

The Supreme Court

The coming firestorm

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Liberals are aghast and conservatives thrilled at the possibility of George Bush reshaping the nation's highest court in 2005. It may not be as simple as that

"MAKE no mistake about it," Theodore Olson, a former solicitor-general and a possible candidate for the Supreme Court himself, said after the November election, "any attempt [to fill a vacancy on the court], especially that of chief justice, will set off a political firestorm. The presidential election was merely about the next four years. A Supreme Court justice is for life. It will not be pretty."

The composition of the present court has remained unchanged for more than a decade—longer than that of any other Supreme Court in the past 180 years. The news that William Rehnquist, the 80-year-old chief justice, has been undergoing chemotherapy for throat cancer, has sparked a bout of speculation that he might retire. There have also been rumours that both John Paul Stevens (who is 84) and Sandra Day O'Connor (74) may go. Most of the other justices—Antonin Scalia (68), Anthony Kennedy (68), David Souter (65), Clarence Thomas (56), Ruth Bader Ginsburg (71), Stephen Breyer (66)—are hardly spring chickens. And most Americans want mandatory retirement for judges.

This could give George Bush a golden opportunity to remould the court in the same brazenly political way that most of his predecessors have done. Of the 108 justices who have served on the Supreme Court since it was set up in 1790, all but a dozen have come from the same party as the president who appointed them (after confirmation by the Senate). Most of the justices have had some form of political experience (William Taft was actually president), and a third have had no prior judicial experience (a group that includes Mr Rehnquist, who was assistant attorney-general in the Justice Department).

Pigeonholing justices is a dangerous sport. But the current court can be crudely split into three conservatives (Scalia, Thomas and Rehnquist), three liberals (Stevens, Ginsburg and Breyer) and three moderates (O'Connor, Souter and Kennedy). Roughly two in five of their decisions are unanimous, but one in four are decided by five-four splits.

Opinion as to how far Mr Bush wants to go in "conservatising" the court tends to divide into two schools. The first, which contains plenty of pessimistic liberals, predicts that Mr Bush's debt to conservative voters, together with his own inclinations, will lead him to appoint strongly conservative judges who would clamp down on abortion, gay rights, affirmative action and so on. "This is a once in a generation opportunity to remake the court," laments one of the country's best-known Democrats, who predicts that Mr Bush will in effect overturn *Roe v Wade*, the landmark 1973 ruling which established a woman's right to abortion. According to the Centre for Reproductive Rights, up to 30 states are poised to make abortion illegal should *Roe v Wade* be overturned.

The other school, which contains plenty of pessimistic conservatives, believes that Mr Bush will opt for more moderate candidates in the hope of avoiding alienating middle-of-the-road swing voters. For instance, the Republicans have considerable support when it comes to limiting late-term abortions and getting teenagers to notify their parents, but most Americans believe abortion should not be illegal. Nearly two-thirds of Americans say nominees for the court should reveal their position on abortion before confirmation.

Mr Bush appointed plenty of conservative judges to lower courts during his first term. But when it comes to the Supreme Court he has hidden behind a formula: if a vacancy occurs, he will "pick somebody who knows the difference between personal opinion and a strict interpretation of the law". With swing voters worried about abortion, he stresses there will no "litmus test" for his nominees.

Yet Mr Bush has also reassured conservatives by saying that he has a firm preference for "strict constructionists". By this he means justices who will concentrate on interpreting the law, as opposed to "activist judges" who, for instance, rewrite the law in favour of gay marriage, as judges appeared to do in Massachusetts.

It is here that liberals begin to worry. The two reputedly strictest constructionists on the court—Messrs Scalia and Thomas—are also the two most conservative members. Both have voted to uphold laws criminalising homosexual acts, banning racial preferences, allowing state-sponsored school prayers, requiring states to subsidise religious instruction and so on. Both have made it clear that they would have voted against *Roe*. The prospect of Mr Scalia, a friend of Dick Cheney, being promoted to chief justice, is one reason why liberals have suddenly become so solicitous of Mr Rehnquist's health.

Yet Mr Scalia also illustrates the danger of pigeonholing justices. Appointed by Ronald Reagan in 1986, he delights in castigating "unelected politicised judges" who think they have "the power to do good" with their "abstract moralising". He wants legislatures, not judges, to decide whether to decriminalise things like abortion, homosexual conduct or assisted suicide. But he is hardly a literal interpreter of the constitution; indeed, he has described strict constructionism as a "degraded" approach that "no one" should follow.

The abortion issue, in particular, is not simple for conservative constructionists. Supreme Court justices of all persuasions are normally reluctant to overturn the decisions of their predecessors, especially when they have been in force for so long. Conservative jurists in particular tend to defer to the principle of *stare decisis*, or established precedent. Even if a conservative jurist dislikes *Roe*, he might still think it would be wrong to overturn it. (This is a position that Mr Rehnquist himself might well take.)

With these caveats, how much difference would a new conservative appointment make? The answer is that a lot depends on who goes. It is easy to imagine Mr Bush replacing Mr Rehnquist with a still more conservative justice—and it having relatively little effect on the court's balance. Indeed, it would be bizarre if Mr Bush did anything else, given his debt to the conservative movement.

Replacing say Mr Stevens or Mrs O'Connor, both of whom have supported abortion choice, with an out-and-out conservative would obviously make more of a difference. The Democrats would also fight much harder against the nominee. They have already blocked other Bush judicial nominees with filibuster threats. Just before Christmas, the White House, emboldened by Republican gains in the Senate, said it would renominate 20 controversial judicial nominees. The Senate Republicans have also threatened to change the filibuster laws.

The White House reportedly thinks Mr Bush should put forward his toughest (ie, most conservative) Supreme Court nominee now, while he is still basking in the post-election glow. Among the most commonly mentioned possible candidates are Harvie Wilkinson, a judge on the Fourth Circuit federal appeals court in Richmond, Virginia; Michael Luttig, who sits on the same court; Edith Jones, a Fifth Circuit appeals judge; and Larry Thompson, a former deputy attorney-general and now general counsel of PepsiCo.

But it has always been notoriously difficult to predict how a judge will behave once he or she gets on to the Supreme Court. There has been a marked shift to the left by the present supposedly conservative-dominated bench, for example. "Packing the Supreme Court just doesn't work," President Harry Truman said ruefully: "Whenever you put a man on the court,

he ceases to be your friend. I'm sure of that—I've tried it." Dwight Eisenhower agreed. When asked about the mistakes he had made during his presidency, he reportedly replied that the two biggest were sitting on the Supreme Court.