

## Kennedy has come to define Supreme Court's center

By Michael Doyle  
Sunday, July 6, 2008

WASHINGTON – Justice Anthony Kennedy vaulted from California to the Supreme Court 20 years ago, seemingly with his eyes wide open.

"In a court that often seems tightly divided, everybody is going to be looking at you," Kennedy advised the Senate Judiciary Committee at the time.

But since his unanimous confirmation in February 1988, Kennedy has learned that the spotlight can burn as well as illuminate. This year, opinions guaranteeing legal protections for Guantánamo Bay detainees and blocking the execution of those who rape children confirmed his role as the court's swing justice even as they repelled his fellow Republicans.

"What are the scariest words in constitutional law these days?" the conservative Weekly Standard magazine asked recently, before answering, "Justice Kennedy delivered the opinion of the court."

Some decisions during the recently concluded term were technical but vitally important. In *Stoneridge Investment Partners v. Scientific-Atlanta*, Kennedy cheered Wall Street with a 5-3 opinion limiting investors' ability to sue, one of the biggest business victories of the year.

Others blew past the corporate bottom line. In *Kennedy v. Louisiana*, Kennedy delivered a 5-4 decision striking down Louisiana's law permitting the execution of those who rape children younger than 12. Presidential campaign rivals Sens. Barack Obama and John McCain put aside their differences to blast Kennedy's opinion.

In *Boumediene v. Bush*, Kennedy's 5-4 opinion extended habeas corpus rights to foreign prisoners seeking to challenge their detention at Guantánamo Bay.

"It will almost certainly cause more Americans to be killed," a vehemently dissenting Justice Antonin Scalia said.

This ideological animus has shadowed Kennedy for years, and it can get personal. Critics say he's squishy and given to extravagant pronouncements. That he spuriously cites foreign laws in his opinions, most famously in a 2005 decision banning the execution of juveniles. Or that he's no Robert Bork, the acerbically brilliant jurist whose Capitol Hill crash-and-burn in 1987 set the stage for Kennedy's rise.

All the while, the 71-year-old graduate of McClatchy High School, Stanford University and Harvard Law School has come to define the Supreme Court's center. The court has decided about 1,000 cases since 1995, and Kennedy has been in the ruling majority a remarkable 91 percent of the time.

Put another way, Kennedy dissents in only about 9 percent of decided cases, data compiled by scotusblog.com show. The more conservative Justice Clarence Thomas and more liberal Justice Ruth Bader Ginsburg have dissented about twice as often.

On the court's really tough calls, the 5-4 decisions where history gets made, Kennedy has been in the majority 75 percent of the time in the past five years. The departure of centrist Justice Sandra Day O'Connor in 2005 only solidified his stature.

"If you have a hard, ideological case, it's Justice Kennedy or bust," Supreme Court litigator Tom Goldstein said. "I don't see him moving" from the center.

This centrist role seems to fit Kennedy like the Sacramento Elks Lodge pin he once wore; he can seem rather stolid, the man of the middle. That's misleading, though, because Kennedy also has a Phi Beta Kappa pin from Stanford.

And it isn't what true believers on either side expected when President Reagan promoted him from the 9th U.S. Circuit Court of Appeals. Conservatives hoped for a Bork without the baggage. Liberals typecast him as a hard-line right-winger. Both would be confounded.

**"His past opinions offer little hope to gays and lesbians challenging adverse treatment in the courts," Jeffrey Levi, the executive director of the National Gay and Lesbian Task Force, lamented during Kennedy's confirmation hearing in 1987.**

However, underscoring the dangers of Supreme Court predictions, Kennedy in 2003 wrote the opinion striking down a discriminatory Texas law banning homosexual sodomy. That opinion in *Lawrence v. Texas* set the stage for the current gay marriage debate.