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Swing Vote: How the Election Could Tip the Balance of the Supreme Court

By: Ben W. Heineman Jr.

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Justice Kennedy is often the deciding vote in divisive 5-4 decisions. A new nomination could strip him of this role and steer the court sharply left or right.



The president sworn in next January may have the opportunity, through a single appointment, to move the Supreme Court strongly in a conservative or liberal direction, with significant implications for some of the most controversial issues of this era far beyond the future of *Roe v. Wade*.

We were reminded of this critical dimension of the election when the Supreme Court [recently announced](#) that next fall it will hear a new case on affirmative action in higher

education. It probably will decide the fate of the new health care law this spring. And it may soon decide issues bearing on the constitutional right to gay marriage.

Aside from the ritualistic calls for a Supreme Court decision to overturn or uphold *Roe*, the court has not figured prominently in the positioning of Democrats and Republicans in this year's presidential or Congressional races.

But it should. The reason turns on dislodging Justice Anthony Kennedy from the pivotal position he currently holds, in which he frequently provides the fifth vote in 5-4 decisions -- often on the conservative side, but at times on the liberal side.

A new appointment to the court could signal the end of that swing vote role for Justice Kennedy in most controversial cases. In the court term that ended last June, Kennedy provided the fifth vote in 14 of the 16 cases decided by a 5-4 margin. In the term ending in 2010, he was the controlling vote in 12 out of 17 cases decided 5-4. In the 2009 term, he was the fifth vote in 20 of 25 cases with a 5-4 margin.

Often, Kennedy is on the so-called conservative side of cases with the liberal bloc of Justices Breyer, Ginsberg, Sotomayor, and Kagan facing off against the conservative wing of Justices Roberts, Scalia, Thomas, and Alito. Examples include: *Bush v. Gore*, *Citizens United* (voiding Congressional limits corporate and union election expenditures on First Amendment grounds), and a case voiding District of Columbia gun control provisions under the Second Amendment. He has also sided with the liberals in, for example, cases striking down sodomy laws under the constitution, declaring the death penalty unconstitutional for juvenile offenders (citing principles from foreign jurisdictions) and ordering the release of thousands of prisoners in overcrowded California jails under the 8th amendment's prohibition against cruel and unusual punishment.

Advocates practicing before the Supreme Court must direct an important part of their argument to Justice Kennedy in order to satisfy the first principle of successful lawyers before the high court: being able to count to five. Certainly, those arguing in favor of health care reform have to focus first on securing Justice Kennedy's vote (they assume Justices Ginsburg, Breyer, Sotomayor, and Kagan will vote to uphold).

Here is how Justice Kennedy's importance could be severely reduced after the 2012 election.

- If a Republican is elected president and if a member of the court's liberal bloc leaves the court, then the new chief executive would nominate a more reliable conservative justice, in the mold of Justice Roberts or Justice Alito (George W. Bush's appointments). Were such a person confirmed, there would be a solid five-vote conservative majority without Justice Kennedy, who would lose his swing vote position and his ability to influence the holding of the conservative majority in 5-4 cases.

- If President Obama is re-elected and if a member of the court's conservative bloc leaves the court, then Obama would nominate a reliable (if moderate) liberal justice, like his earlier appointments of Justice Sotomayor and Justice Kagan. Were such a person confirmed, there would be a solid five vote liberal majority without Justice Kennedy, who would, again, lose his influence in shaping or defining the liberal rule of the case in major constitutional matters.

Just to preserve the status quo, it is also important for conservatives to have a conservative president nominate a conservative justice for a vacancy in a conservative seat. The opposite is true for liberals.

It is, of course, impossible to predict whether the president elected in the fall will have a Supreme Court vacancy. The ages of the Justices vary widely -- from 51-79 -- but health problems or other issues can occur at any time.

One thing is for sure: If there is a vacancy and one of the two scenarios outlined above occurs, there will be a titanic confirmation fight. The stakes are that high.

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