

Decisions, Please!

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

In less than a month, the Supreme Court’s 2017-2018 Term will end – in a flurry of high-profile, controversial and contentious decisions. Still undecided cases when this podcast was recorded probe the constitutionality of the Trump Administration Travel ban, the legitimacy of a baker declining on religious grounds to make a specialty cake to celebrate a same-sex marriage, the constitutional limits (if any) on a political party using its state-legislative control to manipulate legislative districts and enhance partisan advantage, and other notable constitutional and statutory issues.

Which makes it appropriate to address three key questions I’m typically asked around this time about the annual end-of-Term decision dump.

First, does the Court deliberately wait until the last few days to drop decisional bombshells? Do the justices enjoy keeping America’s Court watchers in suspense?

Perhaps the Court does enjoy the temporary limelight, although I’m not aware of any justice ever admitting that! More likely, the answer lies in the dynamics and realities of opinion writing, circulation and finalization on especially controversial cases at Term’s end.

End-of-Term decisions usually reflect a high quotient of especially hot-button cases. On these, the justices are typically both closely divided *and* especially interested in fully recording their thinking. This means that it probably takes more time for the justice assigned to write a first draft reflective of the majority justices’ collective views. There are likely more than the usual requests for changes, deletions and additions by justices who initially voted to form the majority. And on these high visibility cases it’s especially likely that individual members of the majority decide to pen their own separate concurrences. These concurring opinions may amplify themes sounded in the main majority opinion, defend the majority result on alternative grounds, stridently answer criticisms of dissenters, or do all three.

Meanwhile, the dissenters are busy with a parallel process. Even though it may be strategically advantageous for dissenters to “hang together” on one lead dissent, the same pressures pulling for multiple majority-justice opinions are at work on the dissenters.

(By the way, I have a theory – not empirically tested – that the proliferation of opinion writing is in part due to the Court’s deciding fewer cases, yet having more law clerks, compared to previous decades!)

After I describe the opinion drafting and circulation process, I'm typically asked a second question: Can justices change their votes during all this deliberation? If so, could the outcome change as a result? The answer to both questions is "definitely!"

The justices discuss cases and tentatively vote on who wins and why within a couple of days after oral argument. Still, the positions and collective outcome of the deliberations are "not final until they're final" – that is, until the opinions are officially announced. One study of vote patterns under Chief Justice Warren Burger showed that one or more justices changed votes in more than a third of cases annually. The changes usually expanded the size of the majority, but nothing guarantees this. In some very important decisions – including a notorious 1986 decision (overruled 17 years later) upholding a Georgia anti-sodomy law and an important 1992 separation-of-church-and-state decision invalidating prayers at a high school graduation – the outcome flipped and the initial dissenters in the preliminary voting became the ultimate majority.

Which brings up a last question – what's the best way to follow these end-of-Term decisions and cliff hangers? Even though news coverage is quite speedy and intense in the last days of the Term, the most dedicated Court aficionados join the online blog hosted by scotusblog.com (one of several excellent websites providing expert and unbiased Court coverage). It's become my end-of-Term ritual in the last several years to arise around 6 AM (after all, the Court starts handing down decisions at 10 AM Eastern time, which is 7 AM California time!). Then, with coffee cup in hand, I follow the real-time reporting and informed speculation of the career Court watchers who handicap the upcoming opinions.

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