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## **Alito Vote May Be Decisive In Marquee Cases This Term**

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WASHINGTON, Jan. 31 -- Justice Samuel A. Alito Jr. will have only one vote, of course, but it may be the decisive one in several of the marquee cases that will dominate the balance of the Supreme Court's term.

By the end of the term in early summer, legal analysts said, the nation will most likely have a good sense of whether Justice Alito will affirm or veer away from the direction set by his predecessor, Justice Sandra Day O'Connor, in cases involving the treatment of terror suspects and campaign finance. Justice Alito was confirmed Tuesday by a 58-to-42 vote in the Senate.

A first taste of how his legal views on abortion, a signature issue for Justice O'Connor, may differ from hers could come before the end of the year. And other issues on which Justice O'Connor was often the swing vote, including affirmative action and religion, are certain to reach the court in coming years.

"Justice O'Connor's seat is the tipping point on a range of hot-button issues that the Supreme Court confronts every year, including at least a half a dozen cases the Supreme Court is still to confront this term," said Thomas C. Goldstein, a Washington lawyer who appears frequently before the court.

In other cases, though, Justice Alito's votes will probably have only a limited impact. He is expected to join the three justices considered conservative -- Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas -- to form a voting bloc of four. Balancing that is a four-member liberal bloc made up of Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

That leaves Justice Anthony M. Kennedy as the court's new fulcrum.

"We changed from a court split 4 to 3, with two in the middle," said Richard Epstein, a law professor at the University of Chicago, referring to the dual swing votes of Justices O'Connor and Kennedy. "Now it's 4-1-4, and now it's Kennedy."

Justice Kennedy seems poised to be the court's crucial vote in cases involving gay rights, the government taking of private property and aspects of the death penalty.

There are, however, several important cases in which Justice Alito's replacement of Justice O'Connor will put him in the spotlight.

The court will soon decide, for instance, whether to hear a case concerning the constitutionality of the federal Partial-Birth Abortion Act of 2003, which would outlaw an abortion procedure. The law is quite similar to a Nebraska law struck down in 2000 by a 5-to-4 vote in *Stenberg v. Carhart*, with Justice O'Connor in the majority. Three federal appeals courts, two of them ruling on Tuesday, have held the federal law unconstitutional.

"Here, the difference between O'Connor and Alito, is widely expected to be decisive," said Erwin Chemerinsky, a law professor at Duke University. "We could get a read very soon on the difference between them on abortion."

There is no case on the horizon, however, that attacks the core holding of *Roe v. Wade*, the 1973 decision that found a constitutional right to abortion. Nor does it seem that Justice Alito would play a determinative role in such a case in any event, given what is known about the other justices' views. The court's line-up had stood at 6 to 3 in favor of fundamental abortion rights before the death of Chief Justice William H. Rehnquist and the retirement of Justice O'Connor.

Since Chief Justice Rehnquist was in the minority, his replacement by Chief Justice Roberts would not alter the balance if the new chief justice opposed abortion rights. Unless someone switches sides, then, Justice Alito could do no more than add a fourth dissenting vote.

Justice Kennedy was in the majority in *Planned Parenthood v. Casey*, a 1992 decision that affirmed *Roe's* core, but he dissented in *Stenberg*.

"The question now," said Pamela S. Karlan, a law professor at Stanford, "is, what's Kennedy's position going to be?"

Justice Alito will almost immediately begin work on two complex terrorism cases. Each revisits aspects of the trilogy of 2004 cases in which the Supreme Court, with Justice O'Connor in the majority, refused to endorse the Bush administration's broadest claim that people detained as terror suspects were not entitled to challenge their detentions in the courts.

The court is scheduled to hear arguments in March in the case of Salim Ahmed Hamdan, a Yemeni detainee at Guantanamo Bay, Cuba, who has challenged the military commissions the administration has created to try terror suspects. Chief Justice Roberts ruled against Mr. Hamdan in July as a judge on the federal appeals court in Washington, and he will not participate in the case in the Supreme Court. That makes Justice Alito's role much more prominent.

"With Roberts recused," Professor Chemerinsky said, "you have more of the possibility that Alito will have the decisive vote."

Another possibility is a 4-to-4 tie, which affirms the lower court's decision but does not establish a precedent.

After the Supreme Court agreed to hear the Hamdan case, President Bush signed into law a measure that may prohibit the court from considering it. It is not clear if the law applies retroactively and, if it does, whether it is constitutional.

The court is also considering whether to hear an appeal from Jose Padilla, an American citizen suspected of planning a terrorist attack who was held by the military for almost three years without charges. Not long after Mr. Padilla filed his appeal, the government transferred him from military custody to face criminal charges and urged the Supreme Court not to hear the appeal because it was moot.

In both the Hamdan and Padilla cases, said David A. Strauss, a law professor at the University of Chicago, there is reason to think that Justice Alito will be more sympathetic to the government's arguments than Justice O'Connor would have been.

The court will also hear arguments soon in two important election law cases, an area in which Justice O'Connor has often been at the center of the court.

In the first case, to be argued in February, the justices will consider whether Vermont's strict limits on campaign spending and contributions are constitutional.

In a 1976 case, *Buckley v. Valeo*, the Supreme Court equated money with speech and seemed to rule out any restrictions on expenditures by candidates. The court may be ready to revisit that question.

Vermont also limits contributions. Those limits -- \$400 to candidates seeking statewide office in a two-year election cycle and lower for other offices -- are the tightest in the country.

Justice O'Connor cast the deciding vote in a 2003 decision upholding curbs on the unlimited contributions to political parties known as soft money in the McCain-Feingold campaign finance law.

"My guess," said Professor Epstein of the University of Chicago, "is that on these issues, Alito will prove to be more libertarian than O'Connor."

The second election law case, concerning the 2003 Congressional redistricting plan in Texas, again finds Justice Kennedy as the likely crucial vote. He took an equivocal position in a 2004 decision on the question of whether courts may ever consider claims of political gerrymandering.

On election law issues generally, said Richard L. Hasen, who teaches the subject at Loyola Law School in Los Angeles, "switching Alito for O'Connor is likely to have profound consequences from campaign finance to the interpretation of the Voting Rights Act to the constitutionality of the Voting Rights Act itself."

Justice O'Connor was also a swing vote in many affirmative action and religion cases, and it will not be long before those issues reach the court again. When they do, Justice Alito may move in a different direction. But few legal analysts expect him to vote to undo a line of cases in which the Supreme Court in recent years has curbed Congressional authority.

"The federalism cases are unlikely to change dramatically," Professor Karlan of Stanford said, "because both O'Connor and Rehnquist were in the majority in almost every case."