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## II. Trump and the Court

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## “Confident and Assertive, Gorsuch Hurries to Make His Mark”

*The New York Times*

Adam Liptak

July 3, 2017

New justices usually take years to find their footing at the Supreme Court. For Justice Neil M. Gorsuch, who joined the court in April, a couple of months seem to have sufficed.

His early opinions were remarkably self-assured. He tangled with his new colleagues, lectured them on the role of the institution he had just joined, and made broad jurisprudential pronouncements in minor cases.

Other justices moved more slowly.

“I was frightened to death for the first three years,” Justice Stephen G. Breyer, who joined the court in 1994, said in a 2006 interview.

Justice Clarence Thomas, who joined the court in 1991, said he had asked his new colleagues how long it would take to hit his stride. “To a person, they said it took three to five years under normal circumstances to adjust to the court,” Justice Thomas said in 1996. His own circumstances, he added, referring to his bruising confirmation hearings, pushed him toward “the outer limits of that period.”

Estimates have not changed over time. “So extraordinary an intellect as Brandeis said it took him four or five years to feel that he

understood the jurisprudential problems of the court,” Justice Felix Frankfurter wrote of Justice Louis D. Brandeis, who sat on the court from 1916 to 1939.

Justice Robert H. Jackson rejected Chief Justice Charles Evans Hughes’s estimate of three years to “get acclimated,” saying it was “nearer to five.”

Judging by Justice Gorsuch’s early opinions, he is fully acclimated.

In June alone, in addition to his only majority opinion of the term, he wrote seven others: three dissents, three concurrences and a statement urging the court to take up a legal question “at its next opportunity.” By comparison, Justice Elena Kagan, the next most junior justice, wrote seven dissents and concurrences in her first two terms.

Justice Gorsuch cheered his supporters with conservative votes on President Trump’s travel ban, gun rights, money in politics, the separation of church and state and the sweep of the court’s 2015 decision establishing a right to same-sex marriage.

But his most forceful statements came in otherwise forgettable decisions.

Consider *Perry v. Merit Systems Protection Board*, an exceptionally complicated case

about where Civil Service and discrimination claims may be filed.

When the case was argued in April, Justice Samuel A. Alito Jr., who joined the court in 2006, said there was no clear answer to the question. “Who wrote this statute?” he asked. “Somebody who takes pleasure out of pulling the wings off flies?”

“The one thing about this case that seems perfectly clear to me is that nobody who is not a lawyer, and no ordinary lawyer, could read these statutes and figure out what they are supposed to do,” Justice Alito said.

By that standard, Justice Gorsuch is no ordinary lawyer. In dissent, he said the answer was plain, as some kinds of cases belong in one court and other kinds in another. The seven-justice majority had gone astray, he said, in tweaking the statutory arrangement in the name of simplicity to arrive at the conclusion that the claims should all be brought in Federal District Court.

Then he made a larger point.

“If a statute needs repair,” Justice Gorsuch wrote, “there’s a constitutionally prescribed way to do it. It’s called legislation. To be sure, the demands of bicameralism and presentment are real, and the process can be protracted. But the difficulty of making new laws isn’t some bug in the constitutional design: It’s the point of the design, the better to preserve liberty.”

“Congress already wrote a perfectly good law,” he wrote. “I would follow it.”

Commentators wondered whether that vivid writing was a proportional response in a decidedly minor dispute.

“Dude, pick your spots,” Daniel Epps, a law professor at Washington University in St. Louis, said on *First Mondays*, an entertaining podcast that explores developments at the Supreme Court. “You don’t need to pull out all this stuff in every statutory case.”

Justice Ruth Bader Ginsburg, in a majority opinion joined by Justice Alito and five other members of the court, could barely be bothered to respond to her new colleague. The plaintiff in the case, she wrote, “asks us not to ‘tweak’ the statute, but to read it sensibly.”

Justice Gorsuch’s only majority opinion of the term came in *Henson v. Santander Consumer USA*. It was about debt collection, and it was unanimous.

Here, too, Justice Gorsuch was ready to swing for the fences.

“While it is of course our job to apply faithfully the law Congress has written,” he wrote, “it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”

In a concurring opinion in *Maslenjak v. United States*, a case about when naturalized citizens may be stripped of their citizenship, Justice Gorsuch said Justice Kagan, writing for the majority, had provided more guidance than was warranted and proper.

The Supreme Court should announce general principles, he said, and let lower courts fill in the gaps.

Justice Kagan, writing for six members, responded that she had a different conception

of the Supreme Court's role. "Such a halfway decision would fail to fulfill our responsibility to both parties and courts," she wrote, adding that one federal appeals court had already called the Supreme Court's failure to provide clear guidance on the subject "maddening."

Justice Gorsuch, who is 49, concluded his opinion with a nice aphorism of the sort that some justices might have waited decades to deploy.

"This court," he wrote, "often speaks most wisely when it speaks last."

## “Justice Neil Gorsuch Leans Conservative, Fulfilling Expectations”

*The Wall Street Journal*

Brent Kendall and Jess Bravin

June 27, 2017

Justice Neil Gorsuch early on has lined up consistently with the Supreme Court’s most conservative justices, much as President Donald Trump promised.

Justice Gorsuch didn’t join the court until April, after the justices had already conducted much of their business this term, which began last October. Nevertheless, the new justice has spoken up early and often, with Monday’s closing day of the court’s session providing some of the most notable examples so far.

Justice Gorsuch wrote a dissent, joined by Justices Clarence Thomas and Samuel Alito, objecting to the court’s decision to require Arkansas to treat same-sex couples the same as straight partners when recording birth certificates for their newborns. He was particularly critical of the court’s decision to rule against Arkansas without first hearing the state’s defense at oral argument.

In the court’s most prominent action Monday, Justices Gorsuch and Alito joined a Thomas dissent to the court’s decision to allow President Donald Trump to implement only a limited version of his travel ban for now. The president, citing national security, has sought a temporary ban on U.S. entry for people from six Muslim-majority countries.

The dissenters would have permitted the president to enforce all the terms of his ban while the Supreme Court gives full consideration to the case.

The court’s newest member also joined Justice Thomas’s dissent from the court’s decision not to hear a case about the scope of an individual’s right carry a gun outside of the home for self-defense. The dissent criticized a lower-court ruling against gun owners as indefensible.

“Justice Gorsuch seems to be comfortable right next to the other two very conservative justices,” said Vikram Amar, dean of the University of Illinois law school. There may be issues down the line where he diverges from other conservative justices, but such issues haven’t come up yet, Mr. Amar said.

Given the new justice’s lengthy record as a federal appeals court judge, “I don’t think there are many surprises,” said Leonard Leo, executive vice president of the Federalist Society, who advised Mr. Trump on Justice Gorsuch’s selection.

The new justice already is showing his commitment to deciding cases by sticking closely to the text of statutes, “and he is very skeptical of an overly expansive judicial role,” Mr. Leo said.

Justice Gorsuch on several early occasions has framed his opinions as exemplifying judicial restraint. In his one majority opinion, which was unanimous, the new justice wrote that companies that purchase debts aren't subject to provisions of a consumer-protection law when seeking to collect on their own behalf.

If changes in the law, which was designed to rein in the "repo man" and other third-party collectors, need to be made to address the advent of a new industry that purchases debt to collect for itself, "these are matters for Congress, not this court, to resolve," Justice Gorsuch wrote.

His first dissent came in a case that examined which court is the proper home for an appeal when federal employees are raising both civil-service claims and discrimination claims. Justice Gorsuch said the Census Bureau worker who brought the case was asking the court "to tweak a congressional statute—just a little—so that it might (he says) work a bit more efficiently. No doubt his invitation is well meaning. But it is one we should decline all the same."

Justice Ruth Bader Ginsburg, who wrote the court's 7-2 opinion, sided with the worker's approach, suggesting Justice Gorsuch's formalistic reading of the law was at odds with practical realities. The worker "asks us not to tweak the statute, but to read it sensibly," Justice Ginsburg wrote.

Justice Thomas was the one other member of the court to side with Justice Gorsuch in the case, and the two have been almost perfectly aligned so far. Both are committed textualists and proponents of originalism, a legal

method that attempts to interpret the Constitution according to the text's original meaning. Justice Antonin Scalia, whom Justice Gorsuch replaced, embraced a similar approach.

Among the other instances when the two joined forces, both Justices Thomas and Gorsuch in May wanted to take up a campaign-finance challenge to the limits on the use of soft-money donations. The court turned it down.

There was much debate during Justice Gorsuch's confirmation hearings about whether he would go to bat for the so-called little guy. Senate Democrats questioned whether he would, while the nominee insisted that he applied the law faithfully, ruling for everyday men and women when they had the better argument.

The new justice went his own way in a pair of cases Monday, both of which were arguably of the little-guy variety. In one, he objected to the court's announcement that it wouldn't consider a case about the competence of Department of Veterans Affairs medical examiners who render opinions against veterans seeking compensation for disabilities.

In another, he expressed concerns for a drug defendant who may "linger longer in prison" after he was wrongly given a 20-year mandatory minimum sentence under a now-defunct statute.

Despite Justice Gorsuch's flurry of activity early on the high court, legal observers said it would take time to discern his place on the court spectrum.

“It’s too early to make definitive judgments about anything,” said Adam Charnes of Kilpatrick Townsend & Stockton LLP, a former law clerk to Justice Anthony Kennedy. “There are hints,” Mr. Charnes said, “but a new justice can take several years to find their voice and their place on the court.”



## “Gorsuch Makes a Mark on the Court”

*The Wall Street Journal*

Sai Prakash and John Yoo

June 29, 2017

The Republican gamble to stiff-arm Merrick Garland and hold open Justice Antonin Scalia’s seat appears to have hit the jackpot. In his abbreviated first year on the Supreme Court, Justice Neil Gorsuch has lived up to supporters’ greatest hopes and critics’ worst fears.

The term that ended this week revealed that Justice Gorsuch is no Scalia doppelgänger. The new justice has shown greater sensitivity toward individual liberties than his predecessor, who wrote a controversial 1990 decision permitting states to burden free exercise of religion with general prohibitions, including criminal laws.

Justice Gorsuch joined the majority in *Trinity Lutheran v. Comer*, which struck down Missouri’s exclusion of churches from a state funding program for playgrounds. But he refused to accept the distinction suggested by Chief Justice John Roberts, who wrote the court’s opinion, between religious status and activity.

“Is it a religious group that built the playground?” Justice Gorsuch asked in a concurrence. “Or did a group build the playground so it might be used to advance a religious mission?” The majority’s

distinction, Justice Gorsuch wrote, made no sense under the Free Exercise Clause, which “guarantees the free exercise of religion, not just the right to inward belief (or status).”

Justice Gorsuch’s arrival highlights the ascension of Justice Clarence Thomas, also frequently—and unfairly—caricatured as a Scalia clone. Astute court watchers have long understood that Justice Thomas was more conservative and intellectually aggressive than Scalia, who once called himself a “fainthearted originalist.” Scalia sometimes abandoned the constitutional text when it conflicted with traditional values or established precedent.

Justice Thomas is a more consistent originalist, willing to reject longstanding doctrine and practice when they flout the Constitution’s original meaning. He might have found a fellow traveler in Justice Gorsuch.

Reacting to the excesses of the Warren Court, Scalia wanted to limit judicial discretion. But he also sought to restore fidelity to the Constitution’s original meaning. While the latter impulse demanded a narrowing of the court’s Commerce Clause jurisprudence, which has justified the vast expansion of the

administrative state, the former sometimes caused Scalia to flinch. In 2005's *Gonzalez v. Raich*, Scalia concluded that Congress could regulate the growing of marijuana for personal use. Justice Thomas voted to bar the application of federal drug laws under these circumstances.

Similarly, while Scalia wrote the seminal opinion recognizing an individual right to bear arms, he also countenanced state regulation of gun possession, thereby treating the Second Amendment as a second-class right. This week the court declined to hear an appeal in *Peruta v. California*, upholding the Golden State's virtual ban on concealed-carry permits. "The Framers made a clear choice," Justice Thomas wrote in a dissent Justice Gorsuch joined. "They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it."

In the much discussed "travel ban" decision, Justice Thomas authored a concurring opinion, joined by Justices Alito and Gorsuch, arguing that immigration is properly the domain of the political branches, not the courts. *Trump v. International Refugee Assistance Project* mostly resurrected the administration's 90-day moratorium on entry by nationals of six countries, pending a full high-court review in the fall. The other six justices, however, left the door open to challenges by aliens who have some attachment to the United States.

Justice Gorsuch's arrival has underscored the court's fault lines. Conservatives have long criticized Justice Anthony Kennedy's

penchant for conjuring constitutional rights out of whole cloth, from abortion to gay marriage. Chief Justice Roberts likewise earned the ire of conservatives with his 2012 vote to uphold ObamaCare's individual mandate as a tax. In prizing consensus, Chief Justice Roberts forgets that great justices have sacrificed it for constitutional fidelity. Earl Warren regularly joined 5-4 or 6-3 majorities to apply the Bill of Rights and Reconstruction amendments more vigorously to the states. Oliver Wendell Holmes, perhaps the most influential justice of the 20th century, was known as "the great dissenter" for a reason. Consensus comes at a cost.

Justice Gorsuch's appointment is President Trump's greatest accomplishment to date. His early decisions have solidified a three-justice conservative bloc. A resurgent conservative wing exposes the high court's directionless middle, occupied by Justice Kennedy and to a lesser extent Chief Justice Roberts.

Justice Gorsuch's noteworthy debut will prompt an even fiercer fight over the next vacancy, almost certain to occur during President Trump's term. In replacing Scalia, Justice Gorsuch may not have changed the balance of the Court on the most divisive constitutional issues. But his commitment to the original Constitution sets the stage for a noisy confirmation battle.

## “Trump’s Life-Tenured Judicial Avatar”

*The New York Times*

Linda Greenhouse

July 6, 2017

So Neil M. Gorsuch, the aw-shucks humble servant of the law whom the country encountered during his mind-numbing confirmation hearing, turns out to be a hard-right conservative. No real surprise there, and by now, no real news either, given that nearly every account of the Supreme Court term that ended last week took note of Justice Gorsuch’s budding alliance with Justice Clarence Thomas on the court’s far right.

Missing from much of the commentary, however, was the sheer flamboyance of the junior justice’s behavior. To give some context: Here is a man who participated in a mere two weeks of Supreme Court arguments — 13 cases — amid eight colleagues whose collective Supreme Court tenure comes to 140 years. Maybe all those years have brought wisdom, maybe not. But what they have brought, surely, are habits, norms, unwritten rules that enable people to go home after a hard day, show up again the next morning, look one another in the eye and get back to business.

I don’t know whether Justice Gorsuch has adhered to certain of the Supreme Court’s unwritten rules. But we don’t need inside sources in order to read the story that his votes and separate opinions tell.

Whether out of ignorance or by deliberate choice, Neil Gorsuch is a norm breaker. He’s the new kid in class with his hand always up, the boy on the playground who snatches the ball out of turn. He is in his colleagues’ faces pointing out the error of their ways, his snarky tone oozing disrespect toward those who might, just might, know what they are talking about. It’s hard to ascribe this behavior to ignorance — he was, after all, like three of his colleagues, once a Supreme Court law clerk. But if it’s not ignorance, what is it? How could the folksy “Mr. Smith Goes to the Senate Judiciary Committee” morph so quickly into Donald Trump’s life-tenured judicial avatar?

The most widely noticed Gorsuch opinion came on the term’s final day, June 26, in a case the court hadn’t even accepted for argument. The question in *Pavan v. Smith* was whether the state of Arkansas could refuse to put the name of a birth-mother’s same-sex spouse on their child’s birth certificate. A husband’s name is automatically listed on an Arkansas birth certificate without inquiry into his biological relationship to the child his wife bears. Two legally married lesbian couples, parents by means of anonymous sperm donations, claimed a constitutional right to equal treatment.

A majority of the Supreme Court agreed, overturning a contrary ruling by the Arkansas Supreme Court. Quoting from the decision that established the constitutional right to same-sex marriage — *Obergefell v. Hodges*, decided two years earlier to the day — the justices’ unsigned opinion declared that “the Constitution entitles same-sex couples to civil marriage ‘on the same terms and conditions as opposite-sex couples,’ ” and noted that the *Obergefell* decision itself named birth and death certificates as among the rights and benefits of marriage “to which same-sex couples, no less than opposite-sex couples, must have access.”

Most often these days, the Supreme Court uses the device of the unsigned “per curiam” opinion, meaning “by the court,” when a lower court grants habeas corpus to a criminal defendant and a majority of justices finds the error so clear as to warrant summary reversal without the need for full briefing and argument. The decision in the Arkansas case was a per curiam ruling that Chief Justice Roberts, a vigorous dissenter from the *Obergefell* decision, may or may not have joined; as Joshua Matz pointed out on the Take Care blog, it’s not always the case that justices who dissent from an anonymous per curiam ruling identify themselves.

Three dissenting justices did identify themselves: Justice Thomas, Justice Samuel A. Alito Jr. and Justice Gorsuch, who wrote for the three. What the majority found to have been obvious in the *Obergefell* decision — in which all current members of the court but Justice Gorsuch participated — he found lacking. “Nothing in *Obergefell* spoke (let alone clearly) to the question,” he wrote. The

parenthetical “(let alone clearly)” either was or was not a sly dig at Justice Anthony M. Kennedy’s majority opinion in the marriage case: It has been widely criticized, and not only on the right, for grandiloquence that outstripped rigorous constitutional analysis. In any event, Justice Gorsuch’s five-paragraph opinion addressed itself solely to the way the court dealt with the Arkansas case. “It seems far from clear what here warrants the strong medicine of summary reversal,” he wrote.

By sticking to the procedural issue, his opinion skirted, albeit barely, a declaration of his own view of the merits. This raises the question: Why write at all? If he wasn’t willing to argue or even engage with the majority on the merits of what the right to same-sex marriage entails, why bother to dissent? It was, I think, an odd judicial game of show-and-don’t-tell, a way to demonstrate his alliance with the court’s right flank without speaking quotably to the hot-button social issue at hand.

Justice Gorsuch showed no such diffidence in expressing his views on a case the court decided on the merits on the term’s last day: *Trinity Lutheran Church v. Comer*, in which the court held that a state could not make churches ineligible for certain public grant programs (in this instance, a grant for using recycled tires as playground surfaces). Justice Gorsuch joined the majority opinion by Chief Justice Roberts except for one important footnote that appeared to limit significantly the scope of the decision. The chief justice’s footnote said: “This case involves express discrimination based on religious identity with respect to playground

resurfacing. We do not address religious uses of funding or other forms of discrimination.”

But wait, Justice Gorsuch said in his separate opinion. “I worry,” he said, that “some might mistakenly read” the footnote “to suggest that only ‘playground resurfacing’ cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the court’s opinion.” He continued, quoting a 2004 decision: “Such a reading would be unreasonable for our cases are ‘governed by general principles, rather than ad hoc improvisations.’ And the general principles here do not permit discrimination against religious exercise — whether on the playground or anywhere else.”

There’s little doubt that the chief justice inserted that footnote late in the decisional process to satisfy a demand by one or more members of his majority, most likely Justice Kagan, maybe Justice Kennedy. Assuming Justice Gorsuch realizes that compromises of this sort are the stuff of life on a multi-member court, did he really need to call the chief justice out on it with his patronizing public reminder about how the Supreme Court articulates “general principles”? Did he think the chief justice didn’t know that already? Or perhaps he just wanted to underscore the strong suggestion in his separate opinion that he interprets the First Amendment’s Free Exercise clause as the Supreme Court never has, to entitle churches to public money on the same basis as secular institutions, even if the money will be put directly to religious uses (read, parochial school support).

Justice Ruth Bader Ginsburg was also on the receiving end of a public lecture by her new colleague. The case was a particularly obscure one, concerning how particular rulings of a federal agency are to be appealed by federal Civil Service employees. Six justices agreed with Justice Ginsburg that the proper venue was Federal District Court. That’s not precisely how the statute reads, Justice Ginsburg acknowledged, but it was “the more sensible reading” that avoided making courts wrestle with an “unworkable” distinction between the two types of cases at issue.

Oh, no, said Justice Gorsuch in dissent. “If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation.” He went on: “To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn’t some bug in the constitutional design: it’s the point of the design, the better to preserve liberty.”

Really? The effort by seven Supreme Court justices to make sense of an impossibly complex statute rather than throw up their hands is a threat to “liberty”? Those same justices, including the chief justice of the United States, needed a lesson in how a bill becomes a law? This case, argued on the morning of April 17, happened to be the very first case Neil Gorsuch heard as a Supreme Court justice. He dominated the first half of the argument, pounding away at Christopher Landau, an experienced member of the Supreme Court bar who eventually won the case. “We’re not asking the court to break any new ground,” Mr. Landau said at one point. “No, just to continue to make it up,”

was Justice Gorsuch's response from the bench.

Justice Thomas joined Justice Gorsuch's dissenting opinion. And Justice Gorsuch joined an opinion by Justice Thomas, dissenting from the court's refusal to hear a challenge to California's restrictions on the concealed carrying of firearms. In their dissenting opinion, the two called "indefensible" the lower court's decision to uphold the statute, and they said the Supreme Court's failure to take up any gun cases for the past seven years was "inexcusable."

More consequential was Justice Gorsuch's vote with Justice Thomas's separate opinion in dissent from the court's interim ruling on the Trump administration's Muslim travel ban. The majority, in an unsigned opinion, allowed the ban to apply for the time being only to people from the six affected Muslim-majority countries who lack a "bona fide connection" to the United States. Justices Thomas, Alito and Gorsuch would have lifted a lower court's injunction in its entirety, permitting the travel ban to apply to all residents of the six countries.

The opinion that Justice Gorsuch signed contained an odd line: "I agree with the court's implication that the government has made a strong showing that it is likely to succeed on the merits." In fact, the implication from the majority's refusal to leave the injunction in place only for those who were most unlikely to get visas to enter the United States even without the travel ban is exactly the opposite.

And there was a further oddity. Typically when a dissenting opinion refers to

something in the majority opinion, the dissenting justice includes a citation to the point at issue. But in the Thomas opinion, there was no citation to a place in the majority opinion where the pro-government "implication" could be found. Indeed, there could not have been a citation because there was no such implication. Although the majority opinion was unsigned, it's safe to assume that Chief Justice Roberts joined it; certainly, he would have spoken if he thought the court was set on the wrong course.

After the term ended, voices on the right predictably cheered Justice Gorsuch's performance. "Gorsuch proves a solid conservative on court's final day," read a statement from the Committee for Justice, a strong supporter of his nomination. The right has reason to cheer, of course, but also reason to be wary when the new kid on the block overplays his hand. Early in Justice Antonin Scalia's tenure, he lashed out at Justice Sandra Day O'Connor for refusing to join him in voting to overturn *Roe v. Wade* when the opportunity presented itself in the 1989 *Webster* case. In his opinion in that case, he called his senior colleague's position "irrational" and said she "cannot be taken seriously." If Justice Scalia thought that he would persuade Justice O'Connor by belittling her, he placed a bad bet; three years later, she voted with the 5 to 4 majority to uphold the right to abortion.

And while liberals have every reason to gnash their teeth over the justice who holds the seat that should have been Merrick Garland's, they can perhaps take some comfort in the unexpected daylight that has opened between him and two of the court's

other conservatives, Chief Justice Roberts and Justice Kennedy. My concern when Justice Gorsuch joined the court was how like Chief Justice Roberts he seemed in demeanor and professional trajectory. I could see him as a natural ally who would bolster the chief justice's most conservative instincts. It now seems just as likely that Neil Gorsuch's main effect on John Roberts will be to get on his nerves.

## “Gorsuch Joins Thomas as Supreme Court’s New Conservative Anchor”

*Bloomberg*

Greg Stohr

June 27, 2017

Justice Neil Gorsuch didn’t wait long to assert his place on the far right of the U.S. Supreme Court.

Less than three months after being sworn in, the Donald Trump appointee marked the end of the court’s term Monday by signing onto a barrage of opinions involving guns, gay rights, religion and the president’s travel ban.

With each, Gorsuch aligned himself with arch-conservative Justice Clarence Thomas. Together, they cast the other justices as being insufficiently vigilant in protecting gun rights and religious freedoms. They criticized the court for leaving part of Trump’s travel ban on hold and said the majority was too quick to side with a lesbian couple in Arkansas.

Along the way, Gorsuch presented himself as an aggressive, confident defender of the legal principles he backs. In the religion case, which said Missouri unconstitutionally excluded a church from a program to fund playground surfaces, Gorsuch said Chief Justice John Roberts shouldn’t have expressly limited the ruling to that type of program.

"The general principles here do not permit discrimination against religious exercise -- whether on the playground or anywhere

else," Gorsuch wrote in an opinion that Thomas joined.

The gay-rights case stemmed from an Arkansas law that made it easier for male spouses of new mothers to get their name on the baby’s birth certificate than female spouses of new mothers.

Gorsuch, 49, faulted his more experienced colleagues for summarily reversing a lower court ruling without hearing arguments. The Supreme Court majority, citing the 2015 ruling that guaranteed gay-marriage rights, said Arkansas’s practice was unconstitutional.

"It seems far from clear what here warrants the strong medicine of summary reversal," Gorsuch wrote, joined by Thomas and Justice Samuel Alito.

Gorsuch didn’t have to take a position at all in the gun case, given that the court simply refused to hear an appeal that sought gun-carrying rights. He instead joined a blistering opinion by Thomas, who accused the court of being out of touch on the Second Amendment.

"For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the



Second Amendment might seem antiquated and superfluous," Thomas wrote. "But the framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense."

### **Not Doubting Thomas**

Gorsuch was the only justice who joined Thomas's opinion. Three other justices who have backed gun rights in the home -- Roberts, Alito and Gorsuch's former boss, Anthony Kennedy -- said nothing Monday.

Gorsuch, Thomas and Alito were the only justices to say they would have let Trump's entire travel ban take effect to suspend entry into the U.S. from six mostly Muslim nations.

Liberals say Gorsuch's record so far is confirming their worst fears when Trump nominated him to succeed the late Justice Antonin Scalia. The seat was open for Trump only because Republicans last year successfully blocked a vote on Merrick Garland, President Barack Obama's nominee for the vacancy.

"His record so far on the court is hardly surprising to us," said Nan Aron, president of the Alliance for Justice. "He has sided with the most ultraconservative justices on the court."

Gorsuch probably will continue to vote frequently with Thomas, said Leah Litman, who teaches at the University of California, Irvine, School of Law. Both justices read the Constitution with a focus on its original meaning and tend not to dwell on the practical implications of rulings.

Gorsuch "is likely to resolve his cases on very formalistic legal reasoning and to articulate his positions very forcefully," Litman said.

Michael W. McConnell, a professor at Stanford Law School and former judge who sat on the Denver-based appeals court with Gorsuch, said it's too early to draw firm conclusions. But so far, the new justice has been "at least somewhat more conservative than I was expecting," McConnell said.

"The pattern is a bit surprising," McConnell said. When each individual decision is examined, "I'm not sure that they are particularly skewed to the right, but the pattern is."

# “Trump: Next Supreme Court Nominee Will Come From Conservative List”

*US News and World Report*

Joseph P. Williams

May 1, 2017

Responding to rumors that a senior justice on the U.S. Supreme Court could step down this summer, President Donald Trump reportedly plans to fill any vacancy from a hand-picked list of conservative jurists compiled by a pair of powerful Washington think tanks and delivered to him during the 2016 presidential campaign.

Trump told *The Washington Times* on Sunday he's heard chatter about the possible retirement of Justice Anthony Kennedy, a member of the court's five-member conservative bloc but who sometimes sides with his liberal colleagues. If Kennedy leaves, Trump said, he'll pick a replacement from the 21-member list of jurists given to him by the Heritage Foundation and the Federalist Society.

Judge Neil Gorsuch testifies during the third day of his Supreme Court confirmation hearing before the Senate Judiciary Committee in the Hart Senate Office Building on Capitol Hill, March 22, 2017, in Washington, D.C. Gorsuch was nominated by President Donald Trump to fill the vacancy left on the court by the February 2016 death of Associate Justice Antonin Scalia.

His next Supreme Court nominee will be "really talented and of our views," Trump said. Asked specifically whether he would pick from the list he promoted during the campaign, Trump was firm.

"Yes," he said. "That list was a big thing. ... It's a great list. From the moment I put that list out, it solved that problem. And I was proud to say it was my idea."

The Supreme Court's newest member, Justice Neil Gorsuch, was on that list when Trump nominated him in February. Despite broad Democratic opposition, the Republican-majority Senate confirmed him, and he was sworn in two weeks ago.

At the height of the presidential campaign, amid concerns on the right about Trump's conservative bona fides, the Heritage Foundation and the Federalist Society created the list of potential Supreme Court nominees – judges they believe are solid conservatives that could easily win Senate confirmation. Conservatives instantly embraced the concept, and Trump's pledge to use it helped him galvanize support among both grassroots and establishment Republicans.

The list also paid big dividends when Trump won the presidency and Senate Republicans

successfully blocked former President Barack Obama from filling the vacancy created when Justice Antonin Scalia, a staunch conservative, died suddenly in February 2016. Within weeks of his inauguration, Trump kept his promise and nominated Gorsuch to replace Scalia.

Though Senate Democrats – still seething over the GOP's blockade of Merrick Garland, Obama's nominee – linked arms to try and block Gorsuch, Republicans used their majority power and permanently stripped them of the right to filibuster any Supreme Court nominee.

The Capitol in Washington is seen early Thursday, April 6, 2017, as Senate Republicans are poised to change the rules by lowering the threshold for a vote on Supreme Court nominees from 60 votes to a simple majority to eliminate the ability of Democrats to keep President Donald Trump's nominee Neil Gorsuch off the high court.

That means if Trump gets to fill another vacancy, his nominee won't need any votes from Senate Democrats to win confirmation. Analysts predict the president could have as many as three appointments in his first term – a rare chance to pack the court and perhaps create an implacable, 6-3 or 7-2 conservative majority.

In his interview with The Washington Times, Trump said he didn't have any inside information on potential Supreme Court vacancies.

"I don't know. I have a lot of respect for Justice Kennedy, but I just don't know," he said. "I don't like talking about it. I've heard the same rumors that a lot of people have

heard. And I have a lot of respect for that gentleman, a lot."

If Kennedy stepped down, however, Trump's pick would probably anchor the court on the right, leaving liberals without a powerful swing justice as an occasional counterweight to conservatives. Kennedy delivered decisive votes that helped established same-sex marriage as constitutional and blocked a Texas student's attempts to dismantle affirmative-action programs in college admissions.

## “White House Announces Slate of 11 Judicial Nominees”

*The New York Times*

Adam Liptak

June 7, 2017

The White House on Wednesday announced a new slate of 11 judicial nominees, making good on a promise last month to name monthly waves of candidates to the federal bench in a methodical effort to fill more than 120 openings.

The administration’s attention to judicial vacancies stands in contrast to its less vigorous efforts to fill empty positions in the executive branch, where many senior positions remain vacant.

The new nominees, like the 10 announced last month, include prominent conservative judges and scholars.

President Trump’s appointment of Justice Neil M. Gorsuch to the Supreme Court created one of the vacancies the White House now seeks to fill. Justice Gorsuch had served on the United States Court of Appeals for the Tenth Circuit, in Denver.

The administration hopes to replace him with Allison H. Eid, a member of the Colorado Supreme Court. Justice Eid, like some of Mr. Trump’s earlier nominees, was on lists of 21 potential Supreme Court nominees issued during the presidential campaign. The lists were compiled with the help of two conservative groups, the Federalist Society and the Heritage Foundation.

Justice Eid had served as the Colorado solicitor general and as a law clerk to Justice Clarence Thomas. The administration may believe that shifting her from a state supreme court to a federal appeals court could make her a more attractive candidate for eventual elevation to the Supreme Court, as the new job will require Senate confirmation and give rise to a body of federal appeals court opinions.

Conservative groups welcomed the new nominations, which were first reported by The Washington Times.

“Many of the nominees are well known in the conservative legal movement and have shown commitment to principled and evenhanded application of the law throughout their careers,” Carrie Severino, chief counsel of the Judicial Crisis Network, said in a statement. “For the many Americans whose top concern in November was electing a president who would put committed constitutionalists to the courts, this is another major victory.”

Liberal groups expressed dismay.

“Trump’s nominees thus far have had troubling records that have raised real concerns about their ability to act independently of the executive branch,” said Nan Aron, the president of the Alliance for

Justice. “Like the previous nominees, this new slate has the burden to show that they are qualified to lifetime appointments to the federal bench.”

Mr. Trump’s new slate includes two other nominees to federal appeals court. One, Stephanos Bibas, is a law professor at the University of Pennsylvania who served as a law clerk to Justice Anthony M. Kennedy and has argued several cases before the Supreme Court. He is to be nominated to the Third Circuit, in Philadelphia.

The other, Judge Ralph R. Erickson, serves on the Federal District Court in North Dakota and will be nominated to the Eighth Circuit, in St. Louis

In May, Mr. Trump announced the nominations of 10 judges, including five other candidates to federal appeals courts.

Their confirmation hearings will start soon. On May 25, the Senate confirmed an earlier nominee, Judge Amul R. Thapar of a Federal District Court in Kentucky, to the Sixth Circuit, in Cincinnati.

The new list also includes eight nominees to other federal courts.

Over all, the quality of Mr. Trump’s selections is high, said Jonathan H. Adler, a law professor at Case Western Reserve University.

“Five of his nine circuit court picks are current or former academics,” Professor Adler said. “These picks suggest the

administration is serious about influencing the federal courts. These are picks that can be expected to have an outsized influence on the courts on which they sit.”.

## “Judges keep a very close eye on Trump”

*CNN Politics*

Joan Biskupic

June 14, 2017

President Donald Trump has for months belittled federal judges on social media and tried to undermine their legitimacy in the public eye.

In a recent string of rulings against the administration's travel ban, judges have offered an implicit rejoinder by asserting their independence and authority to limit the executive branch.

None of the judges who ruled against the ban on nationals from six predominantly Muslim countries has referred to Trump's criticism of the courts. Their legal reasoning has responded to the administration's specific positions. Yet the language wielded has been sharp, even scathing, as they rebuffed the administration's arguments about national security. They have overall emphasized the judiciary's role in determining the law of the land.

In the latest decision, the San Francisco-based 9th US Circuit Court of Appeals on Monday acknowledged that judges traditionally defer to executive authority regarding who may enter the country.

But, the court wrote, "immigration, even for the President, is not a one-person show."

Lifting a line from a 1981 Supreme Court opinion, the judges added, "Deference does not mean abdication."

Last month, the 4th US Circuit Court of Appeals employed stronger rhetoric as it rejected the administration and its "dangerous idea -- that this court lacks the authority to review high-level government policy of the sort here."

"Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake," the court wrote, siding with challengers of the travel ban who say it infringes religious rights.

So far, the message is that the third branch of government intends to provide a significant check on an executive proudly disrupting the status quo. This first big legal battle over Trump policy could foreshadow greater judicial scrutiny for his initiatives and escalating tensions between the White House and the courts.

A crucial test could come as the Supreme Court considers whether to hear the dispute

over the executive order that would suspend for 90 days the entry of nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen.

Trump said the ban was needed to safeguard against terrorism. Among his campaign promises, as stated on his website: "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."

Trump's efforts to diminish the judiciary emerged during the 2016 presidential campaign. He derided US District Court Judge Gonzalo Curiel, hearing a fraud claims in San Diego against Trump University, for his Mexican heritage. Trump questioned his ability to rule fairly. Curiel was born in Indiana and has been a federal district court judge since 2012.

After Trump became President, he continued the attacks. He referred to US District Court Judge James Robart, of Washington state, as a "so-called judge" and deemed his February order temporarily blocking the travel ban "ridiculous." Trump also said "if something happens blame him and court system."

In a similar vein, Trump took to Twitter on April 26 to declare "ridiculous" an adverse decision in separate litigation over "sanctuary cities" that decline to enforce immigration rules.

Earlier this month, in a series of tweets defending his "original travel ban, not the watered down, politically correct version," Trump said, "The courts are slow and political!"

On Tuesday morning, Trump leveled another broadside on Twitter, declaring that Monday's 9th Circuit ruling comes "at such a dangerous time in the history of the country."

Judges have been reluctant to respond directly. In March, however, 9th Circuit Judge Jay Bybee, who was not part of Monday's panel decision, wrote without naming Trump: "The personal attacks on the distinguished district judge [Robart] and our colleagues were out of all bounds of civic and persuasive discourse -- particularly when they came from the parties. ... Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are accepted principles."

Bybee, a conservative, offered the critique as he signaled support for Trump on his legal arguments. The judge was dissenting from a court order denying a new hearing in an earlier round of litigation on the travel ban.

The rulings in recent weeks marked a more substantive phase of federal appeals court action. In refusing to revive the travel ban, the 4th and 9th Circuits both cited its potential for unlawful discrimination. The 4th Circuit ruled on constitutional grounds, the 9th based on the administration's failure to comply with a federal statute.

Both, however, firmly rejected Trump arguments that courts lacked the authority even to decide the cases.

In Monday's decision, the 9th Circuit noted that the administration argued courts cannot review decisions related to the issuance or withholding of visas. At issue here, the court countered, was not a discrete set of visas but

the president's "promulgation of sweeping immigration policy."

That court said the Trump administration failed to justify the suspension for certain nationals. Federal immigration law allows the president to exclude people who could be "detrimental" to American interests but requires findings related to who might be dangerous and forbids nationality-based discrimination.

The 4th Circuit, meanwhile, highlighted Trump's anti-Muslim sentiment over the past year. That appeals court, along with district court judges who ruled against Trump, cited a 2005 Supreme Court decision that said judges should not "turn a blind eye" to the context of a government decision affecting religious rights.

In looking at past statements that might reveal officials' motivations, the high court declared: "The world is not made brand new every morning.



## “Kennedy Still in Control on Supreme Court as Divisive Issues Loom”

*Bloomberg*

Greg Stohr

June 28, 2017

The U.S. Supreme Court is ready to get back to normal. And that means Justice Anthony Kennedy is still in charge.

The justices closed their nine-month term this week with a new list of major cases they will hear -- and without a retirement announcement from the 80-year-old Kennedy.

It sets up a 2017-18 term that will have a full complement of nine justices and a group of ideologically charged cases in which Kennedy is a good bet to cast the pivotal vote. Highlights include a fight over partisan gerrymandering, a clash pitting gay rights against religious freedoms, and the scheduled showdown over President Donald Trump's travel ban.

"The cases they have for next term are shaping up to be cases where the stakes are significant, where there are likely to be strong differences of opinion," said Jonathan Adler, a constitutional law professor at Case Western Reserve School of Law.

Recent weeks have been filled with speculation that Kennedy might retire at term's end. The justice hasn't made a public announcement of his intentions, but the court on Tuesday implied he will be staying by issuing a new list of oversight assignments for the 13 federal judicial circuits. Kennedy

will continue to handle emergency matters from the circuit based in San Francisco.

The court has been in transition mode since Justice Antonin Scalia's February 2016 death led to a 14-month vacancy that Justice Neil Gorsuch eventually filled.

With only eight justices during most of the just-completed term, the court gravitated toward noncontroversial cases and often found paths toward consensus rulings. Fights over insider trading, disparaging trademarks, credit-card surcharge laws and class-action litigation all ended up being decided unanimously.

"Everybody acknowledges it was a sleepy term so far as big cases are concerned," said Michael Dorf, a constitutional law professor at Cornell Law School.

The changeover to the Trump administration was one reason for the dearth of blockbusters, causing some cases to fizzle and keeping others from materializing. The court dropped a scheduled fight over transgender student access to bathrooms in public schools after the new administration changed a key Education Department policy.

Even Monday's Supreme Court decision on Trump's travel ban had unanimity of a sort. No justices publicly dissented from the

portion of the decision that let part of the ban take effect for now. Three justices said they would have cleared the entire ban.

### **Potential Watershed**

The next term looks to be anything but sleepy. The partisan-gerrymandering case could be a watershed for efforts to depoliticize the process of drawing voting districts -- but only if Kennedy goes along.

The Supreme Court has never struck down a legislative map as being too partisan. In a 2004 case known as *Vieth v. Jubelirer*, Kennedy cast the pivotal vote to uphold a challenged map. But he left open the possibility he could eventually be on the other side of the issue if he saw a manageable way to decide whether a voting map is so partisan it violates the Constitution.

"He was on an island in *Vieth*," said Dorf, a former law clerk to Kennedy. "And it's an island on which the question is: Is there a standard that can recommend itself that's administrable?"

Kennedy might also be the pivot point on a clash between religious and gay rights, though Dorf said that isn't clear. The case concerns *Masterpiece Cakeshop*, a Colorado bakery that refuses to make cakes for same-sex weddings. Kennedy has written the court's key gay-rights rulings but has sided with religious liberties in other contexts.

### **Roberts as Swing Vote**

The travel ban case could be another divisive clash. In the Monday decision, three justices -- Gorsuch, Clarence Thomas and Samuel Alito -- suggested they were inclined to uphold the entire ban. That could leave

Kennedy and Chief Justice John Roberts as the court's swing votes.

The case, however, could dissipate by the time the court reconvenes in October. The policy is a 90-day ban that will expire by the end of September.

The court also will decide next term whether employers can require workers to press wage-and-hour claims through individual arbitration proceedings. In addition, the justices will have a chance to revisit an issue that left them deadlocked in 2016: whether states can require public-sector workers to help fund the unions that represent them.

And no matter how the court decides those cases, the biggest decision may come from Kennedy alone. This term's retirement speculation may pale in comparison to next term's.

"My prediction," Adler said, "is he issues the *Masterpiece Cakeshop* decision June 26 and retires shortly thereafter."

## “Will Supreme Court retirement bring ‘Kennedy Court’ to an end?”

*The Sacramento Bee*

Erwin Chemerinsky

April 26, 2017

With the U.S. Supreme Court handing down this term’s last decision Monday, great attention is being focused on the possibility that Justice Anthony Kennedy might soon announce his retirement.

Neil Gorsuch replacing Antonin Scalia largely restored the court’s ideological balance to what it was before Scalia’s death. But President Trump replacing Kennedy with a conservative in the Gorsuch or Scalia mold will create the most conservative court that there has been since the mid-1930s.

At this point, no one knows Justice Kennedy’s thinking about whether or when he will retire. Obviously, he is aware that his being replaced with a much more conservative justice will dramatically change the court’s ideology and could lead to some of his most important opinions being overruled. I also assume that it must be very difficult to leave his pivotal role on the nation’s highest court.

President Trump replacing Kennedy with a conservative in the Gorsuch or Scalia mold will create the most conservative court that there has been since the mid-1930s.

Since the retirement of Justice Sandra Day O’Connor in January 2006, Kennedy has

been the “swing” justice on a Court otherwise evenly divided between four Republican-appointed conservatives and four Democratic-appointed liberals. Last year, he voted in the majority in 98 percent of all of the cases, something unprecedented in recent memory. I advise lawyers arguing before the Supreme Court to make their briefs a shameless attempt to pander to Justice Kennedy; if the clerk of the court will allow it, I urge them to put Anthony Kennedy’s picture on the front of their briefs.

Overall, Kennedy has voted with the conservatives more than with the liberal justices. He wrote the court’s opinion in *Citizens United v. Federal Election Commission*, which held that corporations can spend unlimited amounts of money in election campaigns. He wrote for the court’s conservative majority in *Gonzales v. Carhart*, upholding the federal Partial Birth Abortion Ban Act. He was a fifth vote in *District of Columbia v. Heller*, which held that the Second Amendment protects a right of individuals to have guns in their homes. He has consistently been with conservative majorities rejecting claims that religious symbols on government property or government aid to religion violate the Constitution.

But there are notable areas where he was with the court's liberal bloc, which is why he truly has been the swing justice. His greatest legacy is in the area of expanding rights for gays and lesbians. There have been four Supreme Court decisions in history providing constitutional protection for gays and lesbians. Each was written by Anthony Kennedy. Kennedy wrote the opinion in *Lawrence v. Texas* in 2003 that state governments cannot criminally punish private consensual homosexual activity. Likewise, he was the author of two opinions in 5-4 cases, in 2013 and 2015, finding unconstitutional laws prohibiting marriage equality.

He also has been key in limiting application of the death penalty, though he has given no indication that he would join the liberal justices who want to find it to be inherently unconstitutional. For example, he wrote the opinion in *Roper v. Simmons* in 2005 that the death penalty cannot be imposed for crimes committed by juveniles and in *Kennedy v. Louisiana* in 2008 that the death penalty cannot be used for the crime of child rape.

He has been instrumental in limiting presidential power in the context of the war on terror. One of his most important opinions was in *Boumediene v. Bush* in 2008, which held that it was unconstitutional for Congress to suspend the writ of habeas corpus and bar Guantanamo detainees from using it to have access to the federal courts.

In some areas Justice Kennedy has shifted his views over time. Last year, he wrote the opinion in *Fisher v. University of Texas, Austin*, upholding an affirmative action program. This was the first time he ever voted

to uphold any affirmative action program. Also last year, in *Whole Women's Health v. Hellerstedt*, he voted to strike down a Texas law imposing restrictions on access to abortion, only the second time he ever did that since coming on the Court in February 1988.

Few modern justices have had as much influence on constitutional law as Anthony Kennedy. For a long time now, it really has been the Kennedy Court. The question, and likely no one but Kennedy knows, is how long it will continue to be that.

## “Anthony Kennedy loves his job -- and he's still here”

*CNN Politics*

Joan Biskupic

July 1, 2017

As he announced a major Supreme Court ruling recently, Anthony Kennedy spoke so fervently about free speech and the power of the Internet, he seemed ready to spring from his black leather chair on the justices' elevated bench.

It was a fleeting but quintessential Kennedy moment as the court was finishing its annual session, a term defined to a large extent by Kennedy's key vote, along with attention to whether he might retire.

The case demonstrated Kennedy's crucial role, as he won a majority for a June 19 decision heralding the Internet's "vast potential to alter how we think, express ourselves, and define who we want to be." It also revealed perhaps why the 80-year-old, longest-serving sitting justice has not given up his black robe.

He lives for this.

Kennedy was in the majority on closely decided cases more than any other justice this term. In several opinions, he wrote passionately, invoking such favored terms as democracy and destiny.

If nothing causes him to reverse course and step down, he could play an influential role in the resolution of a challenge to President Donald Trump's travel ban involving six

predominantly Muslim countries. He could cast the deciding vote in two other high-profile disputes on the upcoming calendar: one testing whether the Wisconsin state legislature unconstitutionally gerrymandered voting districts to favor Republicans, the other whether the Christian owner of a Colorado bakery may refuse to make a wedding cake for a gay couple.

Kennedy has authored the Court's major gay rights cases dating to 1996. Two years ago, he cast the decisive vote and wrote the opinion declaring a right to same-sex marriage.

First Amendment cases particularly inspire Kennedy. His majority opinion striking down a North Carolina law that prohibited registered sex offenders' access to the Web was so expansive that three justices who agreed with his bottom-line judgment declined to sign his opinion.

Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas, deemed Kennedy's rhetoric "undisciplined" and "unnecessary." They criticized him for being "unable to resist musings" that likened the Internet to streets and other public places and that could prevent states from restricting sexual predators from any Internet sites.

Overall, in the full run of cases, not just the handful that come down to 5-4 votes, the Sacramento native appointed by President Ronald Reagan in 1988 votes more on the right than left.

Yet, in the more contentious, ideologically charged social dilemmas, his vote can be unpredictable, and therefore up for grabs during negotiations with colleagues. He's usually the linchpin when the left side of the bench -- Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, Elena Kagan -- wins out.

That was demonstrated when he cast the key vote in a March case that would allow judges to delve into the usually secretive deliberations of a jury to safeguard against racial bias. Kennedy opened his opinion in *Pena-Rodriguez v. Colorado* with lofty language about the twelve men and women drawn from a community to decide a defendant's guilt or innocence: "The jury is a central foundation of our justice system and our democracy ... a tangible implementation of the principle that the law comes from the people."

### **Keeping everyone guessing**

At the columned Supreme Court building, Justice Kennedy works in a tidy, well-organized office with a view of the Capitol across the street. On his desk is a Black's law dictionary and little else. The artwork recalls his California roots: a bronze horse sculpture by Thomas Holland and a California grapes painting by Edwin Deakin.

When it comes to decisions, whether on cases or his future plans, he is more complicated.

Kennedy has navigated a narrow ideological path at the center of the court. He has shifted to the left more in recent years, such as to support abortion rights and racial affirmative action on campus. He still keeps his colleagues and outside legal analysts guessing where he might come down in a dispute.

It was that way in recent months on the retirement watch.

Kennedy, who will turn 81 in July, had told friends and family he was weighing when to step down. Trump administration lawyers, eager for another chance to shape the court, following the April appointment of Justice Neil Gorsuch, were ready to seize another vacancy.

A Kennedy retirement would let Trump appoint a more rigid conservative justice and change the court's makeup for a generation or more. The chances for liberal justices to prevail in close cases -- as they did several times this session -- would plunge.

Kennedy kept his thoughts private. Even as recently as last weekend, some of his former law clerks who attended a reunion with him said a slight chance seemed to exist that he would leave this June rather than next.

That speculation ended as the term closed this week with no retirement statement.

Kennedy's flair for the dramatic suggests that when he does step down, perhaps next year, he would want to make an announcement while the justices are sitting and the court in session.

Kennedy did not respond to an interview request for this story.

Behind the scenes, Kennedy is a go-to justice not only regarding the substance of rulings. He is often at the center of efforts to work out compromises in thorny cases and lower tensions among colleagues.

And in another sign of his standing, justices say that after the nine have met privately and voted on cases, and Roberts has begun the delicate matter of who will author which decision, the chief confers first with one justice: Kennedy.