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**THE SWING JUSTICE: THE FIGURE WHO SHAPES THE SUPREME COURT**

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ABSTRACT

In the closest decisions made by the Supreme Court of the United States, there is one justice whose vote shapes their ruling. This “swing justice” is the figure that determines the outcome of the ruling and is crucial to the opinion that is written on the case. It is their opinions and beliefs that have the most weight when the decision is a close one, as they are the deciding vote on the matter. While the most common justice to serve in this position is the justice at the ideological median of the Court, there are significant cases of the swing justice being a member other than that median justice. Following the theories of notable political scientists and legal scholars such as Lee Epstein, Peter Enns, and Andrew Martin, this thesis contends that in many cases the identity of the swing justice depends on the strategic legal issues at play and not ideological factors. My research has shown that rather than being the same justice who sits in the middle of the ideological spectrum, the swing justice rotates depending on the issues being discussed and the legal considerations made by each member of the Court. Thus, the same justice that is the swing justice on a case about search and seizure could normally be a staunch member of the liberal block but differs on this issue due to certain outstanding factors. This behavior goes beyond the traditional legal view of grouping justices based on ideology and instead argues an approach based in public perception, legal theories, and other non-ideological considerations. My thesis therefore supports the findings of recent legal scholars and further argues that ideology is not the only factor to consider when dealing with the Supreme Court.

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## INTRODUCTION

In 2015 the Supreme Court released a 5-4 ruling in a long-awaited and controversial decision that affected the lives of millions of Americans. Siding with the liberal block of Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer, Justice Anthony Kennedy determined that, in the case of *Obergefell v. Hodges*, the Fourteenth Amendment requires states to recognize and perform marriages for same-sex couples. A landmark ruling like many before and after it, *Obergefell* changed the way that civil rights were viewed. This was all due to the vote of one person, but what was the true implication of that vote? The power to shape the decision of the highest court in the land is something that has been studied for decades, and leading scholars have taken to calling this deciding justice the “swing” or “median” justice to represent their place as the key factor in the outcome of the case. However, there is debate over how this position came to significance, as well as what power the figure who holds it possesses over cases heard by the Court.

Two predominate theories exist as to the significance of the swing justice on the Court. One suggestion is that there is a specific justice who consistently serves in this capacity, only occasionally surrendering their position to another. This justice is believed to occupy the ‘ideological center’ of the court and is the median between the two ideological factors. The second (and less common) theory suggests that the position of median justice rotates depending on the issue being heard. So, Justice A would be the median justice on criminal procedure cases, while Justice C serves in that role for economic issues. My thesis focuses on this second theory, determining that the role of the swing justice is not a static one. Instead, the position rotates among the justices depending on what type of case they are hearing and what significant events in the world may affect the scope of their decisions.<sup>1</sup> While my research does not specifically address outside influences and issues, it does illustrate the lack of dominance that ideology can have on a decision. Not only does my research show a variance in the position of the median justice, but it also discusses how factors such as specific issue areas play a role in the decisions that a justice makes and how that could affect the ruling.<sup>2</sup> This paper analyzes the issue of ideology within the Supreme Court and lays to bed the idea that it plays the only role in determining the course of the highest court in our land.

## HOW THE COURT MAKES DECISIONS

The term “median” or “swing” justice has its roots in the mid-Twentieth century with Scottish economic and social scientist Duncan Black. He proposed a theory known as the Median Voter Theorem, which in essence states that when voters are distributed along a one-dimensional ideological spectrum, the winner will be closest in position to the median voter.<sup>3</sup> This theory has been coopted by legal scholars to explain the shift in majority opinions by one justice on the Supreme Court. The original logic behind this theory was that ideology is the main factor that could describe why a justice votes the way that they do. Specifically, scholars determined that ideology plays a significant role in the actions of the Court, starting from the

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<sup>1</sup> C. W. Clayton & H. Gillman, *Supreme Court Decision-Making new institutionalist approaches* (p. 5). Chicago: The University of Chicago Press.

<sup>2</sup> Epstein, L., & Knight, J. (2005). *The Choices Justices Make*. Washington, D.C: CQ Press.

<sup>3</sup> Black, Duncan (1948). *On the Rationale of Group Decision-making*.

moment a judge is selected to fulfill a vacancy. It is common practice for the sitting president and members of Congress who vet Supreme Court nominees to tailor their inquiries to issues of ideology in order to shift the median of the Court.<sup>4</sup> The actions of outside figures with political interests and motivations supports this theory by involving ideology in such a crucial way. Justices start their careers as nominees in a political system that is filled with partisanship and vast ideological differences, only to move into an arena that has the auspices of neutrality. The Court itself faces complications by being divided between a liberal and conservative bloc, which lends credence to the reality of the swing justice occupying an important position at the center.

Determining how the Court makes its rulings is a complex issue that has been extensively studied. Scholars vary between several theories in an attempt to explain the behavior of the justices as they make their decisions. One idea, suggested by Harold Spaeth and Jeffrey Segal, studies whether the rule of law and legal precedent play the biggest role in the minds of justices. Their study determined that this particular theory does not describe the behavior of most of the justices, leaving room for other ideas.<sup>5</sup> A later theory proposed by Tracey George and Lee Epstein suggests that there are extralegal influences that affect how the justices act. This theory goes further towards explaining judicial behavior, stating that there are sociological, psychological, and/or political motivations for each decision.<sup>6</sup> The theory of Peter Enns and Patrick Wohlfarth is closest to my contention. They argue that ideology and political motivations are less important than the strategic legal considerations being made by the swing justice.<sup>7</sup> My theory goes further, stating that there are specific issue areas that affect the vote of swing justices in addition to other extralegal influences being made on the justices.

Over the course of the modern history of the Court, which most historians agree encompasses the period from the 1940's to the present, the ideological center has been filled by several different justices. While there have been cases of important swing votes prior to the 1940's, it was only with the administrations of President Franklin Roosevelt and his successors that the Court became more politicized and developed the need for a justice to sit at the center and shape the vote of close decisions.<sup>8</sup> There is some debate over which justice held that role at a specific time, however scholars have reached consensus on certain key figures. Justices Potter Stewart, Sandra Day O'Connor, and Anthony Kennedy have all been considered swing justices on their specific courts, with academics and legal experts such as Jeffrey Rosen and Solicitor General Paul Clement referring to such justices as a "majority of one" and the key to determining how liberal or conservative each decision would be.<sup>9</sup> These justices wield enormous influence on

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<sup>4</sup> Martin, A., Quinn, K., & Epstein, L. (2005). *The Median Justice of the United States Supreme Court*. University of North Carolina Law Review.

<sup>5</sup> Segal, J., & Spaeth, H. (1996). The Influence of Stare Decisis on the Votes of United States Supreme Court Justices. *American Journal of Political Science*, 40(4), 971-1003. doi:10.2307/2111738

<sup>6</sup> George, T., & Epstein, L. (1992). On the Nature of Supreme Court Decision Making. *American Political Science Review*, 86(2), 323-337. doi:10.2307/1964223

<sup>7</sup> Enns, P. and Wohlfarth, P., (2013). *The Swing Justice*. University of Chicago, The Journal of Politics.

<sup>8</sup> Zirin, J. (2020, November 02). Beyond Court Packing: The Supreme Court is Always Political. Retrieved March 31, 2021, from <https://time.com/5906442/court-packing-election-history/>

<sup>9</sup> Enns, P. and Wohlfarth, P.

decisions that narrowly divide the Court. Not only do they cast the deciding vote on the case at hand, but they often control the scope and impact of the decision as well. The considerations that they base their decisions on, and how they choose to define the ruling, are things that I will focus on later in this essay as well.

The final consideration to consider with swing justices is to understand the complex nature of issues coming before the Court. While issues may seem strongly conservative or liberal, we have seen many situations where a liberal justice will swing to the right and vice versa. Understanding the relationships that each justice has with controversial topics is essential to determining their motivation for voting the way that they do. Without that understanding it is difficult, if not impossible, to fully understand the intricacies of Supreme Court decisions. Thus, it is important to consider what history a justice has with the topic, and then determine how it could potentially affect their decision on the case. These considerations are the majority of what sets a swing justice apart from the rest, and I intend to go into more detail on each of these reasons further on in this paper.

### WHAT IS A SWING JUSTICE?

As I mentioned earlier in this piece, a swing justice serves as the final vote on a 5-4 decision before the Supreme Court. On an ideologically divided Court, this justice serves as the center of the spectrum. This is most common on a split court with 5 liberals and 4 conservatives (or vice versa), but it could apply to any case where there is a 5-4 split on the decision. This justice is considered to be the fifth-most likely justice to join the opinion, based on ideological factors.<sup>10</sup> While they may normally be grouped with one specific side on an issue, for this case or topic they are ideologically separate from their colleagues and are considered to be the most representative of the median ideal. Enns and Wohlfarth contend that this justice is not only the most centralized of the Court, but that they are in that position due to a variety of reasons and not just ideology.<sup>11</sup> One of these concerns for swing justices is their ability to control the scope of the ruling. In cases like *Currier v. Virginia*, where Justice Anthony Kennedy issued a limiting concurring opinion, the swing justice finds themselves in a position to change the overall ruling of the Court by limiting certain aspects and expanding on others. Another is the idea that these justices rely on is that of considerations other than ideology.<sup>12</sup> Rather than focusing on the ideological concerns in the case, swing justices often rely on these other considerations while forming their opinion. Not only does this affect the creation of the written opinion, it also can change the ruling by changing the motivations of the author.

Lee Epstein makes the argument that the judge that sits in the center controls the entire ideological balance of the Court. Her case uses the example of retired Justice Sandra Day O'Connor, a well-known centrist, by stating that her turn to the left in the final years of her term shifted the entire Court in that direction as well.<sup>13</sup> This opinion has weight, especially when we consider the subsequent shift to the right that took place when Chief Justice John Roberts

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<sup>10</sup> Enns, P. and Wohlfarth, P.

<sup>11</sup> Enns, P. and Wohlfarth, P.

<sup>12</sup> Martin, A., Quinn, K., & Epstein, L.

<sup>13</sup> Martin, A., Quinn, K., & Epstein, L.

became the swing vote upon Justice Kennedy's retirement. Based on her contention, I would suggest that not only does the swing justice hold the key vote on important cases, but they also affect the ideological position of the Court as a whole. As the fifth justice to join the majority coalition (which is made up of mostly ideological justices), the swing justice affects how conservative or liberal the decision of the Court will be even without being primarily driven by ideology themselves. This makes it even more essential to be able to properly analyze their reasons for voting and correctly predict the outcomes from that point. From there I contend that not only do Enns, Wohlfarth, Epstein, and all these other scholars have it correct, but I would go further and suggest that based on their research justices do act in a predictable way depending on the topic being discussed before the Court. It is simply a matter of determining what that topic is for each one of them.

### CASE SELECTION

In order to determine whether swing justices are motivated by specific topics and not merely ideology, I have selected several areas of study. To identify areas of study I have used a collection of information titled "The Supreme Court Database", which I will henceforth refer to as the SCDB. The SCDB compiles the universe of U.S. Supreme Court decisions from the founding until the present-day, and codes decisions and justices along dozens of descriptive, identifying, and substantive variables. Put together by several distinguished experts, including the late Harold Spaeth and Lee Epstein, the SCDB contains a wealth of information that I have found useful. It also contains links to the various cases that it cites, many of which you will see referenced directly from the database in this paper.

Using the SCDB, I analyzed the ideological composition of known swing justices and selected three (who I will go into greater detail on later). I wanted to have several different cases to draw from for each justice to provide evidence for my theory and so I delved into their 5-4 decisions where they voted with the majority. For each justice, I broke down their 5-4 criminal procedure decisions between the liberal and conservative blocs. Then, I looked at every case listed on the SCDB and determined which of the different issue areas in criminal procedure appeared. For example, I discovered that Justice Potter Stewart had 20 liberal cases in criminal procedure with 11 different issue areas, but 6 out of those cases had to do with search and seizure. I did this with both the conservative and liberal decisions for all three justices and looked to see what issue areas showed up repeatedly over their terms. Once I found a topic that repeated itself often, I looked for specific cases to reference. I first determined whether the justice in question was the swing vote by looking at the names of the justices in the majority. If they are all considered to be further from the center, (i.e., more conservative or liberal) based on their Martin Quinn ideological score, than my justice I determined my justice to be the swing vote.<sup>14</sup> Similarly, if they wrote the opinion for the case, I also considered them to be the deciding vote. This narrowed down my options significantly and thus I was left with the cases analyzed below.

Going into more detail, my first step towards determining whether Supreme Court justices are influenced more by specific factors and not just ideology is determining which justices react to which causes. In order to discover this, I used the SCDB to break down all of the

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<sup>14</sup> Martin, A., & Quinn, K. (2002). Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*, 10(2), 134-153. doi:10.1093/pan/10.2.134  
<https://mqscores.lsa.umich.edu/measures.php>

5-4 rulings made since the advent of the 'modern age' of judicial influence in the mid 1940's. My reason for only including cases heard since 1945 is due to the expansion of judicial activism and political influences in the aftermath of the Roosevelt administration and the Warren Court. Both conservative and liberal justices find themselves during complex legal issues which have been, at least in part, influenced by political ideas and societal agendas.<sup>15</sup> Due to these circumstances I felt that this era would be the most likely to have the information I am searching for, as well as be the most relevant in our lives. From the breakdown of these 5-4 decisions, of which there were 1373, I have uncovered three major areas that the majority of 5-4 cases fall under: criminal procedure, civil rights, and economic activities.<sup>16</sup> Of these, criminal procedure was by far the largest, coming in at around 30% of all 5-4 rulings (about 420 cases), with civil rights and economic activities joining at approximately 16% (223 cases) and 15% (209 cases) respectively. Due to the large number of cases in this section and the inherent potential for evidence to be found, I chose to focus my efforts on the criminal procedure arena. In this area we run into disagreements over the scope of trial procedures, Fourth and Sixth Amendment rights, and issues involving evidentiary rules to name a few. Due to the heavily politicized nature of criminal trials and their effect on the populace, the effects of these rulings are incredibly important.

The next major step in gathering data is to look at the cases themselves to attempt to determine any patterns. Here the SCDB again proved useful by allowing me to search the 5-4 criminal procedure cases based on whether they had a liberal or conservative decision handed down. It also gave me the option of searching for specific justices in order to determine where their impact was the greatest. To be successful with this I first had to determine the ideological composition of the Court eras that I was studying. Without this information it would be difficult to determine who the swing justices were and how their votes truly changed the ruling of the Court. For example, I discovered that Justice Potter Stewart was a moderate during his time on the Warren Court but was usually overshadowed by the liberal majority.<sup>17</sup> His time as a true swing justice did not come to pass until years later during the Burger Court, where he played a much more influential role. Together with Justice Byron White he was known as a "swing man" who tipped the balance of court decisions.<sup>18</sup> This type of information was crucial to developing my understanding of the balance of the Supreme Court, but it also provided some clarity as to the relationships the justices have with certain topics. Many of these swing justices find themselves making influential decisions with huge potential consequences, yet they managed to do so with professionalism and a certain degree of predictability. It is this quality, among others, that has enabled me to gather my data and follow the patterns where they lead.

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<sup>15</sup> The Supreme Court and Modern Judicial Conservatism [Introduction]. (2004). T. M. Keck (Author), *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (pp. 1-2). Chicago, IL: University of Chicago Press.

<sup>16</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 18, 2021, from <http://scdb.wustl.edu/analysisOverviewIssues.php?sid=2001-TREEHOUSE-7499>

<sup>17</sup> John P. MacKenzie (December 8, 1985). "Potter Stewart is Dead at 70; Was on High Court 23 Years," NY Times

<sup>18</sup> Potter Stewart. (n.d.). Retrieved March 25, 2021, from <https://www.britannica.com/biography/Potter-Stewart>. Encyclopedia Britannica.

## THEORY TESTING

In order to test my theory, I looked at the voting records of three justices: Potter Stewart, Sandra Day O'Connor, and Anthony Kennedy. Both Stewart and Kennedy are considered to be moderates on their respective courts, particularly Stewart who faced considerable opposition between the liberal and conservative factions of the Warren Court.<sup>19</sup> O'Connor however has the unique distinction of being known as a conservative justice, but still commanding a position in the discussion of swing justices.<sup>20</sup> By observing the voting habits of these three justices, I hoped to uncover evidence that there are factors different from their ideologies that would allow me to predict with some accuracy how they would cast their votes. I intend to show that in the area of criminal procedure, these justices will find themselves being affected by the specific circumstances of cases in particular issue areas. For example, Justice Kennedy may be influenced to vote liberally in search and seizure cases, while he regularly votes conservative in right to counsel cases. In the chart below I have laid out some of the data that I have observed during my research which will help illustrate the factors I worked with as I analyzed different cases. First there is the number of years each justice served on the Supreme Court, followed by the mean ideology scores assembled by Andrew Martin and Kevin Quinn during their research on the Supreme Court.<sup>21</sup> These scores are rated with lower numbers meaning more liberal and higher numbers meaning more conservative overall. The range goes from Justice William Douglas, who averages approximately a -6, to Justice Clarence Thomas, who averages approximately a 3.<sup>22</sup> Then, I list the total number of 5-4 cases that each justice voted with the majority in and broke it down into the topic of criminal procedure. That topic was further divided into categories where the justice voted liberal or conservative, respectively. From this data I was able to draw conclusions about the issue areas within criminal procedure that interest these justices and look at what patterns emerged.

**Figure 1: BREAKDOWN OF CASE RESEARCH**

	Stewart	O'Connor	Kennedy
Years Served	23	24	30
Mean Ideology	0.4	1.01	0.68
Total Number of 5-4 Majority Decisions	194	290	347
Total Number of 5-4, Criminal Procedure	53	101	124
Total Number of Liberal 5-4, C.P. Decisions	20	16	38
Total Number of Conservative 5-4, C.P. Decisions	33	85	86

<sup>19</sup> Mackenzie, J. (December 8, 1985). *Potter Stewart is Dead at 70; Was on High Court 23 Years*. [NY Times](#)

<sup>20</sup> Greenburg, J. C. (2008). *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (pp.68). New York: Penguin USA.

<sup>21</sup> Martin, A., & Quinn, K. (2002). Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*, 10(2), 134-153. doi:10.1093/pan/10.2.134

<sup>22</sup> <sup>22</sup> Martin, A., & Quinn, K. (2002). Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*, 10(2), 134-153. doi:10.1093/pan/10.2.134



## CASE STUDIES IN CRIMINAL PROCEDURE

As I mentioned previously, I analyzed a number of cases within the topic of criminal procedure for each justice. Going into more detail, for each case that I wrote about in this paper I spent a great deal of time determining their value. First, I determined the individual issue area for each case (i.e., habeas corpus, search and seizure, etc.) and found the one that appeared the most in both the liberal and conservative bloc of 5-4 criminal procedure cases for each justice. Once I found a topic that was recurring, I looked to see whether my justice was the swing vote by determining either: a) that my justice was the least liberal (conservative) in the majority on a conservative (liberal) decision, or b) that they wrote the opinion of the court. Unless I state clearly that my justice is the author of the opinion (by saying something such as “writing for the majority” or “writing for the Court”) then it is the first qualification that applies to that case. These qualifications limited my selections down to the cases that I discuss later in this paper and explain my process in choosing them to be examples of my theory.

Justice Potter Stewart played a different role than his two colleagues on the Court. While all three are considered swing justices, Stewart was more balanced than O’Connor and Kennedy, being in the majority of 194 separate 5-4 decisions over his career, with 55 liberal cases and 139 conservative cases.<sup>23</sup> Often, I found him to switch between the liberal and conservative positions without any real reason as to why he did so. I did however discover some patterns in his work where his vote made the key difference. Starting first with his conservative position and then moving to the liberal, I noticed several issue areas within the topic of criminal procedure that sparked his interest and drew him to one side or the other. Over the course of his tenure on the Supreme Court, Justice Stewart was part of 53 criminal procedure cases where the decision was split 5-4.<sup>24</sup> Of those cases, 33 were ruled in a conservative direction and 20 were more liberal. I observed that those 33 conservative cases were then divided into ten different issue areas, but the area that interested Justice Stewart the most were cases having to do with search and seizure. Out of these 33 cases, eight of them had to do with search and seizure issues that had been brought before the Court. Cases such as *Frank v. Maryland*, *Abel v. United States*, and *United States v. White* all serve as examples of Justice Potter Stewart’s interest and agreement with the conservative argument regarding search and seizure.<sup>25</sup> Upon analyzing these cases further I found my theory to be proven again; Justice Stewart appears to be persuaded by the conservative argument when confronted with search and seizure cases. He is also like his colleagues in that he does not only follow the conservative view of search and seizure cases. Instead, his decision is made based on the facts of the case and what the overall impact of the ruling will be, thus he will be persuaded by the liberal arguments as well (which I discuss later). The following three cases are only a handful of examples, but they do clearly illustrate the pattern that I followed while sifting through this data.

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<sup>23</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 31, 2021, from <http://scdb.wustl.edu/analysisOverview.php>

<sup>24</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 31, 2021, from <http://scdb.wustl.edu/analysisOverview.php>

<sup>25</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 31, 2021, from <http://scdb.wustl.edu/analysisCaseListing.php?sid=2001-LADYBUG-2253&pg=0>

In the case *Frank v. Maryland*, we read about the defendant refusing to allow access into his home to city health inspectors who were investigating administrative code violations. The Court then determined that because the inspectors were not engaged in a criminal investigation, they were not to be held to the same standard. Justice Stewart's vote decided that the Fourth Amendment did not apply in this case and thus the inspectors had a duty to the public to fulfill their responsibilities.<sup>26</sup> In this case the Court ruled that the safety of the public was of bigger concern than the privacy of the defendant in their own home, and as I found in other instances Justice Stewart favors an explanation that restricts certain aspects of the right to privacy as it pertains in criminal investigations.

We see another example of a strong ruling that limits privacy in the case of *Abel v. United States*. In this scenario, Abel was suspected of being a Soviet spy and being in the US illegally. He was arrested by ICE and searched, but in the process, ICE discovered evidence of espionage and turned it over to the FBI for investigation. His attorneys argued that it was a violation of the Fourth Amendment for the FBI to prosecute him based on evidence obtained in an unrelated search. But Justice Stewart and his colleagues determined that not only was that incorrect, but it was appropriate for ICE and the FBI to share information since they are sister investigative agencies within the Justice Department.<sup>27</sup> The Court, with Potter Stewart's swing vote, allowed for the regression of privacy rights under the Fourth Amendment with a compelling public interest (in this case espionage).

*United States v. White* is the final example I will use to illustrate the pattern of Stewart deciding search and seizure cases on their merits as a conservative vote, rather than as an ideological statement. In this case, the Court decided the question of whether recording devices worn by informants required the same level of permission (i.e., warrants) as other invasive searches. Justice Stewart and his colleagues determined that since informants have the freedom to recount the details of a conversation to police without a warrant, there is no reasonable justification to change the standard for recording devices worn by the informant themselves.<sup>28</sup> We see that the Court limits expectations of privacy when there are other people present during the act of committing illegal activities. Thus, the facts of each of these cases plays the most important role for Justice Potter Stewart. As I will discuss shortly, he swaps his votes in cases of search and seizure and in these situations finds himself as the deciding vote between the conservative and liberal factions.

Justice Stewart's liberal votes share a pattern with his conservative opinions in these criminal procedure cases. There were 20 liberal cases that were 5-4 decisions in his time on the Court, and of those cases 6 of them involved search and seizure issues.<sup>29</sup> This further illustrates

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<sup>26</sup> Frankfurter, F. (1959, May 4). *Frank v. Maryland*. Retrieved from <https://www.courtlistener.com/opinion/105880/frank-v-maryland/>

<sup>27</sup> Frankfurter, F. (1960, March 28). *Abel v. United States*. Retrieved from <https://www.courtlistener.com/opinion/106021/abel-v-united-states/>

<sup>28</sup> White, B. (1971, April 5). *United States v. White*. Retrieved from <https://www.courtlistener.com/opinion/108304/united-states-v-white/>

<sup>29</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved April 01, 2021, from <http://scdb.wustl.edu/analysisCaseListing.php?sid=2001-FLIPFLOP-7576&pg=0>

my theory which states that some swing justices switch their positions based entirely on the facts of the case before them. In the following cases, Justice Stewart found himself more persuaded by the liberal position after hearing the arguments and specific circumstances that made up the case. *Elkins v. United States*, *Coolidge v. New Hampshire*, and *Gelbard v. United States* are all examples of this perspective that help prove my theory of the swapping of swing justice ideologies on specific cases.

Looking at *Elkins v. United States* as our first example, we see a case of search and seizure which fully overturned precedent in the federal court system. In this case, the defendant was arrested after state police found evidence of illegal wiretapping in his home after searching it on another warrant. Federal authorities had long used state agencies to get around certain warrant requirements in a method known as the “silver platter”, and thus Elkins was convicted in federal court.<sup>30</sup> His appeal led the Supreme Court to determine that any actions that were prohibited from taking place under the Fourth Amendment by federal authorities could not be done by state authorities as a middleman. Writing for the majority (and as a key swing vote), we see Justice Stewart’s opinion as eviscerating the “silver platter” doctrine and witness a clear order strengthening the purpose of the exclusionary rule of evidence in court.<sup>31</sup> This case is a prominent example of Justice Potter Stewart’s equivocation on search and seizure issues.

Moving on to the next example in *Coolidge v. New Hampshire*, we see a different issue at stake within the realm of search and seizure. In this instance, Justice Potter Stewart and his colleagues are faced with a complicated case of kidnapping and murder. The suspect (Coolidge) was readily identified by a police investigation run by the state Attorney General. Upon locating the suspect’s vehicle, police requested a search warrant for the car, which was provided by the Attorney General in his role as a justice of the peace. Coolidge was arrested and convicted of the crime, but the Supreme Court determined that his conviction was made in error.<sup>32</sup> Justice Stewart wrote for the Court, saying that the prosecution and the police had failed by using an unbiased magistrate to authorize the warrant. Additionally, he determined that none of the other justifications that the police used for seizing his car and the evidence within it were permissible under the Fourth Amendment.<sup>33</sup> It is important to note in this case that Justice Stewart focused heavily on the automobile exception to the search and seizure protection, even going so far as to chastise officers for being too quick to apply this exception whenever a vehicle was of interest, regardless of the totality of the circumstances.

The final example I will use regarding Justice Stewart’s role as the swing justice is *Gelbard v. United States*. This case involved the use of wiretapping against several different defendants. When called to testify before the grand jury about the conversations on these tapes,

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<sup>30</sup> Stewart, P. (1960, June 27). *Elkins v. United States*. Retrieved from <https://www.courtlistener.com/opinion/106107/elkins-v-united-states/>

<sup>31</sup> Stewart, P. (1960, June 27). *Elkins v. United States*. Retrieved from <https://www.courtlistener.com/opinion/106107/elkins-v-united-states/>

<sup>32</sup> Stewart, P. (1971, June 21). *Coolidge v. New Hampshire*. Retrieved from <https://www.courtlistener.com/opinion/108377/coolidge-v-new-hampshire/>

<sup>33</sup> Stewart, P. (1971, June 21). *Coolidge v. New Hampshire*. Retrieved from <https://www.courtlistener.com/opinion/108377/coolidge-v-new-hampshire/>

they refused to do so on the grounds that the wiretaps were illegal. The Court determined that the defendants were correct in their assertions. Justice Stewart and his colleagues on the liberal wing of the Court stated that the federal law prohibiting wiretapping also prohibited the grand jury from asking questions and compelling answers from witness based on information that was illegally obtained.<sup>34</sup> This is an interesting contrast to an earlier case we discussed, *Elkins v. United States*, where Justice Stewart ruled in favor of the prosecution in a federal wiretapping case. We see that even in cases with similar issues, the specific facts are different enough that Justice Stewart swung from the conservative to the liberal wing.

While looking at Justice O'Connor, there is an interesting group of cases that show how her vote swings. She votes with the majority in a total of 290 separate 5-4 cases, and among those there are 101 cases within the topic of criminal procedure that we are studying. Justice Sandra Day O'Connor is the most conservative of the swing justices I researched, with the vast majority of cases I looked at involving her being a part of that faction. In the area of criminal procedure, she has 85 cases where she voted with the conservative bloc and only 16 where she sided with the liberals.<sup>35</sup> Due to the majority of these cases being conservative, I chosen to focus exclusively on her 16 liberal cases to determine what made her switch positions, and within these 16 cases a pattern emerged. There are ten different issue areas discussed by the Court among these criminal procedure cases (including cruel and unusual punishment, right to counsel, double jeopardy, and sentencing guidelines), but the most common issue area of habeas corpus has three cases within it.<sup>36</sup> The cases of *Lonchar v. Thomas*, *Lindh v. Murphy*, and *Carey v. Saffold* all highlight the presence of specific qualifications regarding notice of intent to appeal and file motions before the court. Due to the existence of these three cases and the pattern that they show, it seems reasonable to conclude that Justice Sandra Day O'Connor finds herself swayed by the liberal argument and facts of these cases more often regarding habeas corpus than with other issue areas. This illustrates part of my theory regarding the specific circumstances of the cases, as Justice O'Connor's opinion varies with habeas corpus cases depending on the facts and issues being heard.

The case of *Carey v. Saffold* represents a crucial juncture of the timeliness of appeals and what can be considered acceptable under the guidelines for pending motions before the court system. In this case, Justice O'Connor cast the deciding vote in determining that not only was the petitioner (Saffold) correct in continuing to file for his motions before the court but it would be unlawful to establish a national standard that restricts defendants from exhausting their right to appeal.<sup>37</sup> Appeals are complicated by nature, but this case and the ones yet to be discussed all deal with the fairly simple idea that they must be allowed to play out unless there is a statutory prohibition in place that prevents them from doing so.

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<sup>34</sup> Brennan, W. (1972, June 26). *Gelbard v. United States*. Retrieved from <https://www.oyez.org/cases/1971/71-110>

<sup>35</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 24, 2021, from <http://scdb.wustl.edu/analysisCaseListing.php?sid=2001-JUMPBALL-9950>

<sup>36</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved March 24, 2021, from <http://scdb.wustl.edu/analysisCaseListing.php?sid=2001-TRIPWIRE-3220>

<sup>37</sup> Breyer, S. (2002, June 17). *Carey v. Saffold*. Retrieved from <https://www.law.cornell.edu/supct/html/01-301.ZS.html>

Both the cases of *Lindh v. Murphy* and *Lonchar v. Thomas* also supported my theory regarding Sandra Day O'Connor's reaction to habeas corpus cases. In *Lindh* we see the case of a man convicted of murder who was denied the right to confront his accuser at trial. During the course of his appeals to rectify the issue, Congress passed a law changing the requirements of habeas corpus that would affect the legality of his request. Justice O'Connor cast the deciding vote in determining that it would be unfair to apply statutory limits onto cases that were already in the process of being heard, since the standards were not in place at the beginning of the case and the defendant might have acted differently had they known that a modification was imminent.<sup>38</sup> This vote illustrates O'Connor's belief in making requirements for appeals equal and showcases a liberal regard for fairness at all levels of incarceration.

In *Lonchar v. Thomas*, we see another example of an inmate being treated in a less favorable way that Justice O'Connor took exception to. In this case, the defendant was convicted of murder and declined to appeal, but shortly before his execution nine years later he filed a habeas petition with the district court. The legal standard at the time was that since the defendant had not previously filed a petition his argument had to be heard and the execution must be delayed unless there was a compelling argument to dismiss. The appeals court determined there was and dismissed the case while allowing the execution to proceed, but while doing so failed to follow the standards set out to govern this type of scenario. The Supreme Court then held that the Court of Appeals had violated the defendant's rights, and due to the swing vote of Justice O'Connor ordered the petition to be fully heard.<sup>39</sup> All three of these cases illustrate Sandra Day O'Connor's belief in the importance of the judicial process and, in particular, the writ of habeas corpus. It is this strong belief that led her to move away from her usual conservative position slightly right of the center and embrace a more liberal view in order to protect the rights of defendants as they are being placed on trial before the courts.

The third justice, and last traditional swing justice, that I wish to discuss here is Justice Anthony Kennedy. During his career on the Court, Justice Kennedy sat with the majority on 347 different 5-4 cases, with 98 liberal decisions and 249 conservative decisions. He is by far the justice that ruled with the majority the most in 5-4 criminal procedure decisions, with 124 such cases being decided during his tenure.<sup>40</sup> Despite this large number of 5-4 decisions, Justice Kennedy falls more into line with his colleague Sandra Day O'Connor than he does with Potter Stewart due to his larger number of conservative rulings. There are a total of 86 conservative opinions among these cases, with only 38 liberal rulings being decided during the same period.<sup>41</sup> Within the bloc of conservative cases that were decided during this period, Justice Kennedy appears to have a particular interest in cases involving habeas corpus and search and seizures.

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<sup>38</sup> Souter, D. (1997, June 23). *Lindh v. Murphy*. Retrieved from <https://www.courtlistener.com/opinion/118135/lindh-v-murphy/>

<sup>39</sup> Breyer, S. (1996, April 1). *Lonchar v. Thomas*. Retrieved from <https://www.oyez.org/cases/1995/95-5015#!>

<sup>40</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved April 01, 2021, from <http://scdb.wustl.edu/analysisOverview.php>

<sup>41</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved April 01, 2021, from <http://scdb.wustl.edu/analysisOverview.php>

Between these two interest areas, 31 cases out of the 86 are covered.<sup>42</sup> From this collection of cases I have selected four examples to illustrate Justice Kennedy's position as the median vote on the Court: *Lawrence v. Florida*, *Herring v. United States*, *Florence v. Board of Chosen Freeholders*, and *Davila v. Davis*.

The first two cases that I will discuss, *Lawrence* and *Davila*, involve issues of habeas corpus. *Lawrence* discussed issues that were caused by a misinterpretation of federal death penalty regulations. In this case, Justice Kennedy and his conservative colleagues determined that the one-year timeline established by the federal statute includes any time spent waiting for the Supreme Court to decide to hear the case.<sup>43</sup> Additionally, the arguments made by the defendant arguing that he was faced with extraordinary circumstances were found to be lacking by the Court. Justice Kennedy's swing vote created the guideline for extraordinary circumstances regarding the death penalty and removed the ambiguity that was present in a plain reading of the federal statute.

*Davila v. Davis* is the second case involving habeas corpus and Justice Kennedy that I wish to highlight. In this situation, the petitioner alleged that he had received ineffective assistance of counsel during his appeals process, and according to Supreme Court precedent that allowed for relief in similar trial circumstances, he was within his rights to request such relief for himself. Justice Kennedy and his colleagues felt differently, with the Court determining that in absence of a severe constitutional violation the state courts were within their rights to deny such relief.<sup>44</sup> Through Kennedy's swing vote, the Court ruled that ineffective assistance of appellate counsel is not of the same level of seriousness as it would be in the first instance of criminal proceedings, and thus it does not qualify under the precedent set forth by the Court.

Moving on to the second area of interest within Kennedy's conservative cases, I have chosen an additional set of examples to showcase the pattern of his actions in search and seizure cases. Both *Herring v. United States* and *Florence v. Board of Chosen Freeholders* are clear samples of Justice Kennedy's opinion swinging to the right in this area. Starting with *Herring*, we see a case where police arrested the defendant due to a warrant that was out from another county, which was supposed to be cancelled. However, upon the arrest the police found large amounts of methamphetamine and a gun in their vehicle. The defendant claimed that the search was illegal due to the failure to recall the warrant, but the Supreme Court disagreed. Kennedy and his conservative colleagues ruled that the police acted in good faith as they had no way of knowing the warrant was invalid and that it was an isolated incident.<sup>45</sup> They conceded that any repeat issues would warrant further consideration but determined that this case did not require such discussion.

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<sup>42</sup> Epstein, L., & Spaeth, H. (n.d.). The Supreme Court Database. Retrieved April 01, 2021, from <http://scdb.wustl.edu/analysisCaseListing.php?sid=2001-TWODOOR-6275&pg=0>

<sup>43</sup> Thomas, C. (2007, February 20). *Lawrence v. Florida*. Retrieved from <https://www.courtlistener.com/opinion/145759/lawrence-v-florida/>

<sup>44</sup> Thomas, C. (2017, June 26). *Davila v. Davis*. Retrieved from <https://www.oyez.org/cases/2016/16-6219>

<sup>45</sup> Roberts, J., Jr. (2009, January 14). *Herring v. United States*. Retrieved from <https://www.oyez.org/cases/2008/07-513>

The final case in Kennedy's search and seizure section, and in his bloc of conservative case examples, is *Florence v. Board of Chosen Freeholders*. In this situation the defendant had been strip searched twice in a week after being arrested for a minor violation. He argued that the jails had violated his rights by searching him when he had not committed a major crime. Writing for the majority, Justice Kennedy argued that jails have a near absolute right to search incoming prisoners in order to protect their staff and prisoners, as well as to prevent the entrance of any illicit materials.<sup>46</sup> In this case the justices acknowledged the potential for exceptions, but Kennedy and his colleagues suggested they would be limited to specific circumstances as needed.

What I have presented so far shows that Justice Kennedy, unlike his colleagues O'Connor and Stewart, does not appear to shift as much depending on the facts of the case. In his swing decisions it seems as though he follows certain patterns depending on the topic. As I move into discussing his liberal bloc of cases, that observation receives even more evidence to support it. The liberal bloc of cases is much smaller than the conservative bloc, and thus there is only one topic that I intend to discuss. Out of 11 cases within the liberal bloc, there are 9 that fall into the scope of cruel and unusual punishment. This appears to support my theory that Justice Kennedy focuses his swing opinions on issue areas and not specific cases. I have three examples of cases to showcase Kennedy's perspective on this topic, which are *Smith v. Texas*, *Panetti v. Quarterman*, and *Kennedy v. Louisiana*. Looking first at *Smith*, we see the Court discuss the issue of an unconstitutional jury instruction being given during a trial where the defendant was sentenced to death. Since the defendant did not object to the instruction during the trial and only did so on appeal, the appeals court determined that there had to be egregious harm done in order to overturn the verdict.<sup>47</sup> Writing for the liberal majority, Justice Kennedy determined that this was not the case. He stated that the jury instructions did not sufficiently consider the defendant's case, to the point that there could be no remedy other than a new trial.<sup>48</sup> In this scenario we see the beginnings of a clear argument that Kennedy views the death penalty as something that must be ordered with complete legality and absolutely no doubt.

The second case I am using is *Panetti*. In this case there is a disagreement over whether a mentally ill inmate can be executed if they understand the stated reasons for their death but fail to understand the rationale behind it. Justice Kennedy wrote a complex opinion for the Court that suggested that more psychological study and evidence was needed to allow for an execution. He argued that the lower courts had incorrectly applied precedent and had mistaken a stated confirmation of understanding by the defendant for evidence of actual understanding.<sup>49</sup> In absence of strong psychological evidence to the contrary, Kennedy maintained a similar

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<sup>46</sup> Kennedy, A. (2012, April 2). *Florence v. Board of Chosen Freeholders of County of Burlington*. Retrieved from <https://www.courtlistener.com/opinion/626454/florence-v-board-of-chosen-freeholders-of-county-of-burlington/>

<sup>47</sup> Kennedy, A. (2007, April 25). *Smith v. Texas*. Retrieved from <https://www.courtlistener.com/opinion/145740/smith-v-texas/>

<sup>48</sup> Kennedy, A. (2007, April 25). *Smith v. Texas*. Retrieved from <https://www.courtlistener.com/opinion/145740/smith-v-texas/>

<sup>49</sup> Kennedy, A. (2007, June 28). *Panetti v. Quarterman*. Retrieved from <https://www.courtlistener.com/opinion/145700/panetti-v-quarterman/>

perspective as with *Smith*; namely that there must be no doubt or lack of understanding in order for the death penalty to be carried out within the requirements of the Eighth Amendment.

The final example I have chosen that showcases Anthony Kennedy's role as a swing justice is *Kennedy v. Louisiana*. This case was particularly important as it dealt with the death penalty's use as a punishment for crimes other than murder. In this particular case, the defendant raped a young child and was sentenced to death in trial court. His appeal rested on the fact that the Supreme Court had previously held the death penalty to be unconstitutional in adult rape cases, and as there was no national consensus on the issue there could be no reasonable change to that standard.<sup>50</sup> Writing for the liberal majority, Justice Kennedy agreed. He determined that the Eighth Amendment prohibited the use of the death penalty in this case as it was cruel and unusual, and since there was no national consensus on the issue the Court could not in good conscience change the standard.<sup>51</sup> Based on the actions of Justice Kennedy in these three examples, my theory has proven to accurately describe his behavior. He follows a pattern with regards to both liberal cruel and unusual punishment and conservative habeas corpus and search and seizure cases of voting on the issue areas and individual circumstances of the cases, rather than giving more weight to an ideological argument.

### CONCLUSION

The research that I have conducted here has shown support for my theory in the area of criminal law. I have looked at multiple justices (Sandra Day O'Connor, Potter Stewart, and Anthony Kennedy), each of whom served as swing justices in the cases I analyzed, and determined a pattern based on the topics and specific facts of each case. From this I was able to ascertain that ideology was not the driving factor when looking at the positions of swing justices. Justices Sandra Day O'Connor and Potter Stewart swapped their positions depending on the topic being discussed. Both justices found themselves relying on the specific facts of the cases being presented instead of ideological arguments, and often moved freely between the liberal and conservative blocs depending on the issue at hand and the circumstances of the case (although O'Connor did this less frequently). Anthony Kennedy behaved a way that is almost identical to the other piece of my theory; he shifts between the liberal and conservative blocs depending on the topic under discussion. My data has shown that Enns' and Epstein's theories are both correct, but it also has shown that it is possible to determine these "trigger topics" for swing justices and thus make some predictions on their behavior. Ideology is an important factor in these discussions, but as I have shown it is not the only factor.

Ideology is certainly an important predictor of judicial decision-making, but as shown above, my theory presents a more complete picture and helps to address gaps in the ideological argument being presented by legal scholars. It is impossible to truly know what these justices will do before they do it, but I believe my theory provides a good snapshot of their behavior and can potentially give predictions to the outside community as they attempt to determine the decisions of the Supreme Court. Additionally, while these justices have all since died or retired, it would be a simple matter to adapt this method to the justices currently sitting on the Court in

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<sup>50</sup> Kennedy, A. (2008, June 25). *Kennedy v. Louisiana*. Retrieved from <https://www.courtlistener.com/opinion/145950/kennedy-v-louisiana/>

<sup>51</sup> Kennedy, A. (2008, June 25). *Kennedy v. Louisiana*. Retrieved from <https://www.courtlistener.com/opinion/145950/kennedy-v-louisiana/>



order to predict their actions. There are limitations in that I can only predict decisions that are controversial and thus likely to be 5-4, but it still provides a benefit by allowing the behavior of the most prominent legal minds in our country to be analyzed and predicted.