

SEPTEMBER 17

A media focus on the Supreme Court

The big media themes about the 2004 presidential campaign have reveled in vague rhetoric and flimsy controversies. But little attention has focused on a matter of profound importance: Whoever wins the race for the White House will be in a position to slant the direction of the U.S. Supreme Court for decades to come.

Justices on the top court tend to stick around for a long time. Seven of the current nine were there a dozen years ago. William Rehnquist, who was elevated to chief justice by President Reagan, originally got to the Supreme Court when President Nixon appointed him a third of a century ago. The last four justices to retire had been on the high court for an average of 28 years.

Vacancies are very likely during the next presidential term. Rehnquist, 79, is expected to step down. So is Sandra Day O'Connor, 74, a swing vote on abortion and other issues that divide the court in close votes. Also apt to retire soon is 84-year-old John Paul Stevens, who usually votes with the more liberal justices. "The names of possible Bush or Kerry appointees already are circulating in legal circles," the Pittsburgh Post-Gazette reported in August, "and there is virtually no overlap between the lists."

There should be no doubt about the kind of Supreme Court nominee that President Bush would want. "In general what he's going to look for is the most conservative Court of Appeals judge out there who is young," says David M. O'Brien, a professor of government who has written a book about the Supreme Court. "Those are the top two priorities."

Bush has made clear his intention to select replacements akin to hard-right Justices Antonin Scalia and Clarence Thomas. Writing in the Washington Times on Sept. 14, conservative attorney Bruce Fein predicts that "the winner of the impending presidential sweepstakes will likely appoint from one to three new justices." He foresees that if Bush wins on Election Day and the seats held by O'Connor and Stevens become vacant, "constitutional decrees in pivotal areas concerning presidential war

MEDIABEAT 2004 | NORMAN SOLOMON

powers, church-state relations, freedom of speech, the death penalty, the powers of the police and prosecutors, racial, ethnic and gender discrimination and private property will display a markedly more conservative hue."

Some political agendas benefit from the claim that the Supreme Court's 1973 abortion-rights decision, *Roe v. Wade*, is not in jeopardy. But as Michael Dorf, a law professor at Columbia University, wrote this summer, "three justices – Rehnquist, Antonin Scalia, and Clarence Thomas – remain committed to overturning *Roe*. Meanwhile, two of the Court's three oldest members – justices Stevens and O'Connor – are part of the six-justice majority for recognizing a constitutional right to abortion. Should President Bush have the opportunity to name anti-*Roe* successors to these two justices – or to any two or more of the six justices who oppose overturning *Roe* – there is little reason to doubt that he would seize it. The result would be a Supreme Court majority for eliminating the constitutional right to abortion."

Though Bush and Kerry are inclined to understate the importance of potential new Supreme Court picks as they try to attract swing voters, Professor Dorf is unequivocal: "A Bush victory will greatly increase the likelihood that Congress and the state legislatures will be able to ban most abortions at some point in the next four years. In contrast, a Kerry victory will almost surely preserve the status quo of legal abortion prior to the third trimester of pregnancy."

Already, Bush's impacts on the judiciary have been appreciable. Like the members of the Supreme Court, the federal judges on appeals and district court benches are appointed for life – and in less than four years, Bush has chosen almost a quarter of all those judges nationwide.

Dahlia Lithwick, a legal analyst with *Slate*, notes that "Bush has already had a chance to massively reshape the lower federal bench. He's now filled 200 seats" – with judges who'll have far-reaching effects. "He has certainly put a lot of people onto the federal bench who have sort of litmus tests on issues like abortion, on issues like civil rights. And I think we are going to see – in the far future, but not today – the fallout of a massive, massive influx of quite conservative jurists who've been put on the bench in the last four years."

As opponents of abortion rights, civil liberties, gay rights and other such causes work to gain a second term for George W. Bush, they try not to stir up a mass-media ruckus that might light a fire under progressives about the future of the Supreme Court and the rest of the federal judiciary. Likewise, those on the left who don't want to back Kerry even in swing states are inclined to dodge, or fog over, what hangs in the balance. Kerry is hardly a champion of a progressive legal system, but the contrast between his

centrist orientation and the right-wing extremism of the Bush-Cheney regime should be obvious. It's too easy to opt for imagined purity while others will predictably have to deal with very dire consequences.

"The popular constituency of the Bush people, a large part of it, is the extremist fundamentalist religious sector in the country, which is huge," Noam Chomsky said in a recent interview with David Barsamian. "There is nothing like it in any other industrial country. And they have to keep throwing them red meat to keep them in line. While they're shafting them in their economic and social policies, you've got to make them think you're doing something for them. And throwing red meat to that constituency is very dangerous for the world, because it means violence and aggression, but also for the country, because it means harming civil liberties in a serious way. The Kerry people don't have that constituency. They would like to have it, but they're never going to appeal to it much. They have to appeal somehow to working people, women, minorities, and others, and that makes a difference."

Chomsky added: "These may not look like huge differences, but they translate into quite big effects for the lives of people. Anyone who says 'I don't care if Bush gets elected' is basically telling poor and working people in the country, 'I don't care if your lives are destroyed. I don't care whether you are going to have a little money to help your disabled mother. I just don't care, because from my elevated point of view I don't see much difference between them.' That's a way of saying, 'Pay no attention to me, because I don't care about you.' Apart from its being wrong, it's a recipe for disaster if you're hoping to ever develop a popular movement and a political alternative."

Norman Solomon is co-author, with Reese Erlich, of "Target Iraq: What the News Media Didn't Tell You." The complete book is available as a free download at coldtype.net.