Christian Science Monitor (Boston, MA)
July 2, 2001, Monday

A reliably assertive Supreme Court
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OPINION; Pg. 9
LENGTH: 1009 words
ATLANTA

On the final day of the US Supreme Court's annual term last Thursday, news headlines heralded a momentous court ruling. But they were not for a decision handed down by the Supreme Court; they were from the intermediate-rank US Court of Appeals for the District of Columbia circuit, in the widely heralded case of US v. Microsoft Corp.

Probably never before has the US Supreme Court been trumped by a lower court on the final day of its term. But that event illuminates an important point that all too often is overlooked by many commentators: Today's US Supreme Court, its December 2000 decision in Bush v. Gore notwithstanding, usually behaves in stable and predictable ways. What news it makes is of relatively modest import, and when it does surprise us, as it did in several notable decisions this past term, the rulings rarely draw sustained attention or criticism.

Today's Supreme Court has gone seven years without a change in membership, ever since junior Justice Stephen Breyer replaced the retiring Harry Blackmun in 1994. Chief Justice William Rehnquist has presided over the court for 15 years, and neither Chief Justice Rehnquist nor any of his eight colleagues shows any signs of yearning to retire. Rumors to the contrary, whether about Rehnquist or either of the court's two most senior associate justices, John Paul Stevens and Sandra Day O'Connor, were especially rife over the past five months, but it is quite possible that another two full years will pass before President Bush gets to make his first appointment to America's highest court.

In the 80 cases that the justices heard over the past nine months, nonunanimous decisions once again followed a pattern that has become extremely common over the past seven years. If the court was split 5 to 4, it remained a safe bet that the narrow majority was composed of the chief justice and Justices O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. The predictable minority was Justices Stevens, David Souter, Ruth Ginsburg, and Breyer. Only if that "liberal" quartet could attract the potential "swing votes" of either O'Connor or Justice Kennedy could they prevail. In a North Carolina racial districting case, Hunt v. Cromartie, the quartet prevailed thanks to O'Connor; in a notable case concerning legal representation, Legal Services Corp. v. Valezquez, the "liberal" quartet won the controlling vote of Kennedy.

Oftentimes the court's most intriguing decisions are those where these common alignments evaporate. In Atwater v. City of Lago Vista, Justice Souter joined four of the conservatives to uphold the arrest of a woman charged only with failing to buckle her seat belt, while O'Connor authored an impassioned dissent that was joined by the other three liberals. And in Kyllo v. United States, an unusual, both-ends-against-the-middle majority - composed of Justices Scalia, Thomas, Souter, Ginsburg, and Breyer - held that law enforcement's use of a thermal imaging

device to detect indoor, home-grown marijuana cultivation violated the 4th Amendment's prohibition of unreasonable searches.

Careful students of the court know that on some issues, the standard 5 to 4 division is less certain to prevail. Kennedy, for instance, identifies himself as a strong supporter of free-speech claims, irrespective of whether the claimants are legal-services lawyers, as happened this year, or obnoxious anti-abortion protesters, as happened last year. Justice Breyer is not a "safe" liberal vote on questions of speech or separation of church and state, while O'Connor remains the quintessentially unpredictable "swing vote" in any case involving race and affirmative action.

For those who seek overarching themes in the Rehnquist court's work, most observers agree on two main points. First, the conservative majority is actively committed to voiding acts of Congress which in its view impinge on state sovereignty. This federalism crusade began with an under-appreciated 1992 case, New York v. US, concerning state versus federal authority over radioactive waste. It blossomed fully in 1995, when the five conservative justices struck down the Gun-Free School Zone Act in US v. Lopez. The crusade continued last year when the same majority voided the Violence Against Women Act in US v. Morrison, and this spring when they barred state employees from using the provisions of the Americans with Disabilities Act in Board of Trustees of the University of Alabama v. Garrett. These state-sovereignty cases may seem boring and obscure to many Americans, but there is no denying that this federalism revolution will for better or worse be the Rehnquist court's most significant legacy.

But the court majority's active and repeated contempt for Congress's lawmaking power goes hand in hand with a larger theme that could be called "robust judicial self-confidence;" a growing number of critics label it "judicial imperialism." Thus the majority is not so much sticking up for state sovereignty as it is asserting that the court is better able to resolve difficult and complex questions than are Congress, the executive, or the states.

Bush v. Gore's decisively commanding resolution of last November's election is without a doubt the most dramatic manifestation of that belief. The Rehnquist court is unquestionably conservative, but its assertiveness reveals that it has far more in common with earlier activist courts that decided such cases as Marbury v. Madison, where the court created its power of judicial review, Brown v. Board of Education, which desegregated schools, and Roe v. Wade, which legalized abortion, than today's conservative justices may want to acknowledge.

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