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Five takeaways from high court's term

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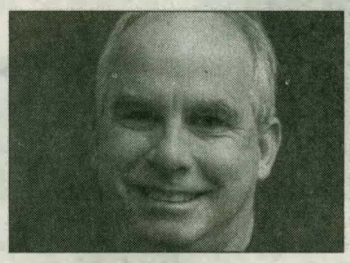

JOHN GREABE
Constitutional Connections

Last month, the Supreme Court wrapped up its 2019-20 term with a flurry of significant rulings.

The court confirmed that Congress and state attorneys general may subpoena third parties for evidence when legitimately investigating a sitting president; held that the executive branch must engage in reasoned decision-making when rescinding administrative protections for a vulnerable population (i.e., beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program); and defined the scope of the president's power to remove officials from high office.

The court also clarified that federal anti-discrimination employment protections extend to LGBTQ workers; held that states may punish members of the electoral college who do not vote for the candidate they pledged to support; determined that much of eastern Oklahoma falls within a Creek Nation Indian reservation; emphasized that the First Amendment right to freely exercise one's religious beliefs contains broad anti-discrimination guarantees; and reaffirmed that states may not undermine abortion rights by enacting laws that purport to protect women's health but in fact are designed to close clinics where abortions are performed.

Each of these rulings deserves its own column. But let's start with five clear lessons that may be drawn from the court's historic term.

1) This is Chief Judge John Roberts's court. When Sandra Day O'Connor retired, Anthony Kennedy replaced her as the "swing" justice – i.e., the justice most likely to swing back and forth between the court's conservative and liberal wings. Now that Kennedy has retired, Roberts has replaced him as the court's swing justice. Roberts authored or joined the majority opinion an astounding 97% (59 out of 61) of the time this term.

The only written decisions in which Roberts was not a member of the majority were *Ramos v. Louisiana*, which held that states must require unanimous jury verdicts as a matter of federal due process, and *McGirt v. Oklahoma*, which held that, for purposes of the federal Major Crimes Act, much of eastern Oklahoma is an Indian reservation where only federal authorities (and not state authorities) may prosecute tribe members for certain major crimes.

2) Roberts, although deeply conservative, is an institutionalist. When Roberts reaches the merits of a dispute, he is likely to side with the court's conservatives. But Roberts is far more likely than the other conservative justices to use procedural and prudential doctrines to enforce rule-of-law values and avoid having the court take center stage in litigation with strong partisan overtones.

Consider, for example, Roberts's opinions in the 2020 case involving the Trump administration's cancellation of DACA (*Department of Homeland Security v. Regents of the University of California*) and the 2019 case involving the Trump administration's efforts to add a citizenship question to the census (*Department of Commerce v. New York*). In both, Roberts joined the court's four liberal justices to hold that the administration had violated fundamental administrative law principles by failing to provide reasoned explanations for their actions. Neither opinion held that the administration was pursuing an unlawful end; both held that the means used to adopt the policy change were unlawful.

Or, consider Roberts's opinion in *June Medical Services v. Russo*. Roberts wrote that, while he disagrees with the analytical approach used in a 2016 court decision rendering unconstitutional a Louisiana statute limiting access to abortion, the court ordinarily should follow its prior rulings. Therefore, Roberts invoked the doctrine of "stare decisis," Latin for "to stand by what's been decided," and joined the court's four liberal justices to strike down the law.

Or, finally, consider Roberts's opinions for the court in *Trump v. Vance* and *Trump v. Mazars*. These cases considered, respectively, the power of state attorneys general and Congress to subpoena third parties for the financial records of a sitting president. In both cases, Roberts rejected President Donald Trump's sweeping claims of presidential immunity. Yet, Roberts remanded these cases back to the lower courts for reconsideration in light of the special concerns that arise when an attorney general or Congress investigates the president. The likely result is that the records will be made public, if ever, only after the November election.

3) Religious rights are expanding. Churches, religious organizations, and religious individuals have invoked the First Amendment's free exercise clause to bring two types of cases in recent years. In the first, they have argued that it is a violation of their right to freely exercise their religious beliefs if they are excluded on grounds of separation of church and state when government makes benefits available to a similar class of organizations or persons. In the second, they have argued for exemptions from required compliance with certain anti-discrimination laws on the ground that these laws intrude on their free-exercise rights. And they have succeeded in both types of cases.

Consider this term's decisions in *Espinoza v. Montana Dept. of Revenue* and *Our Lady of Guadalupe v. Morrissey-Berru*. In Espinoza, the court held that a provision of Montana law barring aid to religious schools could not constitutionally bar tuition assistance to parents who send their children to religious schools when such assistance is made available to other parents. In *Our Lady of Guadalupe*, the court held that, because churches must have the unlimited ability to fire those who serve as their "ministers," Catholic school teachers whose teaching assignments included religion could not challenge their dismissals under either the Americans with Disabilities Act or the Age Discrimination in Employment Act.

Consequently, churches and the religious stand on largely equal footing with all others when it comes to receiving public benefits. But they are exempt from certain generally applicable laws when applying those laws could interfere with the free exercise of their religion.

4) Lower courts should not lightly intervene in election disputes to protect the right to vote. In April, a federal judge in Wisconsin issued an injunction extending the deadline for the casting and counting of absentee ballots to one week beyond election day. The judge premised the injunction on the fact that Wisconsin election officials were overwhelmed by requests for absentee ballots from voters who did not wish to risk exposure to the coronavirus in personally casting their ballots. But the Supreme Court, in *Republican National Committee v. Democratic National Committee*, dissolved the injunction in a 5-4 ruling. The court majority applied a prudential principle that courts should not change election rules as election day approaches.

The court also acted similarly in election disputes that reached it from Alabama, Texas, and Florida. The message to lower courts seems clear: Do not lightly involve yourselves in election disputes on the ground that state officials are failing to sufficiently protect voting rights.

5) If Justice Ginsburg is replaced by another Trump appointee, the court will have a dependable, deeply conservative majority. The court recently announced that Justice Ruth Bader Ginsburg, who is 87, has been treated for a recurrence of cancer. If Justice Ginsburg leaves the court and President Trump succeeds in appointing a replacement, the court will almost certainly lack a swing justice to periodically join with the liberal justices to forge a majority.

President Trump has delivered on his promise to appoint deeply conservative justices. Although Justice Neil Gorsuch joined with the liberal justices in two high-profile cases this term (*Bostock v. Clayton County*, which extended federal anti-discrimination protections to LGBTQ workers, and the aforementioned McGirt, which held that much of eastern Oklahoma is a Creek Nation reservation), he and Justice Brett Kavanaugh (Trump's other appointee) have thus far reliably voted with arch-conservatives Clarence Thomas and Samuel Alito.

Yet another Trump appointee like Gorsuch or Kavanaugh would leave the court with a fifth deeply conservative vote even if Chief Justice Roberts were to continue to sometimes vote with the Court's three remaining liberal justices.

More on these developments in future columns.

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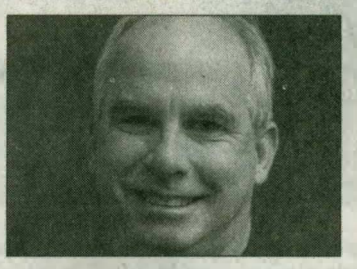

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