican appointee supplied his liberal colleagues with the crucial fifth vote to strike down a Louisiana law requiring abortion providers to have admitting privileges at a nearby hospital. But the chief justice refused to sign onto Justice Stephen Breyer's opinion for the liberal justices. Instead, he wrote a separate concurrence, explaining that he was only voting this way because of a 2016 Supreme Court decision striking down a similar Texas law. He stressed that he still believed that 2016 case was wrongly decided but would nevertheless strike down the Louisiana law out of respect for precedent.

In the same way that his DACA decision was a narrow win for dreamers, reproductive rights groups said the chief justice's concurrence in the abortion case muddied the waters for the future of abortion rights. That's because it's not totally clear how he'll vote in a case involving a different abortion regulation in which there is no identical precedent, as there was in June Medical.

"Will they overrule Roe? I don't know," said Carolyn Shapiro. "Will they allow states to impose increasingly restrictive regulations that functionally make abortion completely unavailable for the vast majority of women in many states? Sure."

One of the clearest examples of the chief justice's tactical approach came on Thursday, the final day of the Supreme Court term. The chief justice navigated a political minefield in **a pair of 7-2 decisions** regarding access to years of President Trump's business and tax records.

In one opinion for the court, the chief justice refused to invalidate a subpoena from the Manhattan district attorney for nearly a decade of records from Trump's longtime accounting firm, rejecting the president's argument that he is "absolutely immune" from state criminal

proceedings while in office. Justice Roberts said that to accept the argument would be to ignore 200 years of precedent.

But in a second opinion handed down just minutes later on Thursday, Justice Roberts ruled for the president, refusing to allow subpoenas in a similar case involving several House committees that also demanded years of records from Trump and his family members. There, he explained that the congressional subpoenas implicated "significant separation of powers concerns" that the D.C. Circuit failed to address when it sided with the House.

The court sent both cases back down to the lower courts for further litigation, with Justice Roberts having sided against the president's claims of immunity — while almost ensuring that the records being sought won't come to light before the 2020 presidential election.

For Fredrickson, it is "a reflection of the times that everybody was so astounded and relieved that we have a nation that's bound by the rule of law and not an autocrat."

But Ilya Shapiro said he was impressed that Justice Roberts was able to cobble together both the liberal and conservative wings of the court in a pair of cases that involved questions of "pure politics" and "bare knuckle partisanship."

"I think the subpoena cases taken together were Roberts' finest moment this term," he said.

Still, the chief justice's conservative decisions this year didn't go as far as some on the right had hoped. In Seila Law LLC v. CFPB, Justice Roberts said the structure of the Consumer Financial Protection Bureau was unconstitutional because the president could only remove the director for cause.

And yet, Justice Roberts otherwise upheld the powers of the CFPB and rejected the argument that the rest of the law establishing the agency was similarly doomed. Further, the chief justice did not go so far as to call into question the fate of the dozens of other independent agencies that exist in the federal government. That shortcoming sparked a dissent by Justice Clarence Thomas that was joined by Justice Neil Gorsuch.

With his outsized influence this term, Chief Justice Roberts steered the court away from what many progressives feared was going to be chock full of landslide conservative victories.

So how did progressives avert disaster in blockbuster after blockbuster case this term?

A Political Minefield

According to experts, a fraught political landscape and unprecedented public health crisis only intensified the chief justice's desire to keep the Supreme Court out of controversy.

At the start of the term last fall, the subject of "reforming" the Supreme Court with court-packing plans or term limits for justices dominated the headlines as Democratic presidential candidates **floated ways** to combat the court's new conservative majority. The Supreme Court

had become a lightning rod after the confirmation fight over Justice Brett Kavanaugh the year before, in which the nominee was accused of sexual misconduct in the early 1980s.

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Shortly after the confirmation, Justice Roberts sought to preserve the reputation of the Supreme Court as a nonpartisan institution after what he described as "the contentious events in Washington of recent weeks."

But the 2019 term dragged Justice Roberts into yet another political maelstrom in the form of President Trump's impeachment. The House's December vote to impeach President Trump made Chief Justice Roberts the presiding officer at the president's Senate trial.

Over dozens of hours in the presiding chair, Justice Roberts **kept an exceedingly low profile**, taking a backseat role in the proceedings even as Democrats clamored for him to involve himself in issues of evidence and witnesses.

His most notable contribution took place on the first day of the trial when he admonished both the House managers and Trump's defense attorneys to tone down their rhetoric out of respect for the Senate, "the world's greatest deliberative body." On more weighty matters, the chief justice ultimately indicated that he had no intention to break a tie between Republicans and Democrats on additional witnesses, and the trial resulted in the president's acquittal on Feb. 5.

But if a historic impeachment trial weren't enough, the Supreme Court also had to navigate an unprecedented public health crisis in the form of the coronavirus pandemic this term. Shuttering the courthouse doors to the public, Justice Roberts supervised the court's first-ever livestreamed oral arguments in **a historic May teleconference session**.

Experts told Law360 that the polarized political environment, upcoming presidential election and public health crisis likely motivated some of his surprise swing votes this year.

"I don't know what's in his head and given that we're all suffering through COVID and politics, maybe he feels that too, and maybe he feels like it's not time for cutting a broad swath through the law," said William Araiza, a professor at Brooklyn Law School. "I wonder whether Roberts wanted to keep the court out of chaos until the country returns to an even keel."

The same considerations likely factored into his votes in the abortion and Trump taxes cases this term, Carolyn Shapiro said. "If he had voted differently in the abortion case, for example, that would change the dynamic around the election," she said. "If the opinions [Thursday] meant that Donald Trump had to release his taxes [Friday], I think that could become an issue in a very different way. But he really threaded this needle of finding a way through many of these very contentious cases."

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That Justice Roberts was able to thread the needle and navigate one of the most contentious terms in recent memory "is pretty awesome actually for the country and for the court," said Araiza.

But the chief justice's apparent strategy of ducking controversial rulings has earned him no shortage of critics.

"It's no secret that his votes are often based on political strategy more than law," said Curt Levey, president of the Committee for Justice. "That's not the job of the chief justice or any justice. Again, their job is to follow the law. Not one of his opinions, even the people that like them, get the sense that he's being guided purely by law."

And others don't think the strategy is that effective. "Roberts is doing what he sees as his best in removing the court from [controversy] but I don't think he's been successful because no one can be successful," said Shapiro. "He takes some votes that make conservatives feel betrayed ... but [those votes] don't necessarily legitimize the court in the eyes of liberals."

Ultimately, the conservative revolution that progressives feared this term did not come to fruition. Instead, Justice Roberts tried to shepherd his colleagues out of a thicket of controversial cases that left both liberals and conservatives wanting more.

What the future bodes for the Supreme Court under Justice Roberts' stewardship remains to be seen, and some expect the outcome of the 2020 election to play a pivotal role in the direction that the court, and Justice Roberts himself, takes.

One thing's for certain, Levey said:

"At the end of the day, as Roberts goes, so goes the court."