

## **THE SUPREME COURT OF THE UNITED STATES THEN AND NOW: A CONVERSATION**

Recently Joseph Cote, group leader for *20<sup>th</sup> Century Supreme Court Decisions* for The Second Half and emeritus Professor of History from the University of Georgia, met with Eileen Sorrentino from The Second Half to talk about the Supreme Court. The conversation explored the origins, current make up, and Joe's thoughts about the crisis facing the Court following the death of Justice Antonin Scalia. Joe also shared some thoughts about the future of the Court.

**TSH:** Let's start with the basics. What is the Supreme Court and what are its origins?

**JC:** The basic premise of the Supreme Court is the country needed a legal body to interpret the Constitution. The Constitution was written in 1787 and provided general guidance for the nation but no specific parameters regarding how much authority the Court would have. Who would be the final arbiter to decide the meaning of the words in the Constitution and the Bill of Rights? So one of the first acts of the first Congress was to pass the Judiciary Act of 1789 that created the Supreme Court. The Act contained no requirement that you needed to have legal training to serve on the Court, it provided for six justices, and it gave the Court broad jurisdiction to determine what the Constitution meant.

**TSH:** So the Supreme Court as we know it was not mandated by the Constitution.

**JC:** No. Article III of the Constitution said we require a legal system, but it did not say what that legal system would look like or what powers it would have. It provided for life tenure "during good behavior" to allow Justices to be free to hand down decisions—even if they were very unpopular—without fear of being voted out of office. There was no provision for judicial review of state or congressional legislation. Judicial review was developed by the Court itself in a slow process started by Chief Justice John Marshall in the Court's opinion, *Marbury v. Madison*, in 1803. Other decisions rendered by Marshall's Court indicated a growing power.

**TSH:** Today many consider the Supreme Court to be the strongest branch of the government. How did that come about?

**JC:** Initially the Court was so weak that the first Chief Justice, John Jay, resigned to become governor of New York. Congress was the most powerful branch of government throughout most of the 19<sup>th</sup> century. The Supreme Court gained in power especially in the last decades of that century by becoming a guardian—a protector—of the great industrial revolution then taking place in the nation. Most presidents of that time were second rate and remain obscure to this day. The Supreme Court stepped in and began to assert its power to restrict Congress. Congress had passed the Sherman Anti-Trust Act to try to regulate what was then going on in the industrial revolution. The Supreme Court in 15 out of 16 decisions basically emasculated the Sherman Anti-Trust Act. It was a gradual process, but from the Civil War to World War I these and other decisions made the Supreme Court the most dominant power in America.

At the beginning of the 20<sup>th</sup> century the Court was made up of white, Protestant, conservative men who believed in social Darwinism. Social Darwinism was based on the theory of survival of the fittest and was used to justify political conservatism, imperialism, and racism, and to discourage intervention and

reform. The justices had no interest in social welfare programs, and rarely did they find in favor of the working man. The early 20th-century Courts struck down attempts to regulate wages and hours of work, and it upheld laws for the benefit of business and agriculture. It found no constitutional basis for child-labor laws. Some say that today's conservatives actually want a return to that Wild West, *laissez-faire* mentality that some argue made America great.

What really changed the Court was the Great Depression of the 1930s and the election of Franklin D. Roosevelt. After a decade-long struggle, the Supreme Court changed direction. Roosevelt's appointees brought to the Court men who rejected social Darwinism and adopted a much more activist, interventionist approach, abolishing child labor and approving civil rights, minimum wages, Social Security, Medicare/Medicaid, and many other social programs.

That held until about 1980 with the election of Ronald Reagan and soon after George Bush, and the appointment of men like Antonin Scalia who argued that judicial activism was wrong, and the Court should look back to what the Constitution originally stood for. We see much less activity on behalf of the common working man and much more of a shift toward business, culminating in *Citizens United v. Federal Election Commission* (under the First Amendment's free-speech provision, corporate funding of independent political broadcasts cannot be limited). The Court's decisions shifted more toward corporate interests and the striking down of some social legislation. The issue I am thinking of now is abortion. In *Roe v. Wade* the Court interpreted the right to privacy to allow women the right to have an abortion. Now in Texas many restrictions on abortion have been put in place, and a case testing the constitutionality of these restrictions was recently argued in the Supreme Court. It looks like the Court will split 4-4, and without a tie-breaking vote, the decision of the lower court upholding these restrictions will stand, greatly limiting a woman's ability to obtain an abortion in Texas. Other states are likely to enact laws modeled after the Texas law, further chipping away at *Roe v. Wade*. They don't outlaw abortion because the law of the land is *Roe v. Wade*, but they certainly put up obstacles to obtaining it, hence the importance of the appointment of whoever this new justice will be.

Other decisions made during this post-Reagan period include *Bush v. Gore*, which gave the presidency to George Bush, and decisions restricting voting rights and eroding protections for those accused of committing crimes. In deciding *Bush v. Gore* the Court actually exceeded its constitutional authority. The Constitution provides that each state should determine who is entitled to its electoral vote, not the Supreme Court. In *Bush v. Gore*, the Court stated that the opinion should not be looked to for precedent. It was a one-time intervention in the rights of the states.

**TSH:** What is the Court's current make up?

**JC:** While the earlier Courts were made up exclusively of white Protestant men, all the members of the current Court are Catholic or Jewish, three women sit on the Court, and two justices are minorities. The Court now includes four liberal appointees: Justice Stephen Breyer, Justice Ruth Bader Ginsberg, Justice Elena Kagan, and Justice Sonia Sotomayor; and three conservative appointees: Justice Clarence Thomas, Justice Samuel Alito, and Chief Justice John Roberts. Justice Anthony Kennedy was the swing vote who, when Justice Scalia was on the Court, frequently broke the tie. Without Justice Scalia, if Justice Kennedy votes with the conservative wing, there will be a 4-4 split, and the decision of the lower court will stand.

**TSH:** How reliably liberal or conservative are the justices in their decisions? Are there surprises?

**JC:** It's not unusual for a justice to vote in an unexpected way. Republican President Dwight Eisenhower made a recess appointment of Chief Justice Earl Warren who presided over a series of liberal decisions that revolutionized the Supreme Court. He was supposed to be a middle-of-the road conservative justice, but he became a liberal activist, strongly supporting civil rights. Justice Hugo Black had been a member of the Ku Klux Klan in Alabama in the 1930s, yet he became one of the great liberal thinkers on issues of civil rights. During her tenure, Justice Sandra Day O'Connor, a reliable conservative (she voted with the majority in *Bush v. Gore*), became the champion of women's and minorities' rights in discrimination cases. Until she stepped down, she was the swing vote on many 5-4 decisions. More recently Chief Justice Roberts voted to uphold a critical funding provision of "Obamacare" and the right to same-sex marriage. Some of our best Supreme Court justices had the courage to change as they became more experienced and educated during their time on the Court.

**TSH:** Justice Antonin Scalia's death left the Court and the government in turmoil. President Obama plans to make an appointment; the Senate is determined to stonewall and not even consider any appointment he makes. Is there a precedent for a president to make a Supreme Court appointment in his final year in office?

**JC:** There is absolute precedent. Since 1900, Presidents William Taft, Woodrow Wilson, Herbert Hoover, Franklin D. Roosevelt, Dwight Eisenhower, and Ronald Reagan had Court vacancies in an election year. Four of those Presidents had their nominees confirmed. President Woodrow Wilson nominated Justice Louis Brandeis in 1916, the first Jewish justice, during his last year in office. And he nominated him against the advice of many politicians, including the former president William Howard Taft, who opposed a Jewish justice. Since 1900 other election year appointments and confirmations were made by Presidents Taft, Hoover, and F. D. Roosevelt. President Eisenhower made a recess appointment of Chief Justice Earl Warren, and Ronald Reagan nominated Anthony Kennedy the year before the election year. Kennedy was confirmed with enthusiastic bipartisan support in the election year, 1988.

**TSH:** Is there precedent for the Senate to refuse to consider a presidential appointment during an election year?

**JC:** I am not familiar that the Senate has ever refused to consider a nominee. I am not familiar that the Senate has ever set precedent where they will not even listen to a nominee.

**TSH:** Could President Obama look to the federal courts for relief if the Senate refuses to act?

**JC:** No. The Constitution states that the President nominates and the Senate advises and consents. Because of the doctrine of separation of powers, the Court cannot require the Senate to do anything. The President could make a recess appointment if the Senate goes out of session, but the Senate will probably not allow that to happen. President Obama would not make a liberal appointment because the nominee would never be confirmed, even if the Senate considered the nomination. Suppose Obama nominated a Republican, would the Republican Senate reject one of its own?

**TSH:** Do you have concerns about the future of the Supreme Court?

**JC:** The Supreme Court justices have made a mistake in recent years. Once upon a time you rarely knew of, read about, or were aware of any of their political activities, whom they supported in an election, where they gave speeches. In the last twenty years, and I am thinking specifically of Scalia but others, they have become more active in political activities to the detriment of the honor that the American people used to have for Supreme Court decisions. In the past, now this is in the 20<sup>th</sup> century, when the Supreme Court spoke, the American people backed it. I don't think that happens today.

The purpose of life-long appointments was to insulate the justices from political influences. The Supreme Court was to be an independent body, uninfluenced by popular trends and opinions. Justice Scalia took over 280 trips around the world while he was a justice. Most of them he did not pay a penny for. During the Bush presidency Dick Cheney had a case before the Supreme Court involving the time he was CEO of Halliburton. At the same time Justice Scalia went out on a hunting trip with Cheney. There may have been no wrongdoing, but there was an appearance of impropriety, of influence pedaling. This is just one of the trends I do not like in the judiciary system.

Today people are skeptical of the Supreme Court because they see the justices responding to political trends, and because they see political influences determining so many solutions. I see a growing call for putting limitations on terms and age limitations as well. The Court has lost some of the aura it once had because of the activities of some of its members, and I fear for the future.

**TSH:** Thank you, Joe, for your sharing your knowledge and thoughts on this important subject.