



## Supreme Court defined by one empty chair

Richard Wolf

June 28, 2016

WASHINGTON — The term completed by the Supreme Court Monday was basically immortalized at halftime.

That's when Justice Antonin Scalia, a larger-than-life fixture on the court for three decades, died suddenly at a Texas ranch, leaving behind a Texas-sized caseload for his colleagues to muddle through without him.

Muddle through they did, deadlocking on four cases, sending others back to lower courts, and deciding the rest with one thing in mind — to compromise where they could and get out of town.

"Clearly, eight is not enough," says Lisa Blatt, an appellate lawyer who has argued 33 cases before the Supreme Court. "With the exception of a few cases, the court decided very little and in some instances ... created more questions than they answered."

On virtually every case big and small decided following his death on Feb. 13, Scalia's impact was felt, though seldom in the final result. Forced to decide the bulk of the caseload without him, the justices developed a newfound creativity — or simply threw up their hands and upheld lower court rulings "by an equally divided court."

Immigration? Riven ideologically and procedurally by President Obama's effort to give more than 4 million undocumented immigrants a path toward deportation protection and work permits, the justices split 4-4 and left a district court's injunction against the program in place. With Scalia, Obama likely would have lost more definitively.

"The 5th Circuit ruling stands, affecting millions of people, because of governmental dysfunction and not because of any decision of the Supreme Court," said Elizabeth Wydra, president of the liberal Constitutional Accountability Center. "However you feel about the merits of a particular case, you should want the court to be able to do its

job and declare what the law is, especially in cases of such profound national importance."

Contraception? Rather than deadlock over whether non-profit employers such as charities, hospitals and universities should get a religious exemption from Obamacare's requirement that health plans include free coverage of contraceptives, the justices unanimously sent the cases back to lower courts in hopes a compromise can be reached.

Labor rights? In the one case where Scalia's absence clearly changed the result, the justices tied 4-4 on the power of public employee unions to collect fees from non-members who they nonetheless represent in collective bargaining. Organized labor was braced for defeat; instead, an appeals court's decision upholding the fees stands for now.

"The court has left uncertainty," said Caroline Fredrickson, president of the liberal American Constitution Society, as well as "differing interpretations of the law in different parts of the country."

The court did issue some more definitive rulings, and for the second straight year, liberals won more than their share. In the last week, Justice Anthony Kennedy joined the liberal justices to affirm the University of Texas' use of racial preferences in admissions and strike down two major restrictions on Texas abortion clinics — both rulings that the court's other conservatives opposed. Scalia's presence would not have altered the results, though on affirmative action — with Justice Elena Kagan recused from the case — it would have produced a 4-4 tie without national precedent.

"After the last few years, any illusions that we have a conservative court should be completely extinguished," said Ed Whelan, president of the conservative Ethics and Public Policy Center. "The very bad news is that the court will get much worse if Hillary Clinton is able to fill Justice Scalia's vacancy."

But Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute, said even the abortion and affirmative action rulings were "minimalistic and *sui generis*, dealing with very specific government policies."

The court was bolder in some other major cases. Faced with efforts by conservatives in Texas to count only eligible voters in drawing state and local political districts, the court lined up unanimously behind Justice Ruth Bader Ginsburg's decision upholding the use of total population, which includes undocumented immigrants and benefits urban areas.

And asked by former Republican governor Bob McDonnell of Virginia to wipe out his federal corruption conviction for helping a business executive gain access to state officials in exchange for lavish gifts, the court voted unanimously for Chief Justice John Roberts' opinion, tossing out the conviction as prosecutorial excess.

It was Roberts who steered his colleagues toward narrow decisions and compromises, both because it's in his nature and because the post-Scalia court faced the potential for gridlock.

"There is an incredibly strong desire to show that the institution can work and that there is institutional continuity," said Andrew Pincus, an appellate lawyer who has argued 24 cases at the high court.

Steven Shapiro, legal director of the American Civil Liberties Union, agreed the court managed to move past Scalia's death in reasonable shape despite being "hobbled" by his absence.

Still, he said, "There's a reason there are nine justices — and this court is the reason."