The New York Times

A Cautious Supreme Court Sets a Modern Record for Consensus

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June 27, 2017

WASHINGTON — The Supreme Court was shorthanded for most of the term that ended Monday, and it responded with caution, setting a modern record for consensus.

"Having eight was unusual and awkward," Justice Samuel A. Alito Jr. told a judicial conference a few days after Justice Neil M. Gorsuch joined the court in April. "That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions than we would have issued otherwise."

As Justice Alito's remarks suggested, the next term, starting in October, will be very different from the past one, which was defined by the long vacancy caused by the death of Justice Antonin Scalia in February 2016 and the court's strenuous efforts to avoid 4-4 votes.

The court has already agreed to hear cases on President Trump's travel ban, a clash between gay rights and claims of religious freedom, constitutional limits on partisan gerrymandering, cellphone privacy, human rights violations by corporations and the ability of employees to band together to address workplace issues.

"Chalk it up to pent-up demand," said Pratik A. Shah, a lawyer with Akin Gump Strauss Hauer & Feld. "The eight-member court dodged the most provocative or consequential cases, and the new nine-member court is making up for lost time."

The last term was marked by a level of agreement unseen at the court in more than 70 years. That was a consequence of a lack of divisive disputes on social issues and hard work by the justices, who often favored exceedingly narrow decisions to avoid deadlocks.

The court issued "a lot of what I'd call cautiously unanimous opinions — that is, opinions that are carefully written to decide cases on relatively narrow grounds and to steer clear of big jurisprudential tar pits," said Jeffrey L. Fisher, a law professor at Stanford.

The court did deadlock twice, in two immigration cases. Those cases will be reargued before all nine justices in the court's next term. The court also sent a case on a cross-border shooting back to a lower court for further consideration.

Recent terms have ended with blockbuster decisions on gay rights, abortion, affirmative action, health care and voting. "We got used to the idea that every year the court decides several

of the biggest national political issues — six or seven consecutive 'terms of the century' — but this year saw a regression to the mean," said Ilya Shapiro, a lawyer with the libertarian Cato Institute.

Less consequential cases seemed to produce consensus. According to data from Lee Epstein, a law professor and political scientist at Washington University in St. Louis, the percentage of cases decided by a 5-to-4 or a 5-to-3 vote was 14 percent, compared to an average since 1946 of 22 percent.

Professor Epstein also devised another measure of consensus, dividing the number of votes in support of the majority or plurality opinion by the total number of votes cast. The last term's rate, 89 percent, was the highest in at least 70 years.

"This term showed that there is broad agreement across ideological lines, sometimes surprisingly broad, on some important areas of the law," said William M. Jay, a lawyer with Goodwin Procter. For instance, he said, "the court continues to read the First Amendment to provide robust protection for free speech, even for unpopular speech or unpopular citizens."

There were, of course, major decisions that revealed deep divisions. One of them, Trinity Lutheran Church v. Comer, lowered the wall between church and state by a 7-to-2 vote.

"This case is about nothing less than the relationship between religious institutions and the civil government — that is, between church and state," Justice Sonia Sotomayor wrote in her dissent, which was joined by Justice Ruth Bader Ginsburg. "The court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."

In Ziglar v. Abbasi, the court ruled by a 4-to-2 vote that high-level officials in President George W. Bush's administration could not be sued for abuses they were accused of committing after the Sept. 11, 2001, attacks. In his dissent, Justice Stephen G. Breyer likened the decision to the Supreme Court's "refusal to set aside the government's World War II action removing more than 70,000 American citizens of Japanese origin from their West Coast homes and interning them in camps" in Korematsu v. United States.

But the justices also avoided hearing important disputes by dismissing an appeal in a case on transgender rights after the Trump administration shifted the government's position and by turning down appeals in cases concerning restrictive voting laws in Texas and North Carolina.

In addressing racial discrimination, the court issued a series of decisions that heartened liberals.

In Buck v. Davis, Chief Justice John G. Roberts Jr. wrote a forceful majority opinion siding with a Texas man who had been sent to death row based on testimony laced with what the chief justice called "a particularly noxious strain of racial prejudice." In Peña Rodriguez v. Colorado, Justice Anthony M. Kennedy, writing for the majority, said courts must make an exception to the usual rule that jury deliberations are secret when evidence emerges that those discussions were tainted by racism. "Racial bias implicates unique historical, constitutional and institutional concerns," he wrote.

In Bank of America v. Miami, Chief Justice Roberts provided the crucial fifth vote, joining the court's four-member liberal bloc, to allow Miami to sue two banks for predatory lending under the Fair Housing Act of 1968.

The decisions amounted to a small but significant trend, said Elizabeth Wydra, the president of the Constitutional Accountability Center, a liberal group. "Just as we have recently seen Justice Kennedy more willing to acknowledge systemic racism in his recent affirmative action and fair housing opinions," she said, "this term saw Chief Justice Roberts vote in a rather surprising — but welcome — way to acknowledge racial bias in the criminal justice system and make it easier for cities to sue over discriminatory mortgage lending practices."

If the court leaned left in cases concerning race, it continued to lean right in business cases.

"The court added to its recent track record as a business-friendly forum, particularly on the class-action and arbitration front," Mr. Shah said. "And class plaintiffs may have even more at stake next term."

He was referring to a trio of cases in which the court will decide whether employees may band together in legal actions to address workplace issues. The cases are the court's latest encounter with expansive arbitration clauses.

The Obama administration supported the workers in the dispute. The Trump administration, in an unusual move in a pending case, switched sides.

The court is also likely to take another look at an issue that makes the labor movement nervous: whether workers who choose not to join public sector unions may be forced to pay fees for the unions' collective bargaining efforts.

Justice Gorsuch's early votes were reliably conservative, and he seemed poised to take a place on the far-right side of the court's ideological spectrum alongside its two most conservative members, Justices Clarence Thomas and Alito. Justice Gorsuch's first consequential vote was to deny a stay of execution to death row inmates in Arkansas over the dissents of the court's four-member liberal bloc.

Not every case was freighted with ideology. Lisa S. Blatt, a lawyer with Arnold & Porter Kaye Scholer, said a theme ran through any number of cases involving colorful disputes. "The court had no difficulty rallying around the little guy vis-à-vis the government in the name of fairness," she said.

In Fry v. Napoleon Community Schools, for instance, the court unanimously ruled in favor of a girl with cerebral palsy who sought to bring her service dog, a goldendoodle named Wonder, to school. And in Nelson v. Colorado, the court ruled that states may not keep fines and restitution paid by defendants whose convictions were overturned.

There will be bigger Supreme Court terms. But the one that just ended was valuable, said William Baude, a law professor at the University of Chicago.

“It has been a quiet term, and that is a good thing for the country,” he said. “Over all, this year the court was the least dramatic, and most functional, branch of government.”

“We will look back on this term,” he added, “as the calm before the storm.”