02.16.2016

The Passage of Justice Antonin Scalia

Antonin Scalia is gone. He shocked everyone, especially conservatives, by having the audacity to die before Justice Ruth Bader Ginsburg. Most people thought that Ginsburg, having been racked by disease and pain, would die first. This would give Republicans, who believe that they are certain to triumph in the next presidential election, the opportunity of nominating and perhaps having confirmed a justice of their particular flavor.

The truth is that justices of the Supreme Court all have a tendency to avoid disciplined analysis in favor of their own personal sociological and political views. Justices interpret the Constitution in a way that fits within their own ideological framework. The debate between originalism and flexibility is a new school exercise. Original intent is not something that any Justice adheres to strictly, unless they agree with the issue at hand. The same is true with respect to the infamous flexibility of flamboyant liberals. They argue for the ability of the Constitution to bend this way and that, where they have a particular interest in a political issue.

Let us take a look at just a few simple issues. In *Bush v. Gore*, Justice Scalia, together with his Republican brethren, took a very expansive view of the equal protection clause. They essentially said that since it was possible that the vote in Florida would be invalidated or questioned, this might somehow dilute or affect the equality of votes in other states. Therefore they declared Bush the winner of the election. This was a Supreme Court decision which had nothing to do with a conservative analysis of law based upon originalism, nor did it have a whit to do with strict constructionism. *Bush v. Gore* was decided on political grounds and nothing else. There are those who will argue that the decision avoided a crisis in the American Electoral system. After all, should the recount in Florida have been in favor of Gore, this may have delayed a new President taking office. The integrity of the nation trumped, you should pardon the expression, strict constitutional analysis. The equal protection clause was never meant by the Founders to stop a recount in a state based upon the danger that might be caused by an unstable and outdated Electoral College.

When Justice Scalia supported an interpretation of the Second Amendment which recognized the right of individual gun ownership, the eminent and colorful Jurist rewrote the Second Amendment. The Second Amendment is clear on its face. The Federalist papers made the Second Amendment even more clear. It was intended to protect the ability of the people to raise a militia. Private ownership of guns was simply not addressed by the Second Amendment. Both the dissent and the majority in the case of *District of Columbia vs. Heller* cited volumes of American revolutionary rhetoric without any particular decisiveness. Anyone who was a true originalist would have understood and admitted that the Bill of Rights was passed to ensure the adoption of the Constitution. The Bill of Rights

addressed former British imperialism in the Colonies and not the right of an individual to use a gun for hunting purposes, unless a militia to oppose foreign interventionism was at issue.

Other Scalia opinions clearly were more deferential to the wording of the Constitution. There were decisions, for example, that upheld First Amendment rights on freedom of speech even though those rights were not necessarily contemplated by the framers.

The men who wrote the Constitution did not know anything about, and never thought about, abortion. Those men also would not, in their wildest dreams, have imagined that the Constitution would require states to permit gay people to marry. All of these interpretations are based upon the individual political convictions of the Justices.

Let us be honest about Justice Scalia and the next nominee to the United States Supreme Court. It is completely ingenuine and dishonest to claim that whoever is nominated will base their legal reasoning on the original understanding of the Founding Fathers. Likewise, the next nominee will not be a principled "flexibleist" but rather someone who answers to the evolving social agenda of the day.

Interestingly, many of President Obama's appointments to the trial courts and the Circuit Courts, which handle the vast majority of cases in the United States of America, have been quite conservative. I was honored to meet with the President's legal staff, who were involved with the nomination of federal judges. An eminent group of lawyers invited me to join them, and we anxiously awaited the President's men, and women, in the Roosevelt Room. The Roosevelt Room, with its fantastic portraits of various Roosevelt family members, was more impressive than the meeting. The African-American federal circuit judge who spoke for the group was courageous. He politely and diplomatically excoriated the President's representatives at the meeting for nominating people to the bench who were not necessarily progressive but rather were corporate types and former United States attorneys. "Where are the progressive nominations that the President has promised us?" asked the senior judge. The President's representatives blamed the low number of nominations which the President made on Republican opposition. "That does not stop the President from making nominations of qualified people," came the response. We were promised that the President would nominate more qualified people and more promptly.

The question is, whether the President will tempt the Republican-controlled Senate and the voracious press by nominating somebody to the Supreme Court similar to those he has nominated for other federal court positions. The President could easily choose someone with a corporate or United States attorney background and is not particularly predictable on any political issue. The President could even name someone who is a true constitutional scholar with a fidelity to "original intent" even though following the path of our Founders is a fiction in modern times.

Any justice to the United States Supreme Court will interpret. They will interpret to the right or to the left, but they will engage in legal reasoning predicated upon their experiences and overall philosophy. Justice Cardozo, the great Jewish Justice of Spanish dissent, studied this very question in *The Nature of the Judicial Process*, published in 1921. Cardozo, who was a "liberal" on the New York State Court of Appeals and a "conservative" on the United States Supreme Court, understood very well that bending the Constitution too much could become a dishonest exercise. "Even a reed can only bend so much until it breaks," my father used to say, borrowing a concept from Aesop's Fable, The Oak and The Reed.

The issue for the next Supreme Court nominee will not be how liberal he or she is, but rather how honest he or she will be in explaining to the public whether the Constitution should be rewritten by judges to reflect modern times or should be a brittle document whose antique words are contorted to fit situations never contemplated by the authors. It is difficult to make relevant a document rewritten prior to 1789 that was intended to be rewritten every decade or so. Nevertheless, our strange, arcane, complex and somewhat dysfunctional system has weathered the tides and storms of time reasonably well. That is probably because of our national commitment to remain one family.

The next few months, concerning Justice Scalia's replacement on the United States Supreme Court, should prove to be interesting and full of political skullduggery. We can only hope that out of the chaotic morass, a person will emerge who is both principled and honorable. God Bless America!

Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)

Cliff Rieders, who practices law in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.