Supreme Court term marks shift to the right

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June 28 marked the completion of the first full term of the United States Supreme Court of Chief Justice John G. Roberts, Jr., replete with decisions demonstrating a dramatic shift to the right in constitutional doctrine. The court handed down decisions removing restrictions on the operations of large business and financial concerns while sharply curtailing access to the courts for average working Americans seeking relief from their depredations, at the same time opening the population up to antidemocratic attacks by the state.

A review of the voting patterns of the individual justices reveals that a clear right-wing majority bloc exercises control over decisions. The *New York Times* on July 1 pointed out that one third of the decisions this term were decided 5 to 4, more than in any recent period. Of these cases, the four most conservative justices—Antonin Scalia, Clarence Thomas, Samuel A. Alito, Jr., and Roberts—prevailed about 70 percent of the time, while the four more liberal justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer—prevailed in less than one third of the cases.

The victories for the conservative group are due to so-called "swing" justice Anthony M. Kennedy, who voted with the right-wingers overwhelmingly, only breaking ranks in a few cases. In fact, the *Times* article notes that the person whom Kennedy voted with most often was Alito, the two of them agreeing in 87 percent of all non-unanimous cases. That Kennedy is now considered the "center" of the Supreme Court, a position previously shared with Sandra Day O'Connor—another Reagan appointee—speaks volumes about the political composition of the court.

The Supreme Court decided only 68 cases this term—the fewest in over 50 years, and an unusually high percentage of them involved damage suits against corporations. Each case was decided in favor of the corporation, indicating the court's decisive turn in a pro-business, anti-consumer direction. The term also included a number of significant rulings limiting First Amendment speech and Establishment Clause protections, restricting abortion rights, prohibiting school desegregation efforts, and restricting the ability of criminal defendants to appeal.

To put the direction of the court into perspective, it is worth drawing a balance sheet of the major cases of the term.

In *Gonzales v. Carhart*, the Supreme Court upheld the Partial Birth Abortion Act of 2003, which imposes harsh fines and prison sentences on doctors who perform dilatation and extraction abortions. The law allowed no exception even for the health of the mother and is likely to impose significant hardships on women seeking abortions for medical reasons during their second or third trimester. The five-justice majority opinion was authored by Kennedy and marks the first time that a complete ban on a specific abortion procedure has been upheld by the Supreme Court. Besides calling into question the constitutional right to an abortion, the right-wing justices ignored limits on federal power they used in the past to strike down state civil rights laws and environmental protections.

This term also saw the court reverse much of the progressive advances embodied in the landmark *Brown v. Board of Education* decision. In *Parents Involved in Community Schools v. Seattle School District*, the court ruled that voluntary racial integration efforts by school districts were unconstitutional, even if intended to prevent resegregation. The decision is a sweeping repudiation of the sentiments that motivated broad masses of working people, both black and white, to mobilize for the advancement of civil and democratic rights under the banner of equality.

The Court dealt a blow to workers who find themselves the victims of pay discrimination. In *Ledbetter v. Goodyear Tire and Rubber Company*, the court dismissed the claim of a female employee who worked for 20 years at Goodyear and was unfairly paid a significantly lower salary than her male counterparts. She won a jury verdict it overturned on appeal. The court's decision held that a person must file a complaint within 180 days of the discriminatory act or the claim will be dismissed. This contradicts the longstanding position of the Equal Employment Opportunity Commission that an employee has a new chance to bring a claim every time he or she receives a paycheck with lower pay as a result of discrimination. The new rule makes payment discrimination suits virtually impossible as such discrimination often takes years to discover. *Ledbetter*, like many of the decisions this term, is one in which the majority worked backward from its desired result, utilizing specious reasoning to deny persons the right to have their case decided by a jury.

In two other 5-4 decisions, the court lessened the guarantees of a criminal defendant to a fair trial by an impartial jury and to have a meaningful review of their trial procedure on appeal. In *Brown v. Uttecht*, the Supreme Court upheld a trial court's decision to strike a juror who expressed a moral opposition to the indiscriminate use of the death penalty. The majority opinion noted that the state has a strong interest in packing a jury with people who are willing to have people executed. The *Bowles v. Russell* decision denied a criminal defendant's right to appeal because it was filed three days too late despite the fact that he was following the directions given to him by the trial judge.

In a serious erosion of the separation of church and state, the court threw out a case brought by an atheist challenging the use of executive department funds to promote the Bush administration's "faith-based" initiatives. In *Hein, Director, White House Office of Faith-Based and Community Initiatives v. Freedom From Religion Foundation, Inc.*, the court held that citizens have no general taxpayer standing to sue if the government is using funds for religious purposes as long as Congress did not expressly authorize the spending. The distinction is absurd, as the legislative branch allocated the money to the executive, and it makes presidential violations of the Establishment Clause immune from judicial review.

In two decisions dealing with other First Amendment issues, the court held that students may be disciplined for speech but that the government cannot limit the ability of wealthy individuals and corporations to influence elections. In *Morse v. Frederick*, the court held that a school principal could not be sued for suspending a student who displayed a banner with the words "Bong Hits 4 Jesus" at an Olympic torch parade near school grounds, gutting an earlier ruling that students do not shed their First Amendment rights at the school house gate. On the other hand, in *Federal Election Commission v. Wisconsin Right to Life Inc.*, the court struck down any limits on the financing of electioneering broadcasts by organizations that act as mouthpieces for the interests of large corporations as a violation of free speech.

In these decisions, largely dealing with the rollback of democratic rights and protections against the prosecutorial power of the state, certain divisions within the court emerge, both between and within the various groups of justices, with dissenting opinions sometimes vituperative.

In an unprecedented move for her, Ginsburg read aloud two dissents from the bench. Other justices noted in their dissents that the decisions of the court were the outcome of changing justices rather than developments in legal doctrine. Breyer wrote in the school desegregation case that "It is not often in the law that so few have so quickly changed so much." In his dissent to that decision, Stevens, the most senior justice, noted that "no member of the Court that I joined in 1975 would have agreed with today's decision."

These sentiments reflect growing concern among the more liberal justices that the reckless path taken by the conservative majority ignores the social and political ramifications of such a dramatic change in constitutional jurisprudence.

Within the conservative majority, there is a divide between Roberts, Alito, and Kennedy—whose modus operandi is to distinguish on trivial grounds or carve out exceptions to prior decisions, effectively overturning precedent while paying it lip service—and Scalia and Thomas, who have abandoned all pretense of upholding precedent and want to plow ahead overruling anything they find inconvenient.

Despite disagreements among the justices about how to proceed regarding these social issues, one thing is clear: when it comes to defending the interests of big business, there is a definite consensus as the following cases confirm:

In *Credit Suisse Securities (USA) LLC v. Billing*, the court decided in a 7-to-1 decision to dismiss a shareholder's antitrust suit against several investment banks that colluded to fix the prices for their initial public offerings. The result of the decision is that investment banks will effectively be immune from antitrust liability.

Likewise, in *Tellabs Inc. v. Makor Issues & Rights Ltd.*, The court ruled 8 to 1 that persons alleging that companies are engaged in securities fraud or manipulation must show "compelling evidence" of an intent to defraud before they can proceed or their lawsuit will be dismissed.

In a pair of unanimous decisions, the court sided with large companies against the interests of employees and consumers. In *Safeco Insurance of America v. Burr*, the court created exemptions for insurance companies for notifying customers if they deny or cancel coverage, an action required under the Fair Credit Reporting Act. In *Long Island Health Care at Home v. Coke*, the court extended an exemption under the Fair Labor Standards act to home companion care workers employed by large agencies so that those agencies would not be required to abide by minimum wage and overtime requirements.

These outrageous pro-business decisions were either reached unanimously or with a lone dissenter; all were authored by the court's "liberal" justices. The *New York Times* reported that the business community was "gleeful," quoting an attorney who handles Supreme Court cases for the Chamber of Commerce (Roberts's former assignment): "It's our best Supreme Court term ever."

The Democratic Party played the key role in the current state of affairs by refusing to block the appointments of Roberts and Alito and the consolidation of the right-wing majority. There was never any question about the views of either justice, as each had a long pedigree of right-wing judicial positions. Although the implications of a right-wing majority were clear, there was no serious attempt to oppose the appointment of either justice. With the Republican majority that existed at the time in the US Senate, the only means the Democrats had to stop either nominee's confirmation was the filibuster. For Alito, only a half-hearted attempt to filibuster was mounted at the last minute, and only after it was clear that such an attempt would not succeed. The Senate then voted 72 to 25 for cloture—41 votes would have defeated the motion—leading the way to his lifetime appointment. In the case of Roberts, not only was no filibuster even attempted, but he was confirmed with half of the Democrats in the Senate voting in his favor.

These most-recent decisions by the Supreme Court underscore a sharp turn to right. The legal opinions rendered by the court are designed to roll back the expansion of democratic rights that it recognized in a previous era, strengthening the repressive powers of the state apparatus, indicating the turn by the ruling elite toward more authoritarian forms of rule. Likewise, the goal of all the justices is to remove any restrictions that may hamper the profit-pursuing operations of corporations and the super-rich, largely by limiting access to the courts by average individuals who seek to challenge the dictates of big business.

When viewed in its historical context, the actions of the current court constitute a wholesale judicial counteroffensive against the Warren Court (1953-1969) and its legacy of democratic legal reforms. Whatever differences exist among the right-wing judges are merely over tactics and degrees. They agree that the constitutional doctrine developed in the postwar period, based on the concepts of individual privacy, secularism, and the right to seek redress in the courts, all of which are embodied in the US Constitution, stands as an intolerable restraint on the ruling elite's ability to further its own interests.

While there have been periods where the Supreme Court has resisted change and acted as a brake on progressive struggles—most notably during the early years of Franklin D. Roosevelt's "New Deal"— this is the first time since the decades following the end of Reconstruction that the court has taken a leading role in dismantling gains won in an earlier period. The failure of the Democratic Party to oppose this trend indicates that there is no constituency within the ruling elite that is dedicated to the defense of fundamental democratic rights. Such a defense can only be undertaken by an independent movement of the working class based on a socialist perspective.