



## Year of surprise Supreme Court rulings shows influence of powerful chief justice John Roberts

Richard Wolf

July 10, 2020

When the Supreme Court opened its 2019 term nine months ago with a debate about the meaning of insanity, few could have predicted how crazy things would get.

The chief justice presiding over a president's Senate impeachment trial. A viral pandemic forcing the first postponement of oral arguments in a century. The oldest justice questioning lawyers from her hospital bed. The quietest justice speaking up daily. Opinions being released into July for the first time since 1996.

By the end of the term Thursday, the customarily conservative court had issued a series of decisions on gay and transgender rights, the DACA program, abortion rights and President Trump's lack of immunity from criminal investigation that produced the loudest cheers from liberals.

The lesson from the court seemed to be that while the president, the Democratic House and the Republican Senate are predictable, a court of nine is harder to pin down.

"The court's a lot more complicated than a lot of observers give it credit for," said former U.S. solicitor general Paul Clement, perhaps the premier Supreme Court advocate of his generation with more than 100 oral arguments under his belt.

That unpredictability is largely the work of Chief Justice John Roberts, who at 65 with 15 years leading the court has become a hugely influential figure in American life. With four justices on the left and four others on the right, Roberts usually determines the result in the court's most contentious cases. In 62 cases this term, he was in the majority 60 times.

Thus it was that in two of the most closely watched cases – Trump's effort to end the DACA program that protects 650,000 young, undocumented immigrants from possible deportation, and Louisiana's effort to impose new restrictions on abortion clinics – Roberts threw in with the court's liberals in 5-4 rulings.

"Those are very tenuous victories," warned Elizabeth Wydra, president of the liberal Constitutional Accountability Center, which files legal briefs in major high court cases. The administration can try again to eliminate DACA, and more abortion restrictions are working their way through lower courts.

More "remarkable and welcome," Wydra said, was the court's 6-3 opinion giving the nation's LGBTQ population employment protection under sex discrimination laws – a ruling written by Associate Justice Neil Gorsuch, Trump's first nominee. Roberts and the court's four liberal justices were his silent partners.

While those cases focused unlikely attention on the court, it has come down in Trump's favor more often. The five conservative justices have voted as a bloc nine times in 5-4 cases. Among them: Enabling states to extend private school scholarships to religious schools and giving the president authority to fire the Consumer Financial Protection Board's director without cause. Both rulings were written by Roberts.

"All chief justices have outsized influence because they are the most senior on the bench and, among other things, dominate the assignment of opinions," said Harvard Law School professor Richard Lazarus, a classmate of Roberts there in the 1970s and author of "The Rule of Five," a new book on the high court and climate change. "But few possess both that seniority and sit on a closely divided court in which they tend to be at the center of the spectrum."

Perhaps more noteworthy, the court has agreed at the Trump administration's request to block many lower court actions from taking effect while appeals are mounted, particularly on the president's immigration crackdown.

"It is way too soon to say this is not a conservative court," said University of Chicago Law School professor David Strauss, who directs the school's Supreme Court and appellate clinic.

### **Seeking good government**

Instead, the court has shown that faced with a freewheeling president and a politically divided Congress, it can be a stickler for what it considers good government.

That was Roberts' intention Thursday when he sent subpoenas issued by congressional Democrats back to two federal appeals courts to assess the information Congress seeks – in order to achieve its stated legislative aims – in light of the burden such demands could place on the president.

And it was Roberts' intention last month in striking down Trump's effort to end the Deferred Action for Childhood Arrivals (DACA) program, just as he did a year earlier when the administration sought to add a question on citizenship to the 2020 census. Both times, Roberts said, the decision-making process was so sloppy it violated federal law.

"Presidents, the chief has made clear, possess great authority. But for that same reason, they have to follow required processes, precisely because so much is at stake when they wield such authority," Lazarus said.

Similarly, Roberts' decision to side with the court's liberals on abortion last month had less to do with opposing state restrictions – he has supported them in the past – than it did with Louisiana's effort to impose the *exact same* limit the court had struck down four years earlier in Texas.

"A lot of his decision-making is strategic or tactical," said Ilya Shapiro, director of the Center for Constitutional Studies at the libertarian Cato Institute. "He defers to the status quo. He doesn't like the court to make waves."

Thus the court often ruled incrementally in some of the major decisions of the term – sending cases back to lower courts and giving the losing side another chance. Roberts promised as much during his 2005 Senate confirmation when he said the justices should only do what they must to resolve the narrow questions that come before them.

“I think Roberts doesn’t get enough credit for being sincere in some of the platitudes he said at his hearings,” said Michael McConnell, a former federal appeals court judge who directs Stanford Law School's Constitutional Law Center. “The chief, in particular, is trying to keep the court balanced.”

Beyond Roberts' influence, Trump's two high court nominees also played prominent roles during the term, making clear they cannot be taken for granted based on their conservative ideology.

Gorsuch wrote the landmark gay and transgender rights opinion, declaring that employers who fire workers based on sexual orientation or gender identity are guilty of sex discrimination. He also wrote Thursday's 5-4 decision declaring about half of Oklahoma Native American territory, which strips the state of jurisdiction over criminal cases involving Native Americans. Only the four liberal justices were on his side.

Kavanaugh sided with Roberts and those four liberals in declaring a New York City gun restriction moot, rather than striking it down as an example of gun control rules run amok. And he wrote for himself and Gorsuch Thursday that while Trump's lawyers can continue to fight a New York prosecutor's subpoena, "no one is above the law."

### **Compromise and decorum**

While the court's liberals have been relatively unified, its conservatives more often go their separate ways – marching to different drummers in a way that aggravates many in the conservative legal movement.

“There are originalists, there are textualists, there are law-and-order types, there are minimalists,” Shapiro said. “There are a lot of different types of Republican-appointed justices.”

That often results in the appearance of compromise and accommodation, if not outright backroom deals. On Wednesday, Associate Justices Stephen Breyer and Elena Kagan went along with 7-2 rulings in cases expanding religious exemptions from laws and rules. The next day, Gorsuch and Kavanaugh went along on both 7-2 rulings about subpoenas for Trump's financial records.

“A lot of people believe that the court is trying to achieve the compromise position that the democratic process probably would arrive at if the democratic process was working,” McConnell said.

Another theme appears to be avoiding chaos. On Monday, the court unanimously allowed states to tie the hands of presidential electors, rather than risk upending the results from Election Day. That same day, they upheld a law banning robocalls to cellphones despite agreeing that an exception made it unconstitutional; they struck down the exception instead.

One theory making the rounds as the term drew to a close was that Roberts, and perhaps several of his colleagues, wanted to project unity and calm during a pandemic and a presidential election year.

At the start of the term back in October, the court introduced a new policy intended to trim the justices' own voluble instincts. It sought to give lawyers arguing in court two minutes uninterrupted before the onslaught of questions from the bench, a self-stifling that proved difficult.

By the end of the term, when forced to conduct oral arguments by conference call, the justices asked their questions in order of seniority. That orderly pattern allowed Associate Justice Ruth Bader Ginsburg, a four-time cancer survivor, to pitch in from a hospital where she was recovering from a gallbladder condition. And it enabled Associate Justice Clarence Thomas, who rarely speaks in court, to take his regular turn in the rotation.

Whether the compromise and decorum will continue into next term is guesswork. By October, the court will be facing its third major challenge to the Affordable Care Act, which Roberts initially saved in 2012 while sullyng his reputation among conservatives. More religious liberty cases are on their way, as well as an effort by House Democrats to get secret grand jury materials from the probe into Russian interference in the 2016 election.

Other cases that seemed ripe for the high court's review have been passed over, such as challenges to state gun restrictions and the qualified immunity from civil lawsuits often given police and other public officials accused of misconduct. It may be that justices on the right and left don't want to hear cases they aren't relatively sure of winning with Roberts in the middle.

And then there is the chance Trump will lose re-election, and the court's conservative majority will be faced with a Democrat in the White House – something that led to considerable friction during the Obama administration.

“They don’t want to be yet another source of friction and controversy and bitter attacks,” Strauss said. “But let's see what they do in a Biden administration.”