

SUPREME COURT – SUPREME DECISIONS

The Supreme Court has always been a political football. Washington struggled over John Jay and Congress had apoplexy over John Marshall who had the audacity to think that the Supreme Court of the United States was the final arbiter of what was constitutional.

There are those who believe the Supreme Court of the United States triggered the Civil War and those who believe the Supreme Court precipitated civil strife during the days of labor busting monopolists. Franklin Roosevelt tried to pack the court and Harry Truman referred to one of his own appointees as a “son of a bitch” when Justice Clark expressed dissatisfaction with Truman’s nationalization of the steel industry during a strike.

Is it any wonder that George Bush will attempt to put his personal stamp on the Supreme Court as most other presidents have done before him? Presidents can be surprised by their appointees as the popular press has pointed out but in reality, that does not happen very often. In these days of experts in “vetting” appointments, it is going to be very difficult for any Bush appointee to escape close scrutiny and predictability as to their decision-making process.

When George Bush says that he wants a strict constructionist, he does not mean that he wants to go back to the days of slavery which was sanctioned by the original Constitution of the United States and he does not mean that he wants to go back to a federal government much smaller and less powerful than his own. George Bush would be appalled by any Supreme Court that says he cannot fight in Iraq because there is no declaration of war by Congress as mandated by the frames of our Constitution. George Bush would be very upset if he found that the Bill of Rights did not apply to the states, as they did not prior to an interpretation by the Supreme Court which said that the Bill of Rights do apply to the states thanks to the due process clause of the 14th

Amendment of the Constitution. If the Bush critics are correct, the President would never admit his disinterest in the Bill of Rights applying to the states.

The truth is that the President has a particular philosophy that some people call interventionist conservatism. Others call the President's appointees activist conservatists. Whatever the title, there is no question that there has been a change in the "conservative" mentality over the years. Justices like Felix Frankfurter and William O. Douglas tried to keep their constitutional analysis within a narrow framework, but they had little interest in pop ideologies manipulated to raise money for special interests. It is common today in the legislature to rouse the people up by threatening that politicians will ban hunting weapons or will wantonly search and seize materials from libraries without a warrant. These extremes are nothing more than what people like Carl Rove and his Democratic equivalents call "fundraisers." There are those on the left and right who want to make the current Supreme Court vacancy a "fundraiser."

Most Americans, according to pollsters at any rate, are boring moderates. Most of us are in favor of religion, apple pie and motherhood, but we don't want any of it rammed down our throats. Most of us agree with the wisdom of the elders when they wrote 2,000 years ago "beware of government lest it swallow you like a fish, whole." Much has been written about Justice O'Connor's travels from Arizona political conservative to middle of the road moderate. Almost just as much has been written about another Republican appointee, Justice Souter, who traveled from a conservative path to an amazingly progressive one. None of these appointees can predict what the next man or woman on the bench of the Supreme Court of the United States will do. Some Justices like Scalia and Thomas are boringly predictable and one wonders whether they would ever consider a point of view that they might consider threatening to the established vested monied interest.

George Bush will not labor over whether he should appoint a moderate. He either will appoint a friend like Gonzales who is his Justice Department Chief or he will reach out to a well-known conservative with a track record of

strongly held right wing views. President Bush believes that the American people gave him a mandate to appoint such a person and there is no reason why he should not do it. Why is President Bush wrong? During the last election as well as the election of 2000, Bush made very clear what his philosophy was. Whom either presidential candidate might appoint to the United States Supreme Court was a matter of debate, public speculation and questioning in a variety of forums. The people who did not vote for Bush in 2000 and those who did in 2004 knew perfectly well that the president who was elected would shape the legal direction of this nation for a generation or more. President Bush has a right to appoint someone who fits his mold and view so long as that person is qualified from a legal point of view.

The argument that George Bush should appoint somebody unlike himself but rather representing the broad majority of Americans is an appealing notion, but one which would produce no more predictable a candidate than Oliver Wendell Holmes who so infuriated Theodore Roosevelt that most historians did not print Roosevelt's words when Holmes decided against the Republican president's decidedly anti-business anti-monopoly economic policies.

If President Bush wants peace in his nation and a favorable legacy, he will of course take into account those who both did and did not vote for him. If President Bush is true to himself, he will nominate somebody in his own imagine.

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