

The US Supreme Court Isn't as Polarized as You Think

A more nuanced view of the totality of the court's work is necessary, especially when assessing a term where there were indeed polarizing rulings.

By **Sheldon Goldman** | September 06, 2018 THE NATIONAL LAW JOURNAL



The likely confirmation of Brett Kavanaugh after this week's judiciary hearing will only reinforce and accentuate the idea of a highly polarized U.S. Supreme Court. While the picture of the justices constantly at each others' throats makes for a good story and fodder for punditry, the evidence suggests that this is not the whole story.

To be sure, there are major differences on some issues between the more liberal and more conservative wings of the court pitting the appointees of Democratic Party presidents against those appointed by Republicans. However, a review of the totality of the court's work during its most recent term suggests a more nuanced perspective on the work of the court and the interpersonal dynamics of the justices.

An examination of the 76 decisions rendered from last term, which includes signed opinions as well as unsigned per curiam opinions and orders, reveals that the justices were unanimous in 30 of the 76 (approximately 40 percent) of its rulings. This is a big chunk of the court's work that did not demonstrate polarization. And this level of consensus is consistent with findings by political scientists Pamela Corley, Amy Steigerwalt and Artemus Ward whose study published by Stanford University Press in 2013 was aptly titled, "The Puzzle of Unanimity: Consensus on the United States Supreme Court."

Looking at only cases that raised a civil liberty claim (these tend to be the most contentious issues), the overall portrait differs from what might be expected from a deeply polarized court. According to my reading and classification of the past term, there were 40 cases in which a civil liberty claim was made. In 13 of them, the justices were unanimous. True, this is a decrease from the previous term when a majority of the civil liberties rulings were unanimously rendered. Yet even this fact is not necessarily a harbinger of things to come.

While limiting analysis to all cases in which a civil liberty claim was made, I was able to calculate the agreement scores among the justices. Specifically, for Justice Neil Gorsuch in his first full term on the court, his agreement scores with his colleagues were:

Gorsuch-Kennedy: 85 percent agreement

Gorsuch-Roberts: 82 percent agreement

Gorsuch-Alito: 82 percent agreement

Gorsuch-Thomas: 82 percent agreement

Aha, you might think, isn't this evidence polarization? But wait, look at the agreement scores with the more liberal wing of the court:

Gorsuch-Kagan: 68 percent agreement

Gorsuch-Ginsburg: 59 percent agreement

Gorsuch-Breyer: 59 percent agreement

Gorsuch-Sotomayor: 56 percent agreement

Looking at all other pairings, of course the more conservative justices tended to have higher agreement scores with each other and lower agreement scores with the more liberal justices. But the point is that most of those agreement scores were close to 50 percent agreement and rarely below 40 percent. This is far from the deeply polarized view of the court presented in the media.

Of course I do not mean to minimize the genuine differences among the justices as to the proper interpretation of the Constitution and statutes, and their policy differences on such matters as abortion and gay rights. But placed within the totality of the court's work, the significant levels of consensus demonstrated term after term underscore the fact, often lost in the punditry and blogosphere, that the Supreme Court is indeed a court of law. And that, according to the authors of the most extensive study of consensus over the past 70-plus years (Corley, Steigerwalt and Ward), "One of the central forces

driving unanimity is law.” And also, it should be noted, are the efforts of the chief justice and other justices who are motivated to reach consensus when possible.

Yes, it does matter who sits on the court as the current controversy over nominee Kavanaugh brings into bold relief. But a more nuanced view of the totality of the court’s work is necessary, especially when assessing a term where there were indeed polarizing rulings—though they occurred on a court that is not as polarized as some would have us think.

Sheldon Goldman is distinguished professor of political science at the University of Massachusetts Amherst.