

The Composition of the Federal Courts: What's At Stake?

Presidents and Senators make important policy decisions every day, but few are as far-reaching as the decisions they make regarding nominations and confirmations to the federal bench. Since *Marbury v. Madison*, it has been “emphatically, the province and duty” of the federal judiciary to say “what the law is.”¹ In performing this role, federal judges have a significant influence on law and public policy through their interpretation of the Constitution and federal statutes. This awesome responsibility gives judges the power to “answer questions that shape for decades how America works and Americans live.”² Judges leave a mark on matters as wide-ranging as civil rights and civil liberties, executive and Congressional power, labor relations and the environment. Moreover, federal court judges receive lifetime appointments and render decisions whose impact may last for decades.

The Supreme Court has undergone a significant change with the appointment by President Bush of two Justices, Chief Justice John G. Roberts and Associate Justice Samuel A. Alito, Jr., replacing Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor respectively. Justice O'Connor, often referred to as the Court's “center of gravity,” was in the majority in over 150 5-4 Supreme Court decisions during her tenure.³ As the new Roberts Court begins to take shape, many observers have noted the signs of a distinct shift in a more conservative direction, with the bloc of Justices Roberts, Alito, Scalia and Thomas frequently voting together and Justice Anthony Kennedy deciding the outcome as the swing vote. A full third of the Court's decisions in the 2006-07 term were decided by 5-4 margins,⁴ and while that pattern was less stark in the 2007-08 term, several major constitutional issues – such as the right of detainees at Guantanamo Bay to habeas corpus and the meaning of the Second Amendment – were characterized by the same division.⁵ As one scholar and advocate before the Court commented at the end of the 2007-08 term, “If there's one thing you can see about this court, it is that it still sits on a knife's edge.”⁶

It is likely that the next President will have the opportunity to appoint at least one new Justice. Such an appointment could have a significant impact; as one Court expert observed, “many areas of the Court's jurisprudence could be pushed in a substantially more conservative direction by a single vote.”⁷

¹ 5 U.S. 137, 177 (1803).

² *Should Ideology Matter? Judicial Nominations 2001: Before the Senate Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (June 26, 2001) (testimony of Marcia D. Greenberger, Co-President, National Women's Law Center).

³ Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times, July 1, 2007.

⁴ *Id.*

⁵ Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. Times, June 29, 2008.

⁶ Robert Barnes, *A Win by McCain Could Push a Split Court to the Right*, Washington Post, June 29, 2008 (quoting Professor Jeffrey L. Fisher, Stanford Law School).

⁷ See generally Tom Goldstein, *Analysis: the Court and the 2008 Election* (May 18, 2007), scotusblog, <http://www.scotusblog.com/wp/commentary-and-analysis/analysis-the-court-and-the-2008-election/>

The lower federal courts play a critical role as well. Because the Supreme Court decides fewer than 90 cases each year, the federal Courts of Appeal have the final word in almost all of the 60,000 cases filed each year.⁸ In addition, Supreme Court nominees are often drawn from the ranks of the federal appellate courts; all of the current members of the Court were federal appellate judges and four served on the D.C. Circuit.

Given the timeliness and critical importance of these issues, ACS encourages its chapters to hold events during 2008 that focus on what is at stake in the appointment of federal judges. To assist chapters in conducting such programming we are providing this program guide along with a speaker list identifying experts on the topic. We hope that this guide and speaker list will enable ACS chapters to plan a robust series of events on this topic. For more information, we suggest reviewing posts online at www.ACSBlog.org. Other useful resources include publications available at www.acslaw.org and the *Harvard Law & Policy Review*, and the online version at www.HLPRonline.org. More substantive information may also be found on the websites of the organizations associated with the various speakers identified on the speaker list.

What's at Stake in the Composition of the Federal Judiciary

Consider just some of the issues of concern to Americans on which the Supreme Court and lower federal courts have a major impact, outlined below.

Access to Justice

According to some observers, one theme to emerge in the opening terms of the Roberts Court is the Court's increasing willingness to limit access to justice in the federal courts.⁹ Indeed, Professor Judith Resnik described the 2006-2007 term as "the year they closed the courts."¹⁰ As others have noted, while public attention tends to focus on social issues, the Supreme Court has far more frequent opportunities to restrict federal court access in cases that involve legal issues such as standing, preemption, implied rights of action and awards of attorney's fees.¹¹ Decisions involving issues that may appear technical or arcane actually can have profound and far-reaching implications for access to justice.

For instance, the Court's interpretation of the filing deadline for claims of pay discrimination in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. ____ (2007) will bar

⁸ <http://www.uscourts.gov/caseload2007/contents.html>

⁹ There have been some notable exceptions, however. See e.g., *Federal Express Corp. v. Holowecki*, 552 U.S. ____ (2008), holding that failure to file the proper form with the EEOC to complain about age discrimination did not bar an employee from bringing a lawsuit alleging discrimination. See also *CBOCS West v. Humphries*, 553 U.S. ____ (2008), holding that there is an implied right of action for retaliation claims under the civil rights statute, Section 1981; and *Gomez-Perez v. Potter* holding that there is an implied right of action for retaliation claims under the Age Discrimination in Employment Act.

¹⁰ See Greenhouse, *supra* note 3.

¹¹ Herman Schwartz, *Court of the People? Conservative Efforts to Shut the Court House Door on the Public*, *The Washington Independent*, February 29, 2008.
<http://www.washingtonindependent.com/view/court-of-the-people>

many victims of discrimination from obtaining relief, even when their claims are meritorious. Similarly, consumers injured by defective medical devices no longer have an avenue for recovery given the Court's expansion of the federal preemption doctrine in *Riegel v. Medtronic, Inc.*, 552 U.S. ____ (2008), in which the Court held that the federal Medical Device Act bars injured consumers from seeking compensation under state law, but the federal law provides no alternative means for recovery by consumers. And, in *Exxon Shipping Co. v. Baker*, 554 U.S. ____ (2008), the Court reduced the \$5 billion punitive damage award for the worst oil spill in U.S. history to approximately \$500 million in a decision holding that a one-to-one ratio between compensatory and punitive damages was appropriate. While *Exxon* involved maritime law, a majority of the Court may be willing to limit punitive damage awards – which help deter and punish corporate wrongdoers – in other contexts as well.¹²

In *Bowles v. Russell*, 551 U.S. ____ (2007) the Court, by a 5-4 vote, overruled two long-standing Supreme Court precedents to bar a criminal defendant from appealing his conviction because he narrowly missed a filing deadline, even though his tardiness was based on the trial judge's erroneous instructions. In another 5-4 case, *Hein v. Freedom from Religion*, 551 U.S. ____ (2007), the Court dismissed a suit challenging President Bush's Faith-Based Initiative under the First Amendment's Establishment Clause, holding that taxpayers do not have standing to challenge executive branch expenditures under the Establishment Clause, despite the Court's 1968 ruling in *Flast v. Cohen*,¹³ upholding taxpayer standing in very similar circumstances.

Executive Power and Civil Liberties

The Court's deep and sometimes bitter divisions may be most apparent on the issues of executive power and civil liberties. This term, in *Boumediene v. Bush*, 554 U.S. ____ (2008), a 5-4 Court rebuked the Bush Administration's handling of detainees in Guantanamo Bay for a third consecutive time, holding that the prisoners have a constitutional right to challenge their detention in federal court using the writ of habeas corpus. In an opinion by Justice Kennedy, the Court rejected the contention that the Military Commissions Act of 2006, which stripped the federal courts of habeas corpus jurisdiction over the detainees, provided an adequate substitute for habeas corpus protections, noting that, "The laws of the Constitution are designed to survive, and remain in force, in extraordinary times." Justice Scalia's vehement dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, predicted "disastrous consequences" from the Court's decision.

As Justice Souter noted in his concurring opinion, however, *Boumediene* was "no bolt out of the blue." Rather, it is the most recent in a series of cases in which the Court has, by narrow margins, rejected expansive claims of executive power at the expense of civil liberties. The Court first held that statutory habeas corpus jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay in *Rasul*

¹² See 554 U.S. __ at n. 28 (for cases involving "substantial" compensatory damages, "the constitutional outer limit [for punitive damages] may well be 1:1.")

¹³ 392 U.S. 83 (1968).

v. *Bush*, 542 U.S. 466 (2004), As Justice O’Connor noted in another opinion issued the same day, involving a U.S. citizen imprisoned in Guantanamo, “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁴ Then-Chief Justice Rehnquist and Justices Scalia and Thomas dissented in *Rasul* and would have denied any review to aliens held outside the United States. Subsequently, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), a 5-3 Court invalidated the system of military commissions the Bush Administration had set up to try Guantanamo detainees for war crimes because it did not comply with the Uniform Code of Military Justice and the Geneva Conventions. The dissenting Justices, Scalia, Thomas and Alito, argued that the Court did not even have jurisdiction to hear the case under the Detainee Treatment Act of 2005. Chief Justice Roberts did not participate in the case because he had previously voted to uphold the military commissions as a member of a three-judge Court of Appeals panel.

These closely-divided cases make clear that if the Roberts-Scalia-Thomas-Alito bloc on the Court were joined by additional Justices who share their views, a dramatic shift in favor of executive power at the expense of civil liberties could take place.

Race Discrimination and Desegregation

The close division on the Court is readily apparent in cases involving affirmative action and desegregation. In *Grutter v. Bollinger*, 539 U.S. 982 (2003), Justice O’Connor authored the opinion for a 5-4 majority upholding the affirmative action program at the University of Michigan Law School. No affirmative action case has reached the Court since her departure.

School desegregation has reached the Roberts Court, however. In *Parents Involved in Community Schools v. Seattle School District No 1.*, and its companion case, *Meredith v. Jefferson County Board of Education*, 551 U.S. ___ (2007), a divided Court held that public school districts in Seattle, Washington and Louisville, Kentucky could not take race into account to achieve or maintain diversity. Four members of the Court, in an opinion authored by Chief Justice Roberts, concluded that the school districts’ goal of achieving racial diversity, which the Chief Justice described as “racial balancing,” can *never* be a compelling state interest. In other words, for the Roberts plurality, no race-conscious approach to school integration, no matter how narrowly tailored, would pass constitutional muster. While three members of the Court joined Chief Justice Roberts’ opinion in full, the fifth vote – Justice Kennedy – did not. Instead, in a separate concurring opinion, Justice Kennedy concluded that racial diversity could be a compelling state interest and opined that the plurality was “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”¹⁵ The four dissenters would have upheld the two school districts’ programs. The splintered opinions leave Justice Kennedy’s concurrence as

¹⁴ *Hamdi v. Rumsfeld* 542 U.S. 507, 536 (2004) (reversing the dismissal of a habeas petition brought on behalf of a U.S. citizen detained as an enemy combatant).

¹⁵ 127 S.Ct. 2738, 2791 (2007).

controlling for the time being. How significant this limitation will be on the approach taken by the Roberts plurality remains to be seen.

Women’s Rights and Reproductive Rights

Justices Thomas and Scalia have written in dissents that they believe *Roe v. Wade* was wrongly decided and should be overturned, and much attention has been focused on whether other Supreme Court nominees are prepared to join them in voting to reverse *Roe*. As one Court expert observed, if Chief Justice Roberts and Justice Alito were “squarely presented with the question [*Roe*’s validity] – and unable to reach the result they believe is right by narrowing *Roe* further – it seems likely that they would vote to overturn it, as it is a decision that (insofar as their pre-judicial statements are instructive) they believe is essentially lawless.”¹⁶ In the meantime, a majority of the Court – those four Justices, joined by Justice Kennedy – has upheld restrictions on reproductive freedom.

In 2000, in *Stenberg v. Carhart*, 530 U.S. 914, the Supreme Court, with Justice O’Connor on it, narrowly rejected a Nebraska a ban on some abortion procedures because the state law contained no exception for situations in which the woman’s health would be placed at risk. The decision was 5-4. Just seven years later, with Justice O’Connor replaced by Justice Alito, the Court came out the other way in *Gonzales v. Carhart*, 550 U.S. ___ (2007), in a 5-4 decision upholding an almost identical federal ban. That marks the first time that the Court has upheld a prohibition on a specific method of abortion. In her dissent, Justice Ginsburg noted that the Court is now “differently composed than it was” and suggested that the new majority was “hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”¹⁷

Many other rights of concern to women depend in significant measure on the composition of the federal courts. The Supreme Court has issued closely divided decisions in cases involving the landmark federal statutes that prohibit sex discrimination in the workplace and at school, Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, respectively. As noted above, in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. ___ (2007), the Court by a 5-4 vote reversed the longstanding interpretation of Title VII that allowed victims of pay discrimination to challenge the discrimination as it continued over time.

GLBT Rights

The gay, lesbian, bisexual and transgender community has a tremendous stake in the composition of the federal courts. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a state constitutional provision that would have prevented localities from protecting citizens from discrimination on the basis of sexual orientation, and in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a state law criminalizing consensual, adult sexual acts between same-sex partners. Although both *Romer* and

¹⁶ Goldstein, *supra* note 7.]

¹⁷ 127 S.Ct. 1610, 1652 (2007).

Lawrence were decided 6-3, with Justices Rehnquist, Scalia, and Thomas dissenting, there may now be a narrower margin of support on the Roberts Court for both decisions.

Moreover, the lower federal courts, have not yet afforded gays and lesbians full constitutional protection, as decisions in the courts have been mixed. Issues such as marriage equality and the adoption of children by gays and lesbians continue to be litigated around the country, with inconsistent and uncertain results.

The Environment

Landmark laws enacted in the 1970s such as the Clean Air Act and the Clean Water Act have been the centerpiece of efforts to reverse environmental degradation and protect America's natural resources. Continued progress, however, depends on federal courts to interpret those laws in a robust manner. In recent years, the federal courts have grown increasingly hostile to environmental claims.¹⁸ In *Solid Waste Agency of Northern Cook County v. Army Corp. of Engineers*, 531 U.S. 159 (2001), for example, the Court interpreted the Clean Water Act narrowly to invalidate protections for migratory birds in intrastate bodies of water. In *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. ___ (2007), the Court curtailed the Endangered Species Act, ruling that section 7 of that statute, which requires that all federal agencies "shall" insure that their actions do not jeopardize endangered species, does not apply to nondiscretionary federal actions. As Justice Stevens noted in his dissent, the Court's holding conflicts with the Court's prior 1978 ruling in *TVA v. Hill*, which held that section 7 "admits of no exception."¹⁹ By creating such an exception, "the Court whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the Act its intended effect."²⁰ Both recent cases were decided by 5-4 votes.

In other cases, the Supreme Court has sustained environmental claims, but by an equally tenuous margin; the addition of one or more justices skeptical of environmental enforcement could tip the outcome in future cases. For example, in *Massachusetts v. Environmental Protection Agency*, 549 U.S. ___ (2007), the Court by a vote of 5-4 rejected the EPA's contention that it did not have authority to regulate greenhouse gases in automobile admissions. The Court held that heat-trapping emissions are "air pollutants" and thus subject to regulation under the Clean Air Act. Chief Justice Roberts' dissent, joined by Justices Scalia, Thomas and Alito, strongly objected to the way in which the majority had expanded environmental standing for states; clearly, there are four votes currently on the Court to narrow sharply access to the courts in environmental cases.

The Court was even more fractured in *Rapanos v. United States*, 547 U.S. 715 (2006), in which it was unable to issue a majority decision, instead splitting 4-1-4. A plurality of the court, in an opinion by Justice Scalia, would have dramatically limited the reach of the Clean Water Act, leaving much of the waters and wetlands currently covered

¹⁸ See generally Community Rights Counsel, *Hostile Environment* (2001).

¹⁹ 437 U.S. 153 (1978).

²⁰ 127 S.Ct. 2518, 2539 (2007)

under that law unprotected. Justice Stevens and another plurality would have upheld the broader definition of wetlands used by the Army Corp of Engineers since the 1972 law was enacted. Because Justice Kennedy concurred in the judgment to vacate and remand, but did not join in Justice Stevens' opinion, the case was sent back to the 6th Circuit without a decision determining what standard of review should be applied.

Workers' Rights

Workers' rights are largely defined by federal statutes: the National Labor Relations Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Family and Medical Leave Act and others. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. ___ (2007), the Court upheld a Department of Labor regulation excluding all workers who provide in-home care for elderly or disabled people from the Fair Labor Standards Act's wage and overtime protections.

Federal courts are often called upon to decide the rights of state government employees, and the legal remedies these workers have when their rights are violated. In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), a state employee unsuccessfully requested unpaid time off from work under the Family and Medical Leave Act of 1993 (FMLA) to care for his ill wife. The Court, by a 6-3 vote, held that he was allowed to seek redress against the state in federal court, but the dissenters would have barred the suit on 11th Amendment sovereign immunity grounds. Both Chief Justice Rehnquist and Justice O'Connor were in the majority in *Hibbs* and it is far from clear that the case would have come out the same way today. Indeed, as a Third Circuit judge, Justice Alito held that a state employee seeking leave under a different provision of FMLA was barred by the 11th Amendment from seeking redress.²¹ At issue in these cases is whether tens of thousands of working women and men lose their right to legal remedies against their employers just because their employer is a state government.

Conclusion

Many other issues of fundamental importance, beyond those discussed above, will be addressed by the Supreme Court and lower federal courts in the coming years. Questions involving the death penalty continue to divide the Supreme Court (with lethal injection upheld this year but executions of child rapists struck down).²² The Court's decision this year in *Crawford v. Marion County Election Bd.*, 553 U.S. ___ (2008), upholding Indiana's voter identification law, but preserving the possibility for future challenges to similar laws, ensures that voting restrictions will continue to be litigated. Similarly, the Court's decision in *District of Columbia v. Heller*, 554 U.S. ___ (2008), holding that the Second Amendment protects individual gun ownership and striking down the District of Columbia's handgun ban, also left room for some forms of gun control and thus guaranteed additional litigation in federal courts throughout the country.

²¹ *Chittister v. Dept. of Community and Economic Development*, 226 F.3d 2223 (2000).

²² *Baze v. Rees*, 553 U.S. ___ (2008) (lethal injection does not violate Eighth Amendment's prohibition on "cruel and unusual punishment"); *Kennedy v. Louisiana*, 554 U.S. ___ (2008) (imposition of death penalty for crime of raping a child violates Eighth Amendment prohibition on "cruel and unusual punishment.").

Many other critical issues have been decided by a narrowly-divided Supreme Court, and a shift of one or two votes on the Court could have enormous impact. Even principles governed by established precedents are not secure, as the Roberts Court has shown a willingness to disregard precedent. Clearly, the composition of the Supreme Court, as well as the lower federal courts, should be a matter of paramount concern to all Americans.

Resources

Accompanying this summary memorandum is a list of possible speakers for ACS Chapter programs. Other possible resources, among the many reports and articles on this subject, are the following:

Mark Agrast, Center for American Progress, *Ideology Matters: A Progressive View of the Judicial Confirmation Process* (2004)

<http://www.americanprogress.org/projects/progressivepriorities/files/Ch14-Judges.pdf>

Alliance for Justice, *A Review of the Supreme Court's 2007 Term* (July 7, 2008)

<http://afj.org/assets/resources/end-of-term-report-07.pdf>

Alliance for Justice, *Independent Courts & Fair Judges* (2008)

<http://www.afj.org/connect-with-the-issues/independent-courts-fair-judges.html>

Center for American Progress, *The Roberts Four: Men on a Mission*, (October 1, 2007)

http://www.americanprogress.org/issues/2007/10/roberts_court.html

Tom Goldstein, *Analysis: the Court and the 2008 Election* (May 18, 2007), scotusblog,

<http://www.scotusblog.com/wp/commentary-and-analysis/analysis-the-court-and-the-2008-election/http://www.uscourts.gov/caseload2007/contents.html>

Tom Goldstein, *Analysis: A True Rightward Turn? The Upcoming Term and the 2008 election* (Sept. 18, 2007), scotusblog,

<http://www.scotusblog.com/wp/uncategorized/a-true-rightward-turn-the-upcoming-term-and-the-2008-elections/>

Human Rights Campaign, *Justice for All: The Courts and Equal Rights*, (November, 2006)

<http://a4.g.akamai.net/f/4/19675/0/newmill.download.akamai.com/19677/anon.newmedia/mill/justice/guide.pdf>

Simon Lazarus, *Repealing the 20th Century*, *The American Prospect* (Dec. 12, 2007)

http://www.prospect.org/cs/articles?article=repealing_the_20th_century

Simon Lazarus and Harper Jean Tobin, *Justice Scalia's Two-Front War*, *The American Prospect* (March 6, 2008),

http://www.prospect.org/cs/articles?article=justice_scalias_two_front_war

People for the American Way Foundation, *Civil Rights and Civil Liberties in the Supreme Court's 2007-2008 Term* (2008), <http://media.pfaw.org/legalfiles/sc-eot-07-08.pdf>

People for the American Way, *The State of the Judiciary and the Bush Legacy*, (January 25, 2008) <http://www.pfaw.org/pfaw/general/default.aspx?oid=24960#>

Jeffrey Rosen, *Supreme Court, Inc.*, The New York Times Magazine (March 16, 2008) <http://www.nytimes.com/2008/03/16/magazine/16supremet.html?scp=2&sq=jeffrey+rosen&st=nyt>

Herman Schwartz, *Court of the People? Conservative Efforts to Shut the Court House Door on the Public*, The Washington Independent, February 29, 2008. <http://www.washingtonindependent.com/view/court-of-the-people>