The State of Justice in America

AG - David Cole - The Supreme Court's 2005-06 term -- the first to feature the newly confirmed Chief Justice, John Roberts Jr., and Justice Samuel Alito -- began with a whimper and ended with a bang. The term's early months saw the Court issuing an unusually high number of unanimous opinions, even in such potentially controversial areas as abortion and gay rights, as the Court sought to decide cases extremely narrowly and thereby avoid controversy.

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The 'Kennedy Court'

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But by the end of the term, controversy was front and center, as the Court divided sharply on its most significant cases, culminating in the stunning 5-to-3 decision, the last day of the term, declaring George W. Bush's military tribunals illegal.

In Hamdan v. Rumsfeld, the most important case of the term, the Court showed itself willing to do what neither Republicans nor Democrats in Congress have been able to do: Stand up to the President in the "war on terror." The Court's decision reaffirmed, as Justice John Paul Stevens put it, that "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." The Court's capitalization of the "Rule of Law" underscored its effort to enforce the concept of legality on an Administration that has long since adopted the view that the law can impose little or no constraint on the President during wartime -- whether it be the international laws of war, criminal prohibitions on torture and warrantless wiretapping of Americans, or the Uniform Code of Military Justice, a statute that establishes the rules for military trials.

But as much as Hamdan deserved celebration for rejecting the President's vision of unchecked power in the post-9/11 world, the term also showed just how close the country is to a system of government that has no meaningful checks and balances. Bush's two new appointees generally proved themselves reliable conservatives -- if not exactly in the mold of Justices Scalia and

Thomas, which Bush said he was striving for, at least very close. Justices Roberts, Alito, Scalia and Thomas proved a reliable four votes for conservative results, while Justices Stevens, Souter, Ginsburg and Breyer continued to be a fairly reliable four votes for moderate to liberal outcomes. (Long gone are the days of Justices William Brennan and Thurgood Marshall.)

That leaves Justice Anthony Kennedy smack dab in the middle, with the ability to cast the decisive vote in many of the Court's most contentious disputes. Before the term began, it was an open question whether Kennedy would be persuaded to join the conservative bloc by the less acerbic and more politic conservative voices of Roberts and Alito, or whether he would maintain a swing-vote presence in the center, a position he shared with Justice Sandra Day O'Connor until her retirement. Thus far, he has remained in the middle. Justice Kennedy sometimes voted with the conservative bloc, including in a case upholding a Kansas death penalty statute, but went his own way on such significant issues as the military tribunals, the reach of the Clean Water Act, the exclusionary rule, gerrymandering and the Voting Rights Act.

Kennedy's influence is perhaps best illustrated by the Court's review of the gerrymandered redistricting of Texas engineered by Tom DeLay. On the issue of whether the redistricting violated equal protection because it was too partisan, Kennedy joined the conservative bloc to rule that there was no constitutional violation. But on the separate question of whether one part of the redistricting contravened the Voting Rights Act by diluting Latino voting strength, Kennedy sided with the liberal bloc to find that a violation had occurred. As Kennedy went, so went the Court.

Where Kennedy sided with the conservatives, he often wrote separately to moderate the result. In Hudson v. Michigan the majority ruled that the prosecution can use evidence obtained illegally when police violate the constitutional requirement that they "knock and announce" before entering a home to execute a search warrant. In its decision the conservative bloc displayed open hostility toward the "exclusionary rule" generally, but Kennedy concurred to specify that he supported the rule in general but simply did not think it justified for knock-and-announce violations. Similarly, in Rapanos v. United States the conservative bloc voted to restrict radically the reach of the Clean Water Act over "wetlands," but Justice Kennedy effectively saved the act, writing separately to say that while he agreed that the lower court had used the wrong standard, the act extends to any land with a "significant nexus" to a navigable body of water, and courts should generally defer to the environmental regulators on that judgment.

Kennedy's vote was also crucial in Hamdan. That case involved a challenge by Salim Hamdan, Osama bin Laden's bodyguard and driver, to the military tribunals Bush had created by

executive order in November 2001 for trying foreign nationals accused of terrorism and war crimes. Under the rules set forth by the President, defendants could be tried, convicted and sentenced to death on the basis of hearsay evidence, testimony obtained through coercive methods or secret evidence that neither the defendant nor his civilian lawyer had any opportunity to confront. In addition, the Defense Secretary or his designate, instead of the presiding judge, was empowered to intervene in ongoing trials and decide issues.

After the Court agreed to hear the case, Congress passed a statute that appeared designed to strip the Court of its jurisdiction. But five members of the Court were undeterred. They ruled that the statute did not apply to pending cases and went on to decide that the President's military tribunals violated military law and the Geneva Conventions. The Court ruled that the Uniform Code of Military Justice requires that military tribunal procedures not vary from those of the courts-martial we use to try our own soldiers, unless court-martial procedures would be "impracticable" -- and that the Administration had made no such showing.

More important, the Court declared that Congress had required the tribunals to adhere to the laws of war, and that the tribunals violated one such law in particular, Common Article 3 of the Geneva Conventions. Common Article 3 requires that detainees in conflicts "not of an international character" be tried by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Administration had insisted that this rule did not apply to the conflict with Al Qaeda, because it was an "international" conflict. But in its most significant holding, the Court rejected that interpretation, ruling that the reference to conflicts "not of an international character" was intended to cover all conflicts not between sovereign nations, literally not inter-national. Since Al Qaeda is not a nation, our conflict with it is "not of an international character," and the conflict is therefore covered by Common Article 3. On July 11 the Administration acknowledged that the Court's ruling means that the Geneva Conventions govern its treatment of Al Qaeda detainees, but in typical fashion it insisted that this would require no change in its practices or policies.

In fact, the Court's Geneva Conventions ruling is significant for three reasons. First, it means that were Congress to enact a statute "overturning" Hamdan by authorizing the very procedures the Court found unauthorized, it would be sanctioning a violation of the laws of war. Second, Common Article 3 also bars any "humiliating and degrading treatment" of detainees, and any violation of Common Article 3 is a felony under the War Crimes Act. Thus, even though torture was not directly at issue in Hamdan, the decision in effect authoritatively bars any inhumane treatment of detainees -- which would include most of what the CIA and Army interrogators have routinely been inflicting on Al Qaeda suspects. Third, and most important, the decision proclaims that the "war on terror" is not a law-free zone open to whatever rules ingenious White House lawyers can devise under cover of secrecy but must be subject to the international standards that govern all wars. In short, it refutes American exceptionalism.

All of this would not have been possible without Justice Kennedy's vote. But the voting alignment in Hamdan and many other important cases this term only illustrates how close the Court is to veering off in an extreme rightward direction. Its two oldest members are Justice Stevens, at 86, and Justice Ginsburg, at 73. If either retires while a Republican President is in office, the Court will likely be reliably conservative for several decades at least. On issues such as affirmative action, gay rights, states' rights, abortion, workers' rights, separation of powers and equal protection of the laws, the Court could become a rubber stamp for right-wing policies and an obstacle to progressive legislative reform -- much as it was until midway through the New Deal. Perhaps never before has the power to appoint the next Justice been so potentially determinative of the course of constitutional law.

Meanwhile, the division on the Court will undoubtedly continue next year. The Court has already agreed to take up cases involving so-called "partial birth" abortion laws and efforts to maintain racial balance in public schools. On both issues Justice Kennedy has previously sided with conservatives. While he was in the majority that refused to overrule Roe v. Wade in Planned Parenthood v. Casey, he dissented passionately from the Court's application of Casey to strike down a "partial birth" abortion statute in 2000. And he has been an outspoken critic of affirmative action, voting to declare it unconstitutional in the University of Michigan's affirmative action cases just three years ago. This time next year, in other words, we may not be celebrating.

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