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Evaluating the New Justices in Light of the Confirmation Ordeal

PROFESSOR KMIEC: We are not done because we have a treat for all of you who have waited this long. We have three wonderful journalists who are going to give us some perspectives on the confirmation process, and to lead into that, we have several excerpts from Senator Kennedy and Senator Feinstein.

(Video clip shown)¹

Senator Feinstein, in her comments and a little bit less in Senator Kennedy's, has articulated a common complaint about the confirmation process, namely, that as I whimsically said in the overview, questions were asked, very few answers were given. Now, the explanation, of course, is that both of the gentlemen testifying were sitting judges; they were under the Code of Judicial Ethics that precluded them from prejudging cases. And Senator Kennedy this summer in the Washington Post had an essay to the effect that that's just insufficient going into the future.

He knows these people have thought about these issues. There's some evidence of that, and he wants to know what their current thinking is, and unless he hears that thinking, he doesn't intend to confirm to anyone else.

So David Savage with that as the lead-in, tell us your thoughts about the sufficiency of the confirmation process.

Please. Please welcome David Savage.

David G. Savage*

Thank you. It's good to be here. In an earlier life, I was an education writer in Los Angeles, and I used to have occasion to come out here to Pepperdine to talk to classes in January or April or October, and I was convinced it was always good to be here. Always pleasant. I also like seeing Ken Starr and Doug Kmiec again. I knew them from the Reagan

1. Video Clip: Confirmation Hearings of John Roberts and Samuel Alito (CSPAN 2005), available at <http://law.pepperdine.edu/symposium/webcast.jsp#robertswebcast> (follow "watch webcast" hyperlink under "Panel II").

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Administration days, Judge Starr and—Solicitor General Starr and Professor Doug Kmiec.²

I say that because with the arrival of John Roberts and Sam Alito, we're now into the second generation of the Reagan Court.

John Roberts and Sam Alito were among the bright young conservatives who were drawn to the Reagan Administration in the early 1980s.³ President Reagan had a very strong view that judges had overstepped their authority, that they were making too many decisions which should be left to the voters and to a democratic society. And they were doing things like throwing out school prayers or overturning, at one time, the death penalty and throwing out the abortion laws.⁴ The American public didn't support all these changes, and Reagan believed that in a democratic society, judges shouldn't be making those decisions.

The lawyers of the Reagan Justice Department also had a series of very distinctive and clear views about the law. They were skeptical of affirmative action and of use of race by the government. They tended not to believe in the strict separation of church and state; they believed this was an incorrect interpretation of the First Amendment and believed there should be more room for religion in public life. They thought *Roe v. Wade*,⁵ of course, was wrong. They were less enthused by environmental protection and more supportive of property rights. They tended to believe in what I think Doug Kmiec would describe as robust executive power. They were opposed to meddling by Congress in the business of the executive branch, and they had some preference for states' rights over a federal power.

Now, my sense is that John Roberts and Sam Alito share all those big views, and we'll see that in the years ahead.

2. Head of the Office of Legal Counsel (Assistant Attorney General), U.S. Department of Justice, 1985-89.

3. John Roberts initially joined the Reagan administration as Special Assistant to Attorney General William French in 1981. He then became Associate Counsel to the President in 1982. *Confirmation Hearing on Nomination of John Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. 58 (2005) (statement of John Roberts, Chief Justice of the Supreme Court nominee). Samuel Alito joined the Reagan administration in 1981 as Assistant to the Solicitor General for the Department of Justice. In 1985 he became Deputy Assistant General. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be Associate Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. (2006).

4. See *Engel v. Vitale*, 370 U.S. 421, 435 (1962) (holding that "it is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance"); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother were unconstitutional); *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (J. Douglas, concurring) (holding that the imposition and carrying out of the death penalty in cases before the Court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

5. 410 U.S. 113 (1973).

I also share the view that the most interesting words that were said at the John Roberts confirmation hearings were his comments in that very fine opening statement about judges as umpires. I want to “call balls and strikes,” not make the rules of the games, he said.⁶ I don’t want to be the star of the game.⁷ That was a clear and simple saying of what Reagan believed, which is that a judge shouldn’t have such an important role in our government.

I must say, to be honest about it, I heard this with mixed feelings. I have a personal, sort of a conflict of interest. I don’t know whether Gina and Marcia share this view, but if you’re a full-time reporter whose job is to cover the Supreme Court, it’s not altogether good news when the Chief Justice says, I want a more modest institution, a humble institution, an institution that doesn’t make waves. That conjures up visions of the do-nothing Supreme Court, and, you know, newspapers don’t assign reporters to cover the Federal Home Loan Bank Board.

Or stated another way, in the words used by John Roberts, when’s the last time you’ve picked up the sports page and read the profile of an umpire? But something tells me that the Court will sort of rise to the occasion and continue to take on big legal issues. There are so many important legal issues coming to the court that it’s going to continue, I think, to be a very interesting place to watch for a number of years.

We were supposed to be talking about John Roberts and his Rookie Year. I would say one thing sort of in the baseball context: When this guy first takes the field, you would say: This guy was born to play the game. He is a real natural talent. John Roberts is also somebody who rose to the top based on merit. In the twenty-five years he was in Washington, he was never a person who tooted his own horn. He was never the type of person who went out of his way to call attention to himself—although, in Washington, that may be a way to call attention to yourself. But as I said, the most interesting words in his confirmation testimony were his comments about modesty and humility, and no dramatic departures for the Court.⁸

During this, his just completed first term, there were signs that point in different directions. I am more impressed, I think, than Erwin was with the

6. Confirmation Hearing on the Nomination of John Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. On the Judiciary, 109th Cong. 55-56 (2005) (statement of John Roberts, Chief Justice of the Supreme Court nominee).

7. *Id.*

8. Transcript: Day One of the Roberts Hearings, Washington Post, Sept. 13, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

number of the unanimous decisions.⁹ I thought Roberts did a remarkable job of finding a smart middle position on a lot of big cases.

Had we been here a year ago, we would have been talking about *Ayotte v. Planned Parenthood of Northern New England*,¹⁰ the New Hampshire abortion case. There, two polar opposite positions were presented to the court. The ACLU said this parental notification law is totally unconstitutional and it can't go into effect because there's no, quote, "health exception."¹¹ Well, the New Hampshire legislators didn't want to put a health exception in because ever since Harry Blackmun's opinion in *Roe v. Wade*, "health," he said, means anything that the doctor thinks it means, including the emotional well-being of the patient.¹² Well, if the New Hampshire legislature put a health exception in, it would swallow the rule. The doctor can perform abortions without notifying the parent in advance, and it would not violate the law so long as he said some health issue was at stake.

New Hampshire's position was: Our law is fine. What's the big deal?, they said. If you've got a problem, go to the judge and seek a waiver of the law.¹³ Well, that's not a very good view either. If you, as a doctor, have a young woman who's bleeding, you don't want to take her to go to a judicial hearing. You want her to go to the hospital.

And so at the very beginning of that argument, John Roberts essentially took the position that both views were wrong. They were too extreme. He ended up finding a unanimous opinion that basically said: Yes, this law can be constitutional, but there needs to be some exception for real medical emergencies. There were a half dozen situations where, with Roberts taking the lead, the Court came out with a very reasonable middle-ground position.

There were at least two, I think, that point the other way. We were just talking about the wetlands case in Ken Starr's presentation.¹⁴ The Clean Water Act of 1972 basically said, it is illegal to discharge pollutants into the waters of the United States.¹⁵ And for thirty years since then, the Army Corps of Engineers has taken a very broad view of the law. Its notion is that because water flows downhill, you can't protect the Santa Monica Bay from

9. Of the seventy-three opinions handed down in Justice Roberts' rookie year (2005-06), thirty-seven were unanimous decisions. Twenty-five of those were 9-0 decisions, while twelve were 8-0 decisions. Northwestern University Medill Journalism, U.S. Supreme Court 2005-2006 Case List, available at http://docket.medill.northwestern.edu/archives/002315.php?sortBy=opinions_issued&sort=DESC.

10. 126 S. Ct. 961 (2006).

11. *Id.* at 965.

12. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (noting that "health" encompasses a variety of concerns: "Psychological harm may be imminent. Mental and physical health may be taxed by child care").

13. *Ayotte*, 126 S. Ct. at 2214.

14. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

15. 33 U.S.C. §§ 1251-1387 (2001).

pollution if people up here in the mountains can put pollution into the streams. That will flow into the Bay. They took this very broad view through Republican administrations and Democratic administrations, and in Republican-led Congresses and Democratic-led Congresses. It seems to me that the modest view would be to say: If this law is being over-interpreted and interpreted too broadly, why not let Congress write a new law? John Roberts joined with Justice Scalia.¹⁶ Of course, Justice Scalia's opinion makes a lot of sense based on the wording of the law. It spoke of the "navigable waters" of the United States, and Scalia concluded that the Corps only has jurisdiction over "continuous flowing bodies of water."¹⁷ As Ken Starr mentioned, Justice Kennedy discussed, that this interpretation would eliminate all wetlands in the West because they are dry at this time of the year.¹⁸ Justice Scalia and Chief Justice Roberts were part of a foursome.¹⁹ With a fifth vote, they could have brought a dramatic departure in the law.

The other one was the Oregon case.²⁰ In 1994, the voters of Oregon passed the Death with Dignity Act.²¹ They don't like to call it "assisted suicide." They make the very interesting point that the word "suicide" means someone is saying, in effect, "I want to die. I choose to die." These people don't want to die; they are dying. These are people who are terminally ill, and the only question is: are they going to die this week or four weeks from now? And the Oregon voters said, if the doctor has certified this person as terminally ill, then this dying person can obtain lethal medication from a doctor and take it at the time of their choosing.²² On one occasion, I talked to some of these people in Oregon. They have all kinds of reasons for wanting this medication. Some people were in pain, or they fear being in pain with no relief. A lot of people were in pain for their families. They didn't want their families to have to suffer with them in the last difficult weeks of life. And some didn't have anyone to be with them.

In 1997, the Supreme Court said that there is no constitutional right to die.²³ The Court said: We're not going to make the same mistake we made

16. *Rapanos*, 126 S. Ct. at 2214.

17. *Id.* at 2225.

18. *Id.* at 2242 (Kennedy, J., concurring).

19. *Id.* at 2214.

20. *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

21. OR. REV. STAT. § 127.800 (2003) et seq. This act exempts state-licensed physicians from civil or criminal liability for dispensing or prescribing a lethal dose of drugs upon the request of a terminally ill patient. *Gonzales*, 126 S. Ct. at 911.

22. OR. REV. STAT. § 127.805.

23. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that the "'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause").

in *Roe v. Wade*, and decide this for the whole nation. We're going to leave it to the states. Some members of Congress, including John Ashcroft, asked Janet Reno to put out an order that would basically void the Oregon law. They wanted her to say that these doctors in Oregon are violating the federal drug-control law. And Reno said, "No. The federal drug control law is about narcotics. It didn't give me, as the Attorney General, the power to prescribe the practice of medicine. That's left to the states."²⁴ That's the way things stood.

In November of 2001, the now-Attorney General John Ashcroft put out a new order that basically did what he wanted to do when he was in Congress and he couldn't get a majority to do it. That is, he said, Oregon's doctors are violating the Federal Drug Control Act if they prescribe this medication.²⁵ It's not a "legitimate medical purpose."²⁶ The Oregon doctors went to federal court, the law was enjoined, and the Ninth Circuit affirmed that.²⁷ It came up to the Supreme Court in the first week or two that John Roberts was there as Chief Justice.²⁸ The Court ended up with a six to three decision affirming the Ninth Circuit and upholding the Oregon law.²⁹

But Roberts, the Chief Justice, joined Justices Scalia and Thomas in dissent in basically upholding the Ashcroft argument.³⁰ Had there been a majority for this view, it would not have been a particularly modest act. It would have been overturning the wishes of Oregon's voters and upholding a new interpretation of an old federal law that Congress had never endorsed. This too would have been quite a dramatic departure.

So I think it's going to be very interesting to watch over the next few years to see whether the Roberts' Court is a really modest, down-the-middle court, one that practices judicial restraint, or whether it becomes a much more aggressive court, pushing in different ways that reflect the strong views back from the Reagan era.

I'll say one other thing. Learned talks need some statistics. Mine are 86, 73, 58, 56 and 51. Now, that's not like the joke about the old New York teachers' exam, where given a series of number that were unrelated, only true New Yorkers would know they were the stops on the Eighth Avenue subway.

24. David G. Savage, *Ashcroft Wants Oregon Suicide Law Blocked*, L.A. TIMES, Nov. 10, 2004, at A20.

25. *Gonzales*, 126 S. Ct. at 913-14.

26. *Gonzales*, 126 S. Ct. at 913-14.

27. *Id.* at 914. For a full discussion on the Ninth Circuit's decision, see *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).

28. *Gonzales* was argued on October 5, 2003, two days after Chief Justice Roberts was appointed to the bench.

29. *Gonzales*, 126 S. Ct. at 904.

30. *Id.* at 926.

These are the ages, first, of the two oldest members of the Supreme Court and the two most liberal Justices. Justice Stevens is 86 and Ruth Bader Ginsburg is 73. Three of the four strong conservatives are in their 50s. Justice Thomas is 58, Sam Alito is 56 and John Roberts is 51. So the second generation of the Reagan Court is alive and well and is going to be with us for a long time, and it's going to be fun to watch. Thank you.

