Anti-democratic actions by the US Supreme Court

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Recent Supreme Court opinions regarding religion, voting rights and warrantless surveillance cast a shadow over existing democratic legal protections.

In a ruling January 11 that constitutes a major victory for the religious right, the Supreme Court unanimously held that employees of religious institutions could not assert their rights under federal employment legislation. The case involved Cheryl Perich, a teacher at an evangelical Lutheran church who was fired by the church after she was diagnosed with narcolepsy.

It seems clear that in firing Perich, the Hosanna-Tabor Evangelical Lutheran Church in Redford, Michigan was motivated chiefly by a desire to avoid having to accommodate Perich's disability, as well as to avoid any obligation to help pay for her medical care. Such treatment is prohibited by federal law, including the Americans with Disabilities Act (ADA) of 1990. Under the provisions of the ADA and other civil rights laws, it is unlawful to discriminate against a worker on account of his or her disability.

In its ruling on the case, *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, the Supreme Court cited "freedom of religion" and the First Amendment as justification for granting religious organizations absolute autonomy in their treatment of their employees and allowing those organizations to escape compliance with federal employment law.

Chief Justice John Roberts, writing for the unanimous court, declared: "When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."

The ruling was greeted enthusiastically in right-wing and religious circles. The *Wall Street Journal* opined: "Hosanna-Tabor is an important reminder that the core religious freedoms guarded by the First Amendment were not to protect the public from religion, but to protect religion from government. The case is arguably among the most important religious liberty cases in a half century, and the concurrence of Justices across the ideological spectrum will be felt for years. Hallelujah."

The First Amendment, ratified in 1791 following the American Revolution, establishes freedom of the press, freedom of religion, freedom of assembly, and freedom to petition the government to redress grievances. The First Amendment has historically been understood to require the separation of church and state and preclude government interference with privately held religious beliefs.

Despite its invocation of the freedoms associated with the First Amendment, the Supreme Court ruling in Ms. Perich's case is designed simply to promote religion and churches as against secular principles and government enforcement of workers' rights. Longstanding precedent on the extent of permissible government regulation of religious institutions was simply brushed aside or ignored for the sake of scoring political points.

The Supreme Court's invocation of the Bill of Rights in this case is thoroughly hypocritical. It is hardly necessary to point out that this Supreme Court presides over a judiciary that sat comfortably on its hands while the federal government asserted the powers to assassinate, torture, spy on the public, launch illegal wars and imprison without trial.

As all of this was happening, the Bill of Rights and its guarantees of due process and essential freedoms was, for the most part, brushed aside in US courts. But when the interests of a corporation or a church became involved, the justices—liberal as well as conservative—offered up paeans to the "absolute" freedoms enshrined in the Constitution.

There was a time when a "right" was thought to be something an ordinary individual possessed to protect him or her from the arbitrary actions of the most powerful institutions in society. In the Supreme Court, what are being enforced are the "rights" of the most powerful institutions in society as they are invoked against the population.

Voting rights

In a case decided on January 20, the Supreme Court issued a unanimous ruling requiring a lower court to show more "deference" to a congressional redistricting plan developed by the state of Texas, notwithstanding the fact that the plan is plainly in violation of the Voting Rights Act of 1965.

The ruling in that case, *Perry v. Perez*, as well as a ruling putting off a decision in a related West Virginia case, casts a shadow over the continued viability of the Voting Rights Act and the principle of "one-person, one-vote."

Supreme Court commentator Lyle Denniston observed in an article last Friday on *SCOTUSblog.com* entitled "New View on

One-Person, One-Vote?" that a lower federal court order blocked by the Supreme Court in the West Virginia case had declared that the principle of "one-person, one-vote" required "zero variance" in population between congressional districts as the norm. Accordingly, he wrote, the Supreme Court's actions have "raised doubts about the authority of federal District Courts to require states to achieve absolute equality of population in drafting new voting boundaries."

Under the challenged West Virginia plan, certain districts have thousands more members than the others, with the ultimate result that Republican votes count more than Democratic ones.

The Texas redistricting plan is, by all accounts, simply a maneuver to squeeze more Republican congressional seats out of a state already infamous for congressional districts that are gerrymandered into bizarre and irrational shapes. The Supreme Court decision on Friday legitimizes and encourages such brazenly undemocratic schemes.

As numerous commentators have observed, it is surely more than a coincidence that, in an election year, the Supreme Court has taken so many contentious cases and decided them on terms favorable to the extreme right.

Warrantless GPS surveillance

Yesterday, the Supreme Court issued its decision in the contentious case involving the government's GPS surveillance of an individual in Washington, DC without a warrant.

This case, *United States v. Jones*, was chiefly significant for the position taken by the Obama administration, which asserted that there was no limit on the government's ability to secretly track any individual using GPS, without a warrant, and to compile that information for use in criminal prosecutions. (See, "Obama administration defends unlimited warrantless GPS surveillance before Supreme Court")

During oral argument last autumn, the following exchange took place between Chief Justice Roberts and Obama's deputy solicitor general, Michael R. Dreeben:

Roberts: Your argument is, it doesn't depend how much suspicion you have, it doesn't depend on how urgent it is. Your argument is you can do it, period. You don't have to give any reason. It doesn't have to be limited in any way, right?

Dreeben: That is correct, Mr. Chief Justice.

Several of the justices, during oral argument, were clearly rattled by the Obama administration's provocative assertion that the government could even collect GPS data on the activities and daily whereabouts of the nine Supreme Court justices themselves. References to George Orwell's novel *1984* were made six times during oral argument.

GPS devices, by means of satellite triangulation, are able to precisely indicate the location of targeted individuals to within, in some cases, a few feet. Government agents had surreptitiously installed a GPS device on nightclub owner Antone Jones' car and then monitored and recorded his movements for four weeks without interruption.

Even the DC Circuit Court of Appeals, perhaps the most right-wing court in the country, thought the Obama administration had overstepped itself. "A person who knows all of another's travels," the DC Circuit wrote, "can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups, and not just one such fact about a person, but all such facts."

In its decision Monday, the Supreme Court unanimously rejected the Obama administration's position, finding that the secret GPS surveillance of Jones without a warrant or judicial oversight of any kind was clearly unconstitutional.

The Supreme Court was split 5-4 as to the rationale. Writing for the majority, Justice Antonin Scalia stated that the government "intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted" in 1791. Scalia's opinion was joined by Roberts and Justices Anthony Kennedy, Clarence Thomas and Sonia Sotomayor.

In writing for the minority, Justice Samuel Alito said instead, that "reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle [Jones] drove." Alito's opinion was joined by Justices Elena Kagan, Stephen Bryer and Ruth Bader Ginsburg.

The Fourth Amendment to the US constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires that the government obtain a warrant to conduct a search. Historically, the Fourth Amendment has been understood to offer protection from searches and seizures where there is a "reasonable expectation of privacy."

The doctrine of Scalia and company, falsely proclaiming itself to be the "original" understanding of the Bill of Rights, would limit the protections of the Fourth Amendment to those factual circumstances that could have arisen in 1791. Accordingly, in his opinion in *United States v. Jones*, Scalia analogizes GPS surveillance to a constable hiding in the back of an 18th century stagecoach to record its movements.

Scalia's "originalism," as codified in *United States v. Jones*, places in doubt a long line of precedent grounded in the formulation that the Fourth Amendment applies wherever there is a "reasonable expectation of privacy." Thus, the Supreme Court's opinion, beneath the appearance of upholding the Fourth Amendment, paves the way for future attacks.