



A Review of the Supreme Court's 2007 Term

The Roberts Court's second full term brought many predictable outcomes—and a few surprises. Once again, the big cases revealed a stark ideological rift between the justices and demonstrated the precarious balance on the Court—a balance that the next President will likely have the opportunity to dramatically shift. Like last term, the conservative wing of the Court railed against judicial activism in one breath and unabashedly exercised it in the next. Yet, for the first time, the 2007 term brought unexpected reactions by the other justices to the ultra-conservative wing's newfound dominance.

A Novel Tactic

In a significant number of cases this term, it seemed that the moderate justices—Justice Stevens in particular—joined with the conservatives in an attempt to temper their decisions. By creating a 6-3 or 7-2 vote split, rather than the usual 5-4, the moderate justices managed to salvage precedent and narrow harmful decisions by siding with the conservative bloc. This behavior was a significant change from last term, when the number of 5-4 decisions was at an all-time high, with the liberal justices often reading their impassioned dissents from the bench. Rather than remaining a vocal minority, eloquently defending their principles but consistently losing the big cases to the right wing, the moderate justices may have decided to change tactics. Recognizing that the Court has taken a sharp turn to the right, it seems that the moderate justices are now attempting to mitigate the effect of the conservative takeover—influencing the conservative justices' opinions by joining them.

By the Numbers

This new method is illustrated by the statistics. According to SCOTUSblog.com, 17% of this term's cases resulted in 5-4 decisions, compared to 33% last term. However, only 30% of this term's cases were decided without dissent, compared to 38% last term and 55% in the previous term. So despite the decrease in 5-4 splits, this term was the most divided in recent history, with an average of 1.85 judges dissenting per case, compared to last term's average of 1.81 judges.

Rather than signaling confluence of ideology or judicial philosophy, the relative lack of 5-4 decisions this term illustrated the continuing importance of Justice Kennedy. When the moderate judges reached out in attempt to influence the conservative wing, they seem to have often turned their attention to Justice Kennedy, joining his opinion if he agreed to circumscribe its conservative reach. As an indication of this significant change in the methods of the moderate justices, while Justice Stevens was only in the majority 37% of the time last term, this term he joined the majority in 65% of cases.

This trend had been emerging even at the end of last term. In April 2006, Justice Stevens voted not to hear an appeal by Guantanamo detainees from a D.C. Circuit opinion upholding the constitutionality of the Military Commissions Act's *habeas*-stripping provisions. Instead of joining with Justices Souter, Ginsburg, and Breyer in calling for the court to grant *certiorari* and take the case, Justice Stevens wrote a concurrence from the denial of *certiorari*. Justice Kennedy signed onto the concurrence, which explicitly left the door open for the Court to accept the case in the future. Just a few months later, in the summer of 2006, the Court took the unprecedented step of reversing its own *certiorari* denial, agreeing to hear the case this term. This extraordinary change of heart resulted in the *Boumediene* decision, which restored the right of *habeas corpus* to Guantanamo detainees and offered yet another stinging rebuke to the Bush administration's unconstitutional aggrandizement of executive power, and put Justice Kennedy squarely in the moderate bloc (note that as senior justice in the majority, Justice Stevens would have assigned authorship of the opinion to Justice Kennedy).

The Newest Members

While the moderate Justices may have surprised court-watchers with their votes this term, the conservative bloc once again demonstrated a stunning cohesion. President Bush's picks did not disappoint his base: over and over again they displayed rigid adherence to conservative ideology, predictably siding with the right wing in every hot-button case. Despite his confirmation hearing soliloquies about calling balls and strikes, Chief Justice Roberts' votes revealed that the umpire was willing to change the rules of the game to benefit one team. The Chief Justice sided more often with Justice Scalia than any other member of the Court—in fact, they had the highest agreement rate of any two Justices—agreeing in 88% of cases. Justice Alito stayed on their heels, also agreeing with Chief Justice Roberts in 88% of cases this term, although his recusal in the *Exxon* case lowered his absolute number of agreements. Justice Thomas rounded out the conservative voting bloc, siding with Justice Scalia 87% of the time and agreeing with the Chief Justice in 79% of cases. Solidifying its supremacy this term, the ultra-conservative wing enjoyed an extraordinary amount of success. Overall, Chief Justice Roberts held the term's best win-loss record, finding himself in the majority in 90% of the term's cases.

The High-Profile Cases

Most of the term's biggest cases represented enormous victories for the right: announcing a new individual right to bear arms, limiting the liability of corporations, eviscerating campaign finance reform, undermining international law, and restricting voting rights. The few decisions that protected due process rights of individuals hung by a mere thread—providing a stark illustration of the Roberts Court's precarious balance. Now that the fulcrum of the Court has moved substantially to the right with the confirmation of President Bush's two nominees, the replacement of a single justice could cement the ascendancy of the conservative bloc, allowing those Justices free rein to dismantle decades of precedent in every area of law.

CONSERVATIVE DOMINANCE

DC v. Heller: 5-4

Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito reject precedent and contort history to strike down the District of Columbia’s handgun ban and create an individual constitutional right to bear arms, unrelated to service in a militia.	X
Justices Stevens, Souter, Ginsburg, and Breyer defer to the judgment of the city’s officials, finding that the gun regulations were enacted in response to increasing crime rates and did not infringe upon the Second Amendment right to form a militia.	

Davis v. FEC: 5-4

Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito strike down the “Millionaires’ Amendment,” which allowed opponents of self-financed candidates to enjoy increased campaign contribution limits, as a violation of the millionaires’ free speech.	X
Justices Stevens, Souter, Ginsburg, and Breyer argue that the amendment was a legitimate Congressional attempt to level the playing field and reduce the impression that elections are sold to the highest bidder.	

Medellin v. Texas: 6-3

Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, and Alito dismiss a treaty and a decision by the International Court of Justice as unenforceable, saying that even an order from the President instructing states to follow international law cannot make Texas do so.	X
Justices Souter, Ginsburg, and Breyer find that the Constitution makes treaties a part of the law of the land which even Texas must follow.	

Crawford v. Marion County Election Board: 6-3

Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, and Alito toss out a challenge to Indiana’s voter ID law, saying that the state has a legitimate interest in requiring a valid, unexpired, in-state ID, despite presenting no evidence of voter fraud.	X
Justices Souter, Ginsburg, and Breyer argue that the ID law is an unconstitutional burden on the right to vote, given that there is evidence that it will thwart legitimate voters without correcting an existing problem with fraud.	

Exxon v. Baker: 5-3 (Justice **Alito** recused himself because he owns Exxon stock.)

Chief Justice Roberts and Justices Scalia, Kennedy, Souter, and Thomas strike down a 2.5 billion dollar punitive damage award stemming from the <i>Exxon Valdez</i> oil spill as excessive, creating a new rule that punitive damages may not exceed compensatory damages in maritime cases and reducing the award to 500 million.	X
Justices Stevens, Ginsburg, and Breyer find no law or precedent to support limiting punitive damages in the way the majority does and would await legislation from Congress on the subject.	

NARROW VICTORIES

Boumediene v. Bush: 5-4

Chief Justice Roberts and Justices Scalia, Thomas, Alito accept the Bush administration's broad assertion of executive power in the "War on Terror."	
Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer restore <i>habeas corpus</i> rights to Guantanamo detainees, rejecting the Bush administration's arguments that it can indefinitely hold so-called "enemy combatants" without ever giving them a fair hearing.	X

Kennedy v. Louisiana: 5-4

Chief Justice Roberts and Justices Scalia, Thomas, Alito argue that the Eighth Amendment's prohibition on cruel and unusual punishment doesn't stop Louisiana from executing for crimes less serious than murder.	
Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer strike down a Louisiana law allowing the death penalty for child rape, saying the ultimate punishment should be reserved for crimes that involve intent to kill.	X

Heights of Hypocrisy

The conservative justices, and like-minded commentators, politicians, and journalists, frequently rail against "liberal judicial activism," contrasting their own methods of constitutional interpretation with what they perceive as freewheeling jurisprudence on the left. However, in cases where the conservative bloc's espoused methods indicated outcomes they eschew, the Court's right wing was quick to discard those methods in favor of ideological results.

FRAMER'S INTENT

The Court's conservative bloc purports to interpret the Constitution based on the intent of its Framers, excoriating the moderate justices for embracing "evolving standards of decency" in cases like *Kennedy v. Louisiana* to put limits on the use of the death penalty. However, in striking down the DC handgun ban, Justice Scalia, joined by the other conservative justices, points to the evolution of gun use in our country and the current prevalence of handguns to support his extension of the Second Amendment's protections to those weapons.

DEFERENCE

In order to support its conclusions, the Court's ultraconservatives often argue that they are deferring to the decisions of state or local officials, who are in a better position to balance the interests at stake. They used similar reasoning to uphold Indiana's voter ID requirements, despite the fact that the state offered no evidence that the law would prevent voter fraud. However, in striking down the DC gun ban, Justice Scalia, joined by the other conservative justices, dismisses the reasoned judgment of the city's officials that the handgun ban was necessary to quell overwhelming rates of urban crime. In DC,

local officials even provided extensive research to support their conclusion—but it was not enough to convince the conservative bloc to defer to the city’s informed, democratic judgment.

CONSEQUENCES

The conservative justices often berate their colleagues for considering the real-world effect of their decisions—arguing that consequences are not a legitimate basis for constitutional analysis. In striking down the DC gun ban, Justice Scalia and his compatriots did not take into account that their new interpretation of the Second Amendment may result in more gun violence and create a flood of litigation challenging gun laws across the country. Yet in his *Boumediene* dissent, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, rebuked the majority for allegedly opening the floodgates to litigation and threatened that restoring *habeas* rights “will cause more Americans to be killed.”

JUDGE-MADE LAW

The Court’s ultraconservatives frequently complain about judge-made law or “legislating from the bench,” reciting the oft-repeated refrain that judges should interpret the law, not make it. In *Kennedy v. Louisiana*, the four conservative justices dissented, bemoaning the majority’s alleged creation of a new law limiting the states’ right to execute criminals. However, their aversion to new judicial limitations did not hamper them from striking down a 2.5 billion dollar jury verdict against a big corporation in the *Exxon* case using a new judge-made cap on punitive damages.

Conclusion

The second full term of the Roberts Court both solidified the conservative justices’ hold on the institution and provided a further glimpse into the true agenda of the Court’s right wing. Now more than ever, the replacement of a single justice could have devastating consequences for American law, unleashing the full force of a conservative bloc currently tempered by an astute and persuasive minority and an unpredictable fifth vote.