



Justice Kennedy's retirement, his legacy and what it means going forward

Joshua Barajas

June 27, 2018

Supreme Court Justice Anthony Kennedy announced Wednesday that he will be retiring from the bench after more than 30 years to spend more time with his family.

Kennedy was appointed by Ronald Reagan in 1988, but sometimes sided with the court's liberal justices and became a crucial vote on the nine-justice court on issues from gun rights to affirmative action. Kennedy wrote the majority opinion legalizing same-sex marriage in 2015. We asked experts who clerked for him, argued against him and wrote about him for their thoughts about Kennedy as a high-court justice and as a man, and what this retirement means for the court's makeup and the country.

On Kennedy as a person

Kennedy loved talking to high school and middle school students, said Michael Dorf, a professor at Cornell Law School who clerked for Kennedy during the 1991-1992 Supreme Court term. He considered that a continuation of his role on the bench. And, Dorf said, he believed that in the big cases, his job was to talk to the people. "You don't talk in legalese, you talk in broad principles," Dorf remembers him saying, adding, "He used to say to us clerks that the only authority we have comes from the reasoning in opinions. You have to justify that reasoning to lawyers, but also to the country as a whole."

Kennedy is an "exceedingly charming person," said attorney Kathleen Sullivan, a partner at Quinn Emanuel Urquhart & Sullivan, LLP who has argued in front of Kennedy before. "He is a great raconteur who can hold a room spellbound with his stories and anecdotes. He is immensely warm and curious about the people he meets and he is deeply learned. He loves to read and he loves to talk about a wide range of subjects. Above all, he exudes a remarkable sense of decency and fairness even in his personal interactions," she added.

Kennedy is also a major Shakespeare buff. In 1994, he jump-started the idea to have a Supreme Court justice preside over a mock trial in a Shakespeare production. Kennedy, himself, participated a handful of times over the years.

On Kennedy's legacy as Supreme Court justice

“Kennedy is most notable for the fact that if you were arguing before him, he kept an open mind,” said Neal Katyal, former acting solicitor general of the United States. “He was called ‘the antagonist’ for a reason. He did definitely antagonize in some of the hard cases. When arguing in front of him, you felt like if you went in and gave a good argument, he was listening carefully, and you could sway him, and that’s what all Americans want in a justice.”

He has a “passionate commitment to free speech,” Jeff Shesol, author of “Supreme Power: Franklin Roosevelt vs. the Supreme Court” said, and he has been, over time, “a kind of voice of tolerance and inclusion,” especially in regards to gay and lesbian Americans, Shesol said.

This defense of the First Amendment was evident “in the context of political or artistic expression made by students, workers, or any citizens,” Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, wrote for the libertarian think tank’s site.

“You’re replacing a center-right justice with possibly a far-right one, and that will be a battle for the ages.”

And he is also a “careful guarantor of the Constitution’s structural protections for liberty,” Shapiro wrote. “Whether federalism, the separation of powers, or any of the other ‘less sexy’ parts of constitutional design, he recognized that they were there as a means to protect and secure our liberties, not as a dry technical exercise.”

Kennedy is the “quintessential balancer” on the Supreme Court, said Muzaffar Chishti, director of the Migration Policy Institute’s office at New York University School of Law. “He has tried to be the middle person on so many issues for such a long period of time and that inevitably made him the most important person in the country for a number of years,” he added.

People also forget that the reason the marriage equality case came down the way it did is that its precursor case, the Lawrence v. Texas case on sodomy, was also Justice Kennedy’s fifth vote, Chishti said. And, without the Lawrence case, the marriage equality case would have been difficult to reach that conclusion, he added.

Kennedy has often been seen as a swing justice, and in some ways, this is accurate, in others it’s not, Dorf said. “That makes it seem mercurial, but he had principles and was predictable in ways that placed him with liberals on some issues and conservatives on others. They were generally libertarian principles.”

I think he wasn’t as sharp a questioner as some of his colleagues, but I think that was offset by a quality of open-mindedness, former Solicitor General Walter Dellinger told PBS NewsHour’s Amna Nawaz on Wednesday’s NewsHour.

On what to expect going forward

This creates an opportunity for President Trump to move the court far to the right, Katyal said. “You’re replacing a center-right justice with possibly a far-right one, and that will be a battle for the ages.”

“We’ll get another Gorsuch,” Shesol said. “We will get another predictable conservative, as predictable as they can find. [The Trump administration’s] looking for certainty in its selection.

The justices whose votes were often in question — Kennedy, O’Connor, Souter — you will not see another selection like that by a Republican president, if they can possibly help it,” he added.

On the social issues that people care about, this will be huge, Dorf said. Chief Justice John Roberts, who is to the right of Kennedy on many social issues, “becomes the center of the court, and that is likely to be true after the Senate confirms.”

All of the people on the White House list of 25 potentials could be considered more reliably conservative than Kennedy, Shapiro said, “which means that Chief Justice John Roberts will become the median justice.”