Forbes

Scalia's Absence Didn't Affect the Supreme Court Like You Think

Ilya Shapiro

June 30, 2016

It was an odd and sad year at the Supreme Court. Most years, pundits strain to concoct some sort of "theme." Was it a liberal or conservative term? Did Chief Justice John Roberts succeed in imprinting his minimalistic methodology or is it still the Kennedy Court? Pretty airy stuff, because year-to-year narratives of the Court are driven by the vagaries of the docket and miss a lot of what's going in the bulk of cases beyond the handful that make front-page news.

But this term there actually was a phenomenon that overshadowed the Court's work: the loss of Justice Antonin Scalia. Justice Scalia's passing "deflated" what would otherwise have been yet another blockbuster term in many ways, defusing several high-profile cases as well as removing the most quotable pen on Earth from media coverage these last weeks of June. He was a legal giant, whose impact on both legal theory and judicial practice cannot be overstated—even if he wasn't able to move the law quite as much in his direction as he would've liked.

And you could see the effect of Scalia's absence immediately: Justice Clarence Thomas asked a question during oral argument for the first time in over a decade, picking up the Second Amendment gauntlet right where his friend had left it. The whole tenor of oral argument changed; sure, some justices—especially Sonia Sotomayor and Samuel Alito—filled some of the vacuum, but there was clearly more time for the advocates to talk, and less notations of "[laughter]" in the oral argument transcript.

In practical terms, however, Scalia's absence was felt in ways different than most people assume: his vote wouldn't have changed all that many outcomes. For example, of the major cases, only *Friedrichs v. California Teachers Association* would have come out the other way with Scalia's participation. In *Friedrichs*, five justices seemed poised to strike down mandatory "agency fees" for public-sector nonunion members, but that would-be reversal of the lower court became a 4-4 affirmance without opinion. Another such 4-4 came in *United States v. Texas*, the case taking up President Obama's executive actions on immigration. But there, the affirmance meant that the lower-court injunction stands, which is surely the position Justice Scalia would've taken. Yes, a five-justice majority would have produced an opinion, but at best that opinion would be useful as a precedent for some future case; the practical result would be what it is now.

The other "big" cases similarly wouldn't have changed. In *Fisher v. UT-Austin II*, Justice Anthony Kennedy surprisingly voted to uphold a use of racial preferences in college admissions for the first time. But Justice Scalia's vote would've just made this into another 4-4 case—Justice Elena Kagan was recused—so the lower-court ruling for the university would still have stood.

In *Whole Women's Health v. Hellerstedt*, Kennedy again went left—striking down an abortion regulation for the first time since *Planned Parenthood v. Casey*—but that just means that Scalia's inclusion would've been on the dissenting side of a 5-4 split. Even *Zubik v. Burwell*, which involved the application of Obamacare's contraceptive mandate to nonprofit religious groups, turned out to be a unanimous punt. While Scalia would likely have made this a cleaner 5-4 ruling against the government—*Hobby Lobby* redux—an 8-0 instruction to the lower courts to facilitate a workable compromise is in fact a win for the challengers given the case dynamics.

And then there were the true unanimous rulings, deferring to states on implementing the "one person, one vote" principle in *Evenwel v. Abbott*and reversing a public-corruption conviction due to failure to prove a quid pro quo in *McDonnell v. United States*. Justice Scalia may have contributed some interesting writings here—as he would have in many the other cases—but the fact remains that his vote wouldn't changed the final result.

Moreover, even if President Obama's nominee to fill the vacancy left by Scalia's departure had been confirmed in due course, Merrick Garland wouldn't have joined the Court in time to consider *any* of this term's cases.

Now, it's absolutely true that Scalia's absence has affected the Court's decisionmaking regarding future cases to review. It takes four votes to grant "cert," and thus far the justices have been much more reluctant in counting to four, as well as declining cases with high probabilities of 4-4 splits (because why bother?). But some of this profile-lowering is a natural regression to the mean: after five straight years of "terms of the century"—covering Obamacare, voting rights, abortion, affirmative action, campaign finance, and seemingly every other hot-button legal issues under the sun—this fall's crazy political scene will be accompanied by the typically more mundane legal one.

In short, Antonin Scalia's death has had and will continue to have repercussions on our law and politics—but its least significance was on the cases he left behind.