Don't Expect Kagan to Change Court Dynamic

Alan E Garfield
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Justice William Brennan famously asked his new law clerks for the most important rule in constitutional law. The clerks would hall about trying to guess the answer - “freedom of speech,” “equal protection,” “due process” - until Brennan would hold out a hand with five outstretched fingers. In a nine-person Supreme Court, Brennan reminded his clerks, the most important rule is that you need five votes to do anything.

This “rule of five” has had special significance in recent years as many important constitutional law issues have been decided by slim vote majorities. The rule might even be called the “rule of Tony” because Justice Anthony Kennedy often casts the deciding fifth vote.

In these cases, the other justices are split into two predictable voting blocs: the four conservatives on one side (John Roberts, Antonin Scalia, Clarence Thomas and Samuel Alito) and the four liberals on the other (John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor).

That leaves the less predictable Kennedy in the middle. If he swings right, as he usually does, the conservatives have a five-vote majority and control the case. If he swings left, as he occasionally does, the liberals control.

This general pattern proved largely true again in this Supreme Court term. In Citizens United v. Federal Election Commission, Kennedy joined the conservatives in a 5-4 decision that struck down limits on independent campaign expenditures by corporations. Kennedy similarly aligned with the conservatives in Salazar v. Buono, a decision that suggested that Congressional efforts to preserve a Latin cross war memorial did not violate separation of church and state.

Kennedy likewise swung right in Berghuis v. Thompkins, which held that criminal suspects must speak up to invoke their right to remain silent. And in McDonald v. Chicago, he provided the critical fifth vote to hold that the Second Amendment’s limits on gun regulations also apply to state and local governments.

But Kennedy also sometimes swung left. In Graham v. Florida, he joined the liberal justices in holding that sentencing a minor to life without the possibility of parole for a non-homicide offense constituted cruel and unusual punishment. And in Christian Legal Society v. Martinez, he joined the liberal justices in holding that a public law school could deny school support to a Christian student group that denied membership to gays.

While Kennedy is the deciding vote in many areas of constitutional law, there are other areas in which the usual voting patterns break down and surprising alignments result. This is particularly true in free speech cases where the more conservative justices have a libertarian bent that makes them leery of government censorship. Thus, in United States v. Stevens, the Court ruled 8 to 1 that a federal law criminalizing the sale of animal cruelty images was unconstitutional. Only Justice Alito, the Judge Bork who would have had a libertarian and more socially conservative, dissented.

So how will a replacement for Justice Stevens affect this dynamic? Not much. Whether it is Elena Kagan or some other Obama nominee, the replacement is likely to be squarely within the liberal camp just as Justice Stevens has been (with rare exceptions such as his dissent in the 1989 flag burning case).

Perhaps the best the liberals can hope for is a justice who would be particularly adept at winning Justice Kennedy’s vote. Indeed, some think President Obama selected Kagan because she succeeded in forging good relations with both conservative and liberal faculty members while serving as the Harvard Law School dean.

But it’s probably foolhardy to think that even the best interpersonal skills could cause the 73-year-old Kennedy, with two decades of Supreme Court experience, to change his vote. Indeed, Justices Scalia and Ginsburg have long been good friends off the bench but neither seems to have any effect on the Court’s vote totals.

At the same time, one can never be certain of how a lifetime appointment would affect Kagan: Stevens, after all, was appointed by a Republican president, as was Justice Souter. Yet he swung up firmly in the liberal camp. So we’ll have to see what happens with Stevens’ replacement.

That’s it for now. Like the Supreme Court, the Bench Press column takes a summer break around the first Monday of October when next year’s Supreme Court term begins.

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