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## Ironic Justice – The Reagan and Bush Appointments to the Supreme Court – Five Degrees of Separation

by

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# Ironic Justice -- The Reagan and Bush Appointments to the Supreme Court -- Five Degrees of Separation

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**Walter E. Joyce, Ph.D.**

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## INTRODUCTION

Writing to his good friend, Senator Henry Cabot Lodge of Massachusetts, President Theodore Roosevelt wrote of his frustration with his recent appointment to the Supreme Court, Oliver Wendell Holmes, whom Lodge had championed..."Nothing has been so strongly borne in on me concerning lawyers on the bench as that the nominal politics of the man has nothing to do with his actions on the bench. His real politics are all important. From his antecedents, Holmes should have been an ideal man on the bench. As a matter of fact he has been a bitter disappointment".[1] Roosevelt had been particularly incensed with Holmes' vote in the Northern Securities case where he dissented from the five-man majority upholding the administration's action to enjoin a merger of competing railroads under the Sherman Act.[2] Roosevelt's concern was echoed years later by Dwight Eisenhower who said to retiring Justice Burton in 1958: "I have made two mistakes and they are both sitting on the Court" referring to Earl Warren and William Brennan.[3] Eisenhower was angered by Warren's and Brennan's votes in the so-called national security cases as well as their emerging liberal voting record. An even harsher indictment of an appointment was President Truman's comment regarding Tom Clark, who was in the majority in overturning Truman's seizure of the steel mills during the Korean War. Truman said to the author Merl Miller, "putting that damn fool from Texas on the Supreme Court was the biggest mistake I made as President."[4] Presidential frustration has often been accompanied by Congress showing its political distaste or approval of judicial decisions or the stature of the Court by enlarging or decreasing the size of the Court several times from 1801-1869 and in defeating President Roosevelt's 1937 plan to again enlarge the size of the Court. To this has been added populist and political attacks on the concept of life tenure.[5] Throughout the history of the Republic the independence of the Court has had political repercussions within and without the polity. Yet at the heart of the Constitutional scheme was the separation of powers doctrine and an independent Supreme Court.

## THE ASSURANCE OF INDEPENDENCE

The Constitutional Convention spent little time debating Article III on the Judiciary.[6] The debates indicate that to those interested in the Judiciary "the only serious objection to the proposed Article III was that to inferior courts which some saw as an encroachment upon the States."[7] Two provisions of Article III ensured the independence of the Supreme Court -- lifetime tenure and a guarantee against reduction of compensation. And it is this constitutional support of judicial independence that has provoked and frustrated Presidents and supporters of successful appointments to the Bench. This despite Hamilton's not too prophetic statement that the judiciary is the least dangerous branch. "The Judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can

take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements."[8] Life tenure was rationalized by Hamilton and others as a safeguard from a temporary majority and a duplication of such a provision in state constitutions.[9] The independence of the judiciary, said Madison in the First Congress, assured us of it being "in a peculiar manner the guardian" of the rights of the people.[10]

This paper examines the record of the five appointments of Presidents Reagan and Bush -- O'Connor, Scalia, Kennedy, Souter, and Thomas to demonstrate that these Justices have not formed a constant voting bloc. This notwithstanding careful and extensive coaching and briefing by members of the Presidents' staffs, plus probing and detailed examinations of them by the Senate Committee, compounded by the extensive and expensive support of outside groups and the promise of Republican platforms and Presidents to reform the Supreme Court and reverse its trend of decisions.[11] The intensity of feelings aroused by the Reagan and Bush nominations produced a polarization that created unrealistic expectations of alignment and agreement by these Justices -- expectations that have not been fully realized.

## THE CASE

What particularly shocked the conservative community and other observers was the division among the five justices in the case Planned Parenthood v. Casey 112 Sup. Ct. 2791 in the 1992-93 term. At issue there was a Pennsylvania statute restricting a woman's access to an abortion with requirements of counseling, parental and spousal notification, a twenty-four hour waiting period as well as hospital reporting procedures. Scalia and Thomas joined Rehnquist and White in dissent, upholding all restrictions and urging the overruling of Roe v. Wade 410 U.S. 113. O'Connor, Souter, and Kennedy in an opinion for the Court[12] rejected some of the statute's requirements but specifically affirmed the "central holding" in Roe v. Wade and refused to follow the Scalia/Thomas philosophy. They affirmed:

1. The right of the woman to obtain an abortion before viability without undue influence from the state; that before viability the state's interest is not strong enough to prohibit abortion or to establish a substantial obstacle to that right. The three justices reiterated O'Connor's previously stated test that there must not be an undue burden on the substantial liberty interests of the woman.

2. The state has an interest after viability providing laws respect a woman's life or health.

3. The state has an interest in protecting the health of the woman and the life of the fetus that may become a child.

This defense of Roe, pointedly omitting the trimester test, was based on society's need to rely on and trust legal precedent. Here was the essential difference between the dissenters and the Court's opinion. Stare decisis was important to enable the community to have a sense of confidence in the stability of law. Thus the only time stare decisis should not be followed is when the precedent's rule has been found unworkable or the facts have so changed "as to have robbed the old rule of significant application or justification. ...the overruling must not lead to serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule."[13] To simply overrule Roe on doctrinal grounds would destabilize a society that has lived with and relied upon Roe, whether it be good or bad law, for twenty years. "A decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[14]

In his biting, sarcastic dissenting opinion with which Thomas and others concurred, Scalia scoffed at the joint opinion for the court. "The Court's reliance upon stare decisis can best be described as contrived... It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version."[15]

## FIVE DEGREES OF SEPARATION

If we examine the voting records of the five justices, the voting alignments in Planned Parenthood should come as no great surprise. The justices have served together for two terms, 1991 and 1992. The longest serving is O'Connor who was named in 1981, followed by Scalia in 1986, Kennedy in 1987, and Souter in 1990. Thomas was appointed as successor to Thurgood Marshall in 1991. I have arbitrarily chosen to examine the voting patterns since Souter's appointment in 1990. This examination does not distinguish cases as to topic or significance. Concurring opinions are considered in agreement. It is an overall view of the general areas of consistency of accord in a Court that can fairly be described as conservative compared to its predecessors.

## 1990 Term

### Percentage of Agreement Among the Justices

| | O'Connor | Scalia | Kennedy | Souter |
|---|---|---|---|---|
| O'Connor | -- | 69 | 85 | 89 |
| Scalia | 69 | -- | 72 | 71 |
| Kennedy | 85 | 72 | -- | 84 |
| Souter | 88 | 71 | 84 | -- |

### Dissenting Opinions

| | |
|---|---|
| O'Connor | 13 |
| Scalia | 23 |
| Kennedy | 16 |
| Souter | 8 |

## 1991 Term

| | O'Connor | Scalia | Kennedy | Souter | Thomas |
|---|---|---|---|---|---|
| O'Connor | -- | 54 | 63 | 67 | 60 |
| Scalia | 54 | -- | 62 | 61 | 85 |
| Kennedy | 63 | 62 | -- | 74 | 60 |
| Souter | 67 | 61 | 74 | -- | 66 |
| Thomas | 60 | 85 | 60 | 66 | -- |

### Dissenting Opinions

| | |
|---|---|
| O'Connor | 19 |
| Scalia | 26 |
| Kennedy | 12 |
| Souter | 8 |
| Thomas | 24 |

1992 Term

| | O'Connor | Scalia | Kennedy | Souter | Thomas |
|---|---|---|---|---|---|
| O'Connor | -- | 69 | 73 | 70 | 74 |
| Scalia | 69 | -- | 82 | 74 | 86 |
| Kennedy | 73 | 82 | -- | 75 | 83 |
| Souter | 70 | 74 | 75 | -- | 68 |
| Thomas | 74 | 86 | 83 | 68 | -- |

Dissenting Opinions

| | |
|---|---|
| O'Connor | 19 |
| Scalia | 8 |
| Kennedy | 7 |
| Souter | 22 |
| Thomas | 12 |

From the above certain generalizations can be made:

1. The group can be said to be divided three ways -- O'Connor and Souter, Scalia and Thomas, with Kennedy back and forth.

2. Thomas and Scalia form a fairly solid voting bloc joined only occasionally by Kennedy.

3. O'Connor votes least with Scalia.

4. Souter's dissents have tripled. He and O'Connor are emerging as separate from the others and appear more independent. They are the only ones who agree with the others 74 percent of the time at most.

5. Kennedy's dissents have been reduced by 50 percent indicating a "swing vote" and he is in fairly consistent agreement with the Chief Justice and to some extent Scalia and Thomas.

6. As recently as 1986, O'Connor voted with Chief Justice Rehnquist, an acknowledged leader of the conservative wing, 86 percent of the time. That has decreased to 76 percent and her dissents have gone from 13 to 19.

7. O'Connor and Souter and to some extent Kennedy do not vote with any colleague 80 percent or more, indicating a moderate approach alignment.

8. It should not be assumed that the moderation of O'Connor and Souter in any way detracts from the overall conservatism of these Justices. It should be noted that they agreed with Rehnquist over 70 percent of the time in the last term of the Court, albeit to a lesser degree than the others. Any thought of a break from their basic conservatism must be tempered by the fact that they agree far less with the more so-called liberal Blackmun and Stevens. There the 1992 figures show a consistency in the division discussed in #1 above. Thus, we find the following for the most recent term of the Court:

| | Blackmun | Stevens |
|---|---|---|
| O'Connor | 61 | 54 |
| Scalia | 47 | 47 |
| Kennedy | 60 | 55 |
| Souter | 62 | 58 |
| Thomas | 51 | 46 |

It is interesting to note here how even more extreme is the difference between Scalia and Thomas and the other three Justices.

9. If we were to label the distinctions in judicial philosophy, the O'Connor/Souter approach would seem to be pragmatic, while Scalia and Thomas are the more ideological. The difference, however, is not as clear cut as the fissure that developed among the appointments of President Franklin Roosevelt when Hugo Black and Felix Frankfurter led the so-called "judicial activist" and "judicial restraint" schools, terms originally applied by Arthur Schlesinger, Jr., in 1947.[17] Not only are the distinctions less clear cut at this time but, except perhaps for Scalia, intellectual leadership comparable to those earlier giants is not yet there on the present Court. A distinguished historian of the Court has compared the Court's opinion in the Pennsylvania case to the judicial philosophy of the distinguished conservative of the Warren Court, John Marshall Harlan, indicating that O'Connor, Souter, and perhaps Kennedy are heirs to his mantle, while Scalia and Thomas are far too radical. "The three Justices wrote a joint opinion that might have been written by Justice Harlan himself...the rule of law requires a respect of precedent... Respect for the Courts, Harlan wrote to another Justice, is not something that can be achieved by fiat."[18]

10. It remains to be seen, of course, what influence Justice Ginsburg, a moderate on the Court of Appeals, will have on the Rehnquist Court. It seems highly unlikely that she will feel philosophically comfortable with Scalia and Thomas (with both of whom she served on the Appeals Court). This, together with the expected retirement of Justice Blackmun (now 86), indicates the O'Connor/Souter wing may well be strengthened and Scalia and Thomas more isolated.

## CONCLUSION

Article III imparts independence and power to those who sit on our highest Court. And because the Court is a political institution as well as a judicial one,[19] the current appointment process is fraught with hopes, expectations and sensitive issues. It is a process dealing with philosophy, nuances of attitude and thought, accompanied by all forms of tactical contrivance. Yet, as we have seen, predictability of future voting patterns is a fallible procedure. Issues change, Justices' intellectual and judicial thought evolve, questions as to how Judges conceive of and exercise their judicial function, whether they accept Cardozo's definition of judicial review as the "utility of a restraining power," what their sense is of the nature of the Court in a democratic society -- all these foil measures of prognostication of voting alignments. This study, limited as it is to five fairly young Justices (O'Connor is the eldest at 64, Scalia and Kennedy 58, Thomas the youngest at 46) appointed by Presidents who sought a consistent ideology examines how in a period of just three terms the conservatism may be there but the consistency and the coalitions are not. And since Washington was the only President to appoint an entire Court and Carter the only President in our century to appoint none, it appears that there seldom is a Court with a stable membership for a long period of time. Despite four successive "conservative" Presidents having appointed eight out of the nine current Justices, ideology often conflicts with pragmatism as great issues are decided. It is a tribute to Madison and Hamilton and the authors of Article III that the independence of the Court they created in 1787 is sustained by the autonomy of its present members.[20]

## ENDNOTES

1. Theodore Roosevelt to Henry Cabot Lodge 9/4/06, quoted in G. Edward White, *Justice Oliver Wendell Holmes*, Oxford University Press, 1993, p. 307.

2. Northern Securities Co. v. U.S. 193 U.S. 197 (1904).

3. Whether these were the exact words, the thought was there. See Kim Isaac Eisler, *A Justice for All*, Simon and Schuster, 1993, p. 158.

4. Quoted in David McCullough, *Truman*, Simon and Schuster, 1992, p. 901. McCullough, however, sympathetically writes that this observation like others he made to Miller "was more harsh than he meant or than he indicated at the time." Ibid.

5. See Archibald Cox, *The Court and the Constitution*, Houghton Mifflin, 1987, pp. 372-374.

6. See Max Farrand, *Records of the Federal Convention of 1787*, 1913, p. 154.

7. Bernard Schwartz, *History of the Supreme Court*, Oxford University Press, 1993, p. 11.

8. Hamilton, Article 78 of the *Federalist*, Modern Library Edition, 1937, p. 504.

9. Ibid, p. 503.

10. 1 Annals of Congress 439 (1987).

11. For a fascinating study of Judge Bork's failed nomination and the political and economic forces mustered for and against the nominee see Ethan Bronner, *Battle for Justice*, W.W. Norton, 1989, and Robert Bork's, *The Tempting of America*, Free Press, 1990. The Thomas hearings produced a more sensational experience and an equally pandering media coverage. See especially Timothy Phelps, *Capital Games*, Hyperion, 1992; Toni Morrison, *Racing Injustices*, Pantheon, 1992, and the more controversial bestseller, David Brock, *The Real Anita Hill*, Free Press, 1993.

12. Justice Blackmun in a concurring and dissenting opinion voted to strike down all restrictions. Justice Stevens in a separate concurring and dissenting opinion, upheld the reporting and informed consent requirements and rejected the others. Thus was created a bare 5-4 decision. This prompted Justice Blackmun who authored the Roe v. Wade opinion to write

and unusually personal statement: "I am eighty-five years old. I cannot remain on this Court forever, and when I do step down...the choice between the two worlds will be made." (112 S.Ct, at 2854-2355).

13. Planned Parenthood *supra* at p. 2809.

14. Ibid, at 2813 - 2814.

15. Planned Parenthood v. Casey 120 LED2 674 at 791.

16. The statistical analysis is based on materials in the November issues of 1987, 1991, 1992, 1993, 1994 of the *Harvard Law Review*, Harvard Law Review Association, Cambridge, Mass.

17. See *Fortune Magazine*, March 1947. A most readable and interesting study of the rift among appointments of Roosevelt is James F. Simon, *The Antagonists*, Simon and Schuster, 1989, in which he concentrates on the leaders of the two schools of thought - Hugo Black and Felix Frankfurter.

18. Schwartz, *supra*, p. 376.

19. Alexis de Tocqueville, *Democracy In America*, Alfred A. Knopf, vol. 1, p. 151. His comment on the Supreme Court in 1831 was not only perceptive but prophetic: "It may even be affirmed that, although its constitution is essentially judicial, its prerogatives are almost entirely political."

20. My conclusion differs somewhat from a study done by the distinguished Constitutional expert and lawyer, Lawrence Tribe: "What we saw in nominees was pretty much what we got;...there are few real surprises in a Justice's overall trajectory." Lawrence Tribe, *God Save This Honorable Court*," Random House, 1985, p. 140. My aim has been to examine the futility of expecting consistency in group voting patterns.

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