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Neil Gorsuch no 'swing vote' despite liberal crossovers, court watchers say

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President Trump's first Supreme Court pick, Justice Neil M. Gorsuch, sided with the liberal wing of the court in divided rulings more than any other Republican-appointed justice during the 2018 term. But don't mistake him for a swing vote.

Court watchers say he aligns with the more liberal side of the court on only a few legal cases dealing with criminal law and tribal issues.

"He's pretty predictable," said Adam Feldman, founder of the Empirical SCOTUS blog. "It's kind of like [the late Justice Antonin] Scalia was predictable in some areas."

Justice Gorsuch accounted for four of the 10 times a justice from the conservative wing of the court crossed over to vote with Democrat-appointed justices in 5-4 decisions last year.

Chief Justice John G. Roberts Jr. sided with the liberal wing three times, and the other three Republican-appointed justices swung to the left only once.

But Justice Gorsuch's four tiebreakers didn't signal to court watchers that he is necessarily representing the bench's middle ground in all disputes.

"Gorsuch is far too conservative to be seen as a reliable swing vote for the liberals. This is clear in his method of interpretation favoring originalism," Mr. Feldman said.

"I see a blatant demarcation between a justice that swings in a few particular case areas and justices like Kennedy and O'Connor who, though conservative, would often split their votes in both directions in the court's closest decisions."

Justice Anthony M. Kennedy was considered the court's "swing vote" after Justice Sandra Day O'Connor retired in 2006, but he rejected that term.

"The cases swing; I don't," Justice Kennedy said during a 2015 appearance.

With nine justices on the high court, there has almost always been one nicknamed the "swingman" or "swing vote," which signals who could be the one to decide a tight case.

Justice Kennedy voted with the conservative bloc in 64% of cases from 2006 to 2017, a more than 10% drop after Justice O'Connor's retirement, according to a FiveThirtyEight report after his retirement last year. The legal areas where he tended to sway to the left involved civil rights, criminal law and due process.

But Justice Gorsuch tends to vote with the liberal side of the court on cases interpreting criminal statutes and tribal matters.

Josh Blackman, a professor at South Texas College of Law, said the disputes don't always "fit a neat right-left divide."

The court's 2019 docket doesn't have any tribal disputes, and there doesn't appear to be a number of criminal cases that court watchers say could lead Justice Gorsuch to cross over.

"In terms of ones that are expected to be 5-to-4 with Gorsuch as the one joining the liberals, there are two fairly high-profile criminal cases coming up in the October sitting," said Ilya Shapiro, editor of the Cato Institute's Supreme Court Review.

Mr. Shapiro said Justice Gorsuch's votes in criminal matters tend to parallel those of his predecessor, Justice Scalia, who died in 2016.

"My impression is that they're identical. And that goes for the types of criminal cases where they're with conservatives, like in death penalty cases," said Mr. Shapiro, noting that challenges to executions are different from questions of whether a law is too vague to pass constitutional scrutiny.

Advocacy groups, though, are hoping Justice Gorsuch — or another Republican-appointed justice — will align with Justice Scalia's reasoning in a prominent LGBTQ case to be heard Tuesday.

The legal battle is over the definition of "sex" under the Civil Rights Act of 1964. Advocacy groups have filed briefs trying to sway some of the Republican-appointed justices to the liberal side of the court by arguing that "sex" includes discrimination based on sexual orientation and gender identity.

Several of the briefs have turned to Justice Scalia's opinion in a unanimous ruling in a 1998 case that said Title VII protected a male employee from sexual harassment from someone of the same gender, Mr. Blackman said. The briefs say the opinion provides the Republican-appointed justices with a standard in ruling for the LGBTQ plaintiffs, who said they were fired from their jobs based on their sexual orientation or based on being transgender.

"They no doubt hope that Gorsuch will find these textualist arguments persuasive," Mr. Blackman said.