

The Unsinkable Center

Given the chance to tilt, the Supreme Court maintains its delicate balance.

BY CHARLES A. ROTHFELD

When President George W. Bush had the opportunity to name two justices this past term, everyone knew the Supreme Court would move dramatically to the right.

The logic seemed inescapable: Justice Sandra Day O'Connor, long the Court's swing voter, would be gone, and the new justices would prove reliably conservative.

O'Connor had made possible many of the Court's recent liberal rulings. For example, in the 2003-04 term, the last term before Chief Justice William Rehnquist's fatal illness, O'Connor provided the decisive margin in five important cases that the liberals won by 5-4 votes. Justice Anthony Kennedy, the other supposed centrist, provided the fifth vote for the liberals only twice.

But unsinkable ships can sink. And the real world can defy inescapable logic.

TWO ON THE RIGHT

The Court's new members have certainly voted like staunch conservatives. Justice Samuel Alito Jr., who took O'Connor's seat, cannot have disappointed those who torpedoed stealth nominee Harriet Miers as too squishy. Alito has voted most often with his fellow newcomer, Chief Justice John Roberts Jr., and least often with the anchor of the Court's liberal bloc, Justice John Paul Stevens.

In cases where the Court was not unanimous this term, Roberts and Alito voted together almost 90 percent of the time. They voted with conservative Justices Antonin Scalia and Clarence Thomas in more than 65 percent of divided decisions.

By contrast, Roberts joined with Stevens barely more than one-third of the time in divided decisions, and Alito did so in less than one-quarter of them. The new justices joined the Court's other liberals—Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer—in half or less than half of the cases that were not unanimous.

The effect of switching Alito for O'Connor was immediate in the three cases the Court reargued after her departure. All resulted in 5-4 conservative victories. In two of those cases, the opinion assignments strongly suggest that the majority switched after O'Connor retired, which means that Alito voted right where O'Connor had voted left.

Indeed, where O'Connor had been the likeliest source of a fifth liberal vote, Alito in his first year did not vote with the liberals to form a 5-4 or 5-3 majority even once. For that matter, he did not vote with the liberals in a single case in which the Court was divided 6-3.

So this means that the Court is now reliably and firmly conservative, doesn't it?

Actually, it doesn't.

SPLIT DOWN THE MIDDLE

Somewhat surprisingly, despite the changes in the Court's composition, the delicate balance between the ideological wings that has been visible in recent years continued during the first term of the Roberts Court. By one measure, the Court actually tacked a bit to the left. It is possible that the conservatives will take charge in the coming years, as the mix of issues before the Court changes. But for now, the center has held.

Consider the Court's 5-4 (and 5-3) decisions. Those cases—in which the outcome was truly debatable, the justices had room to express their individual predilections, and the vote often broke along liberal-conservative lines—provide the starkest measure of the Court's ideological balance. (One disclaimer: The labels "liberal" and "conservative" provide an imperfect description of the justices' own views, although they do capture the general philosophies reflected in the Court's voting.)

In recent years the Court's 5-4 and 5-3 decisions have reflected a Supreme Court split right down the middle. In the 2003-04 term, there were 16 such ideologically divided 5-4 decisions, with the liberals and conservatives each winning eight. Similarly, in the 2004-05 term, there were 15 cases in which the Court split 5-4 along ideological lines. The liberals won eight and the conservatives seven.

And the Roberts Court in its first year? There were 15 ideologically split 5-4 or 5-3 votes. (Because of the complexity of the justices' opinions, this calculation counts the contentious Texas redistricting dispute, *League of United Latin American Citizens v. Perry*, as two cases, one involving constitutional issues and the other the Voting Rights Act.) Of these, the liberals won eight and the conservatives seven—just like last term.

And this raw number may actually understate the liberals' success. In two of these 5-4 cases, the conservatives' margin of victory was provided by Kennedy concurrences that significantly restricted the scope of the Court's ruling. In *Hudson v. Michigan*, Kennedy repudiated what appeared to be an effort by the conservative plurality to cut back substantially on the scope of the exclusionary rule, which precludes use of illegally obtained evidence against criminal defendants. In *Rapanos v. United States*, an important decision addressing the scope of environmental protections under the Clean Water Act, Kennedy's legal standard closely paralleled that of the liberal dissenters.

SOME HIT LEFT

That the liberals held their own this term was not a consequence of O'Connor's participation during the first third of the term. In her abbreviated time on the Court, O'Connor voted once with the liberals and once with the conservatives in 5-4 cases.

Nor is the apparent liberal success a fluke, with favorable statistics covering up liberal losses in the most important cases. This is not to deny that the conservatives won significant victories in some closely divided cases this past term. The Court rejected the constitutional challenge to the Texas redistricting plan. The majority also rejected a due process challenge to Arizona's test for criminal insanity (*Clark v. Arizona*, with the fifth vote provided by Souter while Kennedy joined the dissent). In the three reargued cases, conservatives likewise prevailed in limiting public employees' First Amendment rights (*Garcetti v. Ceballos*), upheld the constitutionality of Kansas' capital-sentencing statute (*Kansas v. Marsh*), and held that violation of the knock-and-announce rule does not require suppression of evidence obtained in police searches (*Hudson*).

But the liberals did just as well. They prevailed in probably the most important decision of the term, *Hamdan v. Rumsfeld*,

where the Court invalidated use of special military commissions to try terrorism suspects at Guantánamo Bay, Cuba.

The majority also ruled that a prisoner claiming "actual innocence" satisfied the standard necessary to proceed with a habeas claim (*House v. Bell*) and that a co-occupant's refusal to consent to police entering a residence renders a search unreasonable (*Georgia v. Randolph*). The liberals invalidated one of the challenged Texas congressional districts under the Voting Rights Act. And they held that Attorney General Alberto Gonzales overstepped his statutory authority in prohibiting the use of drugs in physician-assisted suicides (*Gonzales v. Oregon*, a 6-3 decision with Kennedy and O'Connor both in the majority).

In fact, of the eight 5-4 or 5-3 decisions this past term in cases labeled "high profile" by Georgetown University Law Center's respected Supreme Court Institute (again counting the Texas case twice), the liberals and conservatives each won four.

FUTURE DIRECTION

How can this be? One shift that has kept the Court rooted in the middle was widely anticipated: Kennedy has stepped into O'Connor's place as the Court's swing vote. In addition to his two key baby-splitting concurrences in *Hudson* and *Rapanos*, Kennedy provided the deciding vote in four liberal victories, including *Hamdan*.

The liberals also had some success in picking up an occasional vote from other conservatives. Scalia voted with the four liberals in a criminal case (*United States v. Gonzalez-Lopez*), as he is sometimes led to do by his strict historical approach to constitutional interpretation. Roberts also cast one vote with the liberals in a 5-3 due process case (*Jones v. Flowers*). That was a notable departure from his predecessor's record: During Rehnquist's entire 19 years as chief justice, he virtually never provided the decisive vote for the more liberal outcome.

There is one other explanation for the liberals' relative success, which may not bode as well for their future prospects: The mix of questions before the Court this term, as well as the justices' willingness to decide some contentious issues on very narrow grounds, may have kept the Court from resolving issues where the conservatives would have had the advantage. That theory will be tested next term, when the Court tackles cases involving "partial birth abortion" and affirmative action, areas where O'Connor had often voted to the left of Kennedy.

And it does seem that the Court's playing field has changed in ways that aren't favorable to the liberals. If Roberts and Alito prove to be reliable allies of Scalia and Thomas—a proposition that, after just one term, can't be regarded as settled—the liberals won't have any margin for error in the biggest, most ideologically charged cases. The justices can all count to five (Justice William Brennan Jr. once called that ability the one essential qualification for service on the Court), and this usually will lead the liberals to Kennedy's door.

Of course, everyone knew that was true this term, too. And we still got a new Court that, on balance, looked a lot like the old one.

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