

## Kennedy Reigns Supreme on Court

With O'Connor's Departure, Sole Swing Voter Wields His Moderating Force

By Charles Lane  
Washington Post Staff Writer  
Sunday, July 2, 2006; A06

It was the O'Connor court. Now it may be the Kennedy court.

The Supreme Court's just-concluded 2005-2006 term was a historic one, in which two new justices, Chief Justice John G. Roberts Jr. and Samuel A. Alito Jr., changed the court's style and ideological balance.

But by the end of the term, it was clear that the main impact of the turnover was to enhance the influence of a justice who has been at the court since 1988, 69-year-old Anthony M. Kennedy.

With the departure of centrist Justice Sandra Day O'Connor, the court is now frequently split between two four-justice liberal and conservative blocs, with Kennedy as the sole remaining swing voter.

An eclectic and sometimes inscrutable moderate conservative, Kennedy repeatedly cast the decisive vote on the most polarizing issues the court faced, from President Bush's military commissions, to the Clean Water Act, to the death penalty. He is poised to do so again next term when the court takes up the issues of abortion and school integration.

"Justice Kennedy seems to be asserting himself more and seems to be relishing the role," said Richard Lazarus, a law professor at Georgetown University who heads the school's Supreme Court Institute. "All the justices enjoy being more significant rather than less significant, and he has certainly asserted his role as a moderating force on both sides."

In the 17 cases during the 2005-2006 term that were decided by five-vote majorities, Kennedy was on the winning side 12 times, more than any other justice, according to figures compiled by the Supreme Court Institute.

In six of those cases, Kennedy voted with the conservative bloc, made up of Roberts, Alito, Antonin Scalia and Clarence Thomas. As a result, the court upheld most of Texas's Republican-drafted redistricting plan, restored the death penalty in Kansas, and ruled that police do not have to throw out evidence they gather in illegal no-knock searches.

But four times, Kennedy, a 1988 appointee of President Ronald Reagan, defected to the liberal justices, John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

As a result, the court not only struck down Bush's military commissions, but also ruled that the police need permission from both occupants to search a home without a warrant, gave a Tennessee death row inmate a chance to win a new trial, and said that Texas violated the Voting Rights Act by diluting the voting power of Latino Democrats in one district. (Twice Kennedy was part of mixed left-right coalitions.)

Roberts voted in 10 five-justice majorities, the second-most on the court, but he joined the four liberals only once, in a minor procedural case.

The "swing voter" role is not entirely new to Kennedy, who has been in that position before, along with O'Connor.

Indeed, Kennedy is disliked by many conservatives because he has voted with liberals to uphold gay rights

and abortion rights, and to strike down the juvenile death penalty.

But since O'Connor retired from the court Jan. 31, and Alito, who replaced her, has lived up to his conservative billing, Kennedy has been all alone as the swing voter -- with the added clout, and added pressure, that implies.

O'Connor used to tell audiences that, at the court, "we decide what cases to hear, and then we decide 'em." Though she often ruled only narrowly, she did not agonize.

Kennedy, by contrast, has been known to brood or to switch his vote in the middle of a case -- though he is more inclined than O'Connor was to rule broadly once he comes to a conclusion. He is a passionate free-speech advocate, and has a consistent record of opposing affirmative action.

While O'Connor saw herself as a fact-oriented problem-solver, Lazarus says, Kennedy "views himself as a major intellectual force."

More than some other justices, "Kennedy sees real values in conflict in the court's cases, and it's a question how you negotiate it," said Neil Siegel, who served as a Supreme Court law clerk in the 2003-2004 term and now teaches at Duke University's law school. "Sometimes he does it well and skillfully, and sometimes he just can't make up his mind and the legal system gets stuck in a kind of vertigo."

In the military commission case, Kennedy ruled unequivocally, joining almost all of Stevens's broad opinion. His few reservations came in a concurring opinion that also contained Kennedy's admonition that "concentration of power puts personal liberty in peril of arbitrary action by officials."

But at other times this term, Kennedy cut difficult issues very fine, drawing criticism from his colleagues.

In a key case on the scope of the Clean Water Act, Kennedy refused to join either the conservatives, who voted as a bloc to scale back federal power to regulate wetlands, or the liberals, who wanted to leave it intact.

Kennedy instead wrote a long opinion of his own. He agreed with the conservatives that a lower court had mistakenly allowed the federal government to block development on two Michigan properties, but disagreed with them about why. He said the lower court should reconsider the issue under a new legal test -- one that most analysts thought would end up producing the same result the liberals wanted anyway.

Kennedy's opinion would not change wetlands protection in the long run, Stevens wrote in a dissenting opinion joined by the three other liberals, but "will have the effect of creating additional work for all concerned parties."

Scalia, joined by the three conservatives, called Kennedy's proposal "perfectly opaque."

"He is a man in the middle, and the man in the middle is fully capable of causing muddle," said Douglas A. Kmiec, a Pepperdine University law professor.

The pressure on Kennedy could mount next term, when the court will rule on the constitutionality of a federal law banning the procedure opponents call "partial birth" abortion, and will decide whether local governments may consider students' race when assigning them to public schools.

Though Kennedy is on record in favor of *Roe v. Wade*, the 1973 decision that recognized a right to abortion, he dissented angrily from a 5 to 4 ruling in 2000 that struck down a state law banning partial-birth abortion.

That would seem to commit him to upholding the federal ban, legal analysts said, except that the 2000 case is binding precedent and Kennedy may "be acutely aware of a mere personnel change on the court causing a radical shift," Siegel said.

Kennedy has always voted against affirmative action, most recently in 2003 when he voted against race-conscious admissions policies at the University of Michigan's law school and undergraduate program.

But the cases the court has agreed to hear next term involve compulsory public education for students as young as kindergarten age. They also present the problem of how public schools can avoid resegregation, at a time when residential segregation persists and court-ordered school desegregation is largely a thing of the past.

Under the circumstances, legal analysts do not all agree that Kennedy necessarily relishes his situation.

"I'm not certain it's an enviable position to be in," Siegel said. "It's quite a burden to bear."

© 2006 The Washington Post Company

Ads by Google

[Custom Apparel SALE](#)

Design Your Own Garments & Products Embroidery. Monogramming. Printing.

[YoursToWear.com](http://YoursToWear.com)