
UNITED STATES SUPREME COURT POLITICS: FOCUS ON STEVEN'S AND OTHER MODERATE JUSTICES' LONGEVITY

In the United States Supreme Court politics the month of June is normally 'crunch time'. Many rulings are delivered by the Supreme Court during and before the end of the month of June. In the beginning of July of each year the nine Justices of the Supreme Court go for a three month (fully-paid of course) summer vacation. After the three months vacation the Court resumes hearing new cases on the 'first Monday in October'.

During the Supreme Court terms of 2000-2001, 2001-2002 and 2002-2003 the month of June was also 'speculation' time. During the 2002-2003 Supreme Court term there was also speculation as to whether any of the Supreme Court Justices would retire. (Normally though, but not invariably, Justices make announcements of their retirement at the end of June when the Court recesses for the summer vacation). As the most recent (US) Supreme Court term ends at the end of June 2003 there were no announcements of resignations or retirements from the nine-member Bench. At the start of the Supreme Court term in October 2003 also there has been no announcement of impending resignations or retirements.

In a ruling delivered on the night of 12 December 2000, in the (in)famous *Bush v Gore*¹ case the Supreme Court by a five to four majority peremptorily stopped the Florida recounts and by this action virtually declared George W. Bush to be the winner of the 2000 United States Presidential election. Since then speculation has been rife as to

¹ 121 S.Ct 636 (2000).

when (not if)² George W. Bush would have the chance to make an appointment to the Supreme Court. The majority of the Justices of the Supreme Court are indeed Bush's benefactors in that they helped propel him to the Presidency in the first place. (Under the United States Constitution the President first 'nominates' the Supreme Court Justices which must be approved by a majority of the 100 member United States Senate. Once the appointment is approved by the Senate, the appointment is during 'good behaviour' – which in the American context virtually means life term appointment. There is no compulsory retirement age. A Supreme Court Justice can be impeached and removed for 'High Crimes and Misdemeanours'³ under the relevant provisions of the United States Constitution but in the 227 year history of the United States a successful impeachment and removal of a Supreme Court Justice has never taken place.)

² In the 2000 election campaign the (eventually) defeated –thanks to the US Supreme Court - Democratic Presidential nominee Albert Gore stated that if George W. Bush were to be elected (in the 2000 election) Bush would have had the opportunity to appoint up to four Supreme Court Justices. That opportunity did not come to pass from Bush's inauguration to the time of the November 2004 election but -alas- as the Burmese saying goes the eventuality of Bush appointing Justices to the US Supreme Court is as sure as one's chances of hitting the ground with the palm (i.e. as there is little chance of missing the ground when one tries to touch it with one's palm, Bush is now certain to appoint not only the next Chief Justice but also quite a few Associate Justices of the US Supreme Court).

³ Article II, Section 4 of *The Constitution of the United States of America* stipulates that '[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanours'. Article III Section 1 of *The Constitution of the United States* in part stipulates that 'The Judges both of supreme and inferior courts, shall hold their offices during good Behaviour ..' In the 213 year history of the United States Supreme Court (since 1790) there has been only one impeachment proceeding against a Supreme Court Justice – Justice Samuel Chase- and that occurred in the year 1805. The impeachment proceedings did not succeed and Justice Samuel Chase was acquitted of the charges against him. See generally WH Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992) *par tim* and Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (2002) 80-83. The authors Rehnquist and O'Connor were at the time of the publication of their books Chief Justice and Associate Justices respectively of the United States Supreme Court. As of January 2004 they still hold those positions. Hence in the 213 year history of the US Supreme Court no Supreme

The appointment of Supreme Court Justices attracts much public attention in the United States not merely due to the fact that these privileged positions are for life⁴ but also due to the fact that Supreme Court Justices wield enormous power. In few other countries – at least that of the common law world with British legal heritage – are the Judges of the top apex courts as powerful as those in the United States. Among others, the Supreme Court can and has struck down many legislation passed by the United States Congress (the Legislature) by declaring them unconstitutional.

In the 1857 case of *Dred Scott v Sandford*⁵ Dred Scott, a Negro (the official term now is African-American) slave, sought to be declared a free man on the basis that he had lived for a time in a 'free' territory with his master. The Supreme Court in the *Dred Scott* case decided that, under the United States Constitution Scott was his master's property and was not a citizen of the United States. The Court also declared that the Missouri Compromise which prohibited slavery in certain areas of the United States unconstitutionally deprived people of property. The *Dred Scott* case was said by some to have 'contributed' to the American Civil War of 1861 to 1865.⁶ On the other hand, on the positive side, the Supreme Court's 1954 decision in

Court Justice has been removed through the impeachment process. As of January 2004 all the 99 Supreme Court Justices that had served (and who are not currently on the Court) either retired or resigned from their positions of their own choosing or have died in office. Hence though the US Constitution does not explicitly states so, a Supreme Court appointment is indeed (virtually) for life.

⁴ Compare Article III Section I of *The Constitution of the United States of America* with Section 72 (as amended by Act No. 83 1977 s 2) of *The Constitution of the Commonwealth of Australia* which states that 'The appointment of a Justice of the High Court [of Australia] shall be for a term expiring on his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age'.

⁵ 19 How. 393 (1857).

⁶ Sandra Day O'Connor who as of (January 2004) is an Associate Justice of the Supreme Court writes in her book *The Majesty of the Law* (2003) (at pages 44-45) that '[t]he history books also provide very clear examples of Supreme Court decisions that were completely rethought after vehement criticism by the nation. The infamous *Dred Scott* decision is the example that first comes to mind. But it does not always take a civil war to reverse a Supreme Court decision'. (footnote omitted)

*Brown v Board of Education*⁷ case helped end racial segregation in the United States schools by declaring that the 'separate but equal' practice of sending white and black children to separate schools was unconstitutional. Its controversial 1973 ruling in *Roe v Wade*⁸ made abortion – at least in the first trimester of a woman's pregnancy- legal. The unanimous decision of the United States Supreme Court in the case of *United States v Nixon*⁹ on 24 July 1974 that President Richard Nixon must surrender the White House 'Watergate' tapes to the grand jury investigating the 'Watergate break-in' led to the first and only resignation of an American President from office when Richard Nixon resigned on 9 August 1974. More recently, the year 2000 decision in *Bush v Gore* all but propelled George W. Bush to the Presidency of the United States: the first case in American legal and political history where the Supreme Court decided the outcome of a Presidential election.¹⁰

⁷ 347 U.S. 483 (1954).

⁸ 410 U.S. 113 (1973).

⁹ 418 U.S. 683 (1974). For the writer's comparison of a 'parallel' Malaysian case law with the decision in *US v Nixon* see Myint Zan, 'The Three Nixon Cases and their Parallels in Malaysia' (2001) 13 (3) *St Thomas Law Review* 743,745-55. Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (2001), 173-74.

¹⁰ At least one scholar has 'equated' *Bush v Gore* with the *Dred Scott* case and has expressed the view that *Bush v Gore* was in a certain sense even worse than *Dred Scott* :

Bush v Gore is certainly not the first bad Supreme Court ruling. Over the years the Justices have rendered many evil, immoral, even dangerous decisions, most of which have been overturned by the verdict of history. Heading the list, of course, is *Dred Scott v Sandford*, which essentially declared African-Americans to be property, without rights. But each of these decisions was rendered by justices who almost certainly believed that they were following the dictates of the Constitution. For the most part the justices who wrote or joined the majority opinions for these terrible decisions were acting consistently with their own judicial philosophies – wrongheaded as they may have been. *Bush v Gore* was different because the majority justices violated their own previously declared judicial principles — principles they still believe in and will apply in other cases. In this respect, the decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliations of the litigants. This was cheating and a violation of the judicial oath.

The speculation in 2004 –and also in recent years- had perhaps been more intense as the Chief Justice William Rehnquist (born October 1924)¹¹ is (as of October 2004) 80 years old and the third oldest Justice – and the first woman to be appointed to the Supreme Court by Ronald Reagan – Sandra Day O'Connor (born March 1930) is 74. There are speculations and murmurs that both may wish to retire before the next scheduled Presidential election in November 2004.¹²

This writer might venture to make a guess as to who Bush would appoint as the next Chief Justice especially if the current Chief Justice Rehnquist were to retire or indeed his seat were to become vacant. Any of Bush's appointees to the Supreme Court would have to obtain at least 50 votes of the Senate to be confirmed as the next Chief Justice of the United States. (If there is a 50-50 tie, Vice President Dick Cheney can cast a vote to break the tie.) During his campaign for President, Bush had expressed his admiration for the two most right-wing Justices in the Supreme Court. They are Justices Antonin Scalia and Clarence Thomas and Bush has already made it plain that he wants to appoint persons like them to the Supreme Court. The United States Senate has, after the mid-term 2002 Congressional elections, fifty-one Republican Senators, forty-eight Democratic Senators with one independent.¹³ There is a good chance that Bush would nominate the opinionated, acerbic Antonin Scalia to be the next Chief Justice of the United States perhaps touting him as the 'first Italian-

¹¹ The birth month and birth years of Chief Justice Rehnquist as well as those of other Justices which are mentioned in this article are taken from http://supreme.lp.findlaw.com/supreme_court/justices/presjustices.html (accessed 25 July 2003)

¹² As stated earlier this was written in February 2004. Both Rehnquist and O'Connor did not retire or made any announcements of their intention to retire before the November 2004 Presidential elections but it is now sure that the Rehnquist seat would become vacant and Bush will have the chance to nominate the next Chief Justice of the United States. Also, Bush could name a replacement for Sandra Day O'Connor during his second term.

¹³ That was written in February 2004. After the November 2004 elections the Republicans have increased their majorities in both the United States House of Representatives and the Senate. The Republicans now have 55 seats, the Democrats 44 seats and one independent.

American' to be nominated as Chief Justice. Taking into account the current composition of the United States Senate Scalia might well be approved by the Senate to be America's 17th Chief Justice.¹⁴

A somewhat more risky undertaking on the part of Bush would be to nominate the 55 year old (born June 1948) Clarence Thomas rather than the now 67 year old (born March 1936) Scalia to be the next Chief Justice. If such a nomination were to take place Bush could also claim that his choice as 'historic' and would certainly argue that the Senate should not let the opportunity to confirm Thomas as the 'first African-American Chief Justice'. Additionally if Thomas were to be nominated and confirmed by the Senate as Chief Justice, as a 55 year

¹⁴ The list of Chief Justices – and all the Justices of the United States Supreme Court – from the year 1789 to 1988 can be seen in 'Appendix 2 Justices of the Supreme Court (1789- 1989)' in Louis Fischer, *American Constitutional Law* (1990) A. 17- A.18. As of January 2004 Chief Justice Rehnquist has served in that position for 17 years and 4 months since he became Chief Justice on 26 September 1986. Rehnquist has also been an Associate Justice of the Supreme Court since 7 January 1972. (The entire list of Associate Justices and Chief Justices of the US Supreme Court from 1789 to 2003 is also stated in <http://www.oyez.org/oyez/portlet/justices/> (accessed 12 February 2004). As 2004 is a US Presidential election year any resignation or replacement of a Supreme Court Justice, especially of a Chief Justice of the United States could be subject to intense lobbying in the confirmation proceedings in the Senate and is likely to be controversial. The most recent occasion when a Chief Justice of the United States submitted his resignation was in June 1968 when then Chief Justice Earl Warren submitted his resignation to then President Lyndon Johnson. Johnson appointed (then) Associate Justice Abe Fortas as Chief Justice but Johnson's appointment was not approved by the US Senate. After the election (in November 1968) and inauguration (in January 1969) of Richard M. Nixon as the 37th President of the United States, Nixon appointed Warren E. Burger as the 15th Chief Justice and the US Senate confirmed it and Burger was sworn in as Chief Justice on 23 June 1969. When Burger resigned in 1986 then President Ronald Reagan nominated then Associate Justice Rehnquist to succeed Burger and Rehnquist became the 16th Chief Justice on 26 September 1986. As of early January 2004 Rehnquist had become the longest serving Chief Justice of the United States since 1888. Melville Fuller who died in July 1910 served as Chief Justice for more than 21 years eight months (Source http://www.oyez.org/oyez/resource/legal_entity/50/ accessed 12 February 2004). Previous to January 2004 Warren Burger held the longest-serving Chief Justice since 1888 but since then Chief Justice Rehnquist holds that record. (The complete list of dates and other brief biographical information of every Associate Justice and Chief Justice of the United States that has served in the United States Supreme Court can be accessed at <http://www.oyez.org/oyez/portlet/justices/>, accessed 12 February 2004.)

old person he could serve as Chief Justice much longer than Scalia, thirteen years his senior in age, would or could serve. Still, Thomas had a very tough nomination fight in 1991 and he barely made it to the Supreme Court. He became an Associate Justice of the Supreme Court by the thinnest of margins when the Senate barely approved him with a 52 to 48 vote. (In the end, the margin of votes did not matter. When he took office in October 1991 Thomas was 43 years old. I have read reports that Thomas vowed that he would 'stay' in the Supreme Court for the next 43 years as a 'revenge' to those who tried to block his appointment to the Supreme Court.) Also, a Thomas nomination, in comparison with that of Scalia would probably have a much tougher nomination fight. (In 1986 Scalia's nomination to the Supreme Court was approved 98-0 in the United States Senate.) Hence George W. Bush might play it safe with a Scalia nomination.

Bush could perhaps even try 'to play it safer' by nominating Anthony Kennedy to be the next Chief Justice. Though not as right-wing as Scalia, Kennedy is still conservative enough –perhaps- for Bush and a Kennedy nomination would probably sail through the Senate much easier than a Scalia or Thomas nomination.

If Bush were to appoint the next Chief Justice from the current Supreme Court Bench – be it Scalia, Thomas or Kennedy- he would have to make another appointment to fill the Associate Justice position which would become vacant as the result of that person being appointed as Chief Justice. Again my 'guess' is that Bush would probably 'love' to nominate another arch-conservative the current Attorney-General John Ashcroft as a replacement. Scalia or Thomas as Chief Justice and Ashcroft as an additional Justice would be the dream of Bush and his neo-conservative coterie.

The 'rumour mills' concentration of possible retirement is focused on the second-oldest (Rehnquist) and third-oldest (O'Connor) of the Supreme Court Justices. My 'worry' though is not the retirement of either Rehnquist or O'Connor but the possible retirement or replacement of the oldest Justice of the current US Supreme Court: the 83 year old John Paul Stevens (born April 1920). Bush may replace either Rehnquist and/or O'Connor with 'right-wing' (reactionary, conservative) nominee(s) and they could, after some wrangling, be approved by the Senate. (After all the Senate did approve Thomas' nomination by Bush Senior in 1991 with a 52-48 margin.) Realistically speaking, the

replacement of Rehnquist and - if Scalia were to be nominated and confirmed as Chief Justice- of Scalia could be conservative right-wing nominees but they cannot be much further 'right' than Rehnquist or Scalia.

However the oldest Justice in the current Supreme Court the 83 year old John Paul Stevens were to retire or his seat becomes vacant (i.e. if one were not to mince words if Stevens were either to retire or to die during Bush's presidency) it would be almost 'judicial heaven' for Bush. In all likelihood, the replacement of Stevens is likely to be more conservative or right-wing than him. John Paul Stevens was appointed as a Supreme Court Justice by President Gerald Ford in December 1975 when the longest-serving Justice in the US Supreme Court history William O. Douglas was virtually forced to retire due to his various ailments and state of health. Douglas had served on the Supreme Court from 1939 to late 1975: a total of more than 36 years. Stevens has, as of January 2004, served for more than 28 years in the Supreme Court. For more than sixty years the Douglas-Stevens 'seat' has been occupied by a liberal/moderate member of the US Supreme Court. That could all change if the Stevens 'seat' were to become vacant during Bush's presidency.

Through a Republican and appointed by a Republican president Stevens can generally be described as a 'moderate conservative' or - in the context of the ideological orientation of the current Supreme Court- as a moderate and even a 'liberal'. (He is perhaps the only male Justice who in official or unofficial photos wears a bow tie rather than a neck-tie.) He strongly dissented from the ruling in *Bush v Gore*. The last sentence of his dissenting opinion in *Bush v Gore* is pertinent and stirring. It has almost become a 'mantra' for those who are critical of the *Bush v Gore* ruling. The sentence reads: 'although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear: It is the Nation's confidence in the judge as an impartial guardian of the rule of law'.

Hence the chance for Bush to make a replacement for Stevens (rather than or in addition to Rehnquist or O'Connor) could tilt the Court definitely further right than a replacement for either Rehnquist, Scalia or O'Connor. A replacement for these three may not 'tilt' the future decisions of the Supreme Court further to the right as much as

a replacement for Stevens. Since there is a good chance that due to the Bush White House's cynical and skilful exploitation of 'September 11' and 'victory' in the Iraq war of 2003 it is likely that George W. Bush would be re-elected in 2004.¹⁵ Even if Stevens do not retire in 2004 it is very likely that the Stevens 'seat' in the Supreme Court might not 'survive' a Bush Presidency if Bush were to be elected for a second term. Hence liberals who do not like to see the Supreme Court turn further right would have to wish or 'pray for' the personal and judicial longevity of John Paul Stevens together with the other 'liberal' or moderate Justices Ruth Bader Ginsburg (born March 1933) and Justices David Souter (born October 1939) and Stephen Bryer (born August 1938).

Since Bush has won his second term, it would seem that only if John Paul Stevens, like one of his predecessors on the Supreme Court Justice Oliver Wendell Holmes, serve until the age of ninety¹⁶ could a Bush replacement of his seat be avoided.

Needless to say there are other potential 'candidates' who have been mentioned as possible Supreme Court nominees. One of them is White House counsel Alberto Gonzalez, a former Associate Justice of the Texas Supreme Court when George W. Bush was Governor of Texas. If Bush were to nominate Gonzalez to the Supreme Court he could 'tout' Gonzalez as the first Hispanic American appointee to the Supreme Court. Another recent (potential) candidate who has been mentioned as a possible candidate is (as of July 2003) Associate Justice Janice Rogers Brown of the California Supreme Court (a State court rather than a Federal court in the American constitutional milieu).

¹⁵ This sentence was written around February 2004. In earlier versions of the article I have written Bush could win the then scheduled 2004 Presidential election with a significant majority but deleted the phrase 'significant'. As it was, in the November 2004 Presidential elections Bush won the popular vote by about 3.7 million (out of an estimated 115 million votes cast) and won the electoral vote by a majority of 34 votes (286 votes to John Kerry's 252 votes)

¹⁶ Oliver Wendell Homes Jr. (1841-1935) was appointed Associate Justice of the US Supreme Court at the age of sixty in the year 1902 and retired in January 1932 when he was nearly ninety years old and after serving in the Supreme Court for almost thirty years. For a brief biography of Oliver Wendell Holmes including about the years he was an Associate Justice of the United States Supreme Court see <http://www.arlingtoncemetery.net/owholmes.htm> (accessed 28 July 2003).

In late July 2003 President George W. Bush nominated Janice Rogers Brown to be a Judge in the US Court of Appeals for the (Washington) D. C Circuit (a Federal Court). At least one commentator has stated that by appointing Brown to the Federal Court of Appeals George W. Bush is preparing the ground to nominate Brown as a possible future Supreme Court nominee.¹⁷ Morrison states that Brown, like the current African-American Justice Clarence Thomas of the US Supreme Court, is very conservative and also that three Justices of the current (January 2004) US Supreme Court namely Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg, served in the Court of Appeals of D.C before they were elevated to the US Supreme Court.¹⁸

The writer would 'second' Morrison's statement that George W. Bush (Bush junior) may be preparing the ground for the first African-American woman to be appointed to the US Supreme Court especially if the first woman to be appointed to the US Supreme Court Sandra Day O'Connor were to retire or if her seat were to become vacant. Just as his father George Herbert Walker Bush (Bush senior) nominated the African-American Clarence Thomas to replace the retiring Thurgood Marshall as an African-American replacement in 1991 Bush (junior) could nominate Brown to be the first female African-American (though very conservative) replacement especially if either or both the seats held by the two female Justices were to become vacant during Bush (junior)'s term. And should Bush nominate Brown to the Supreme Court, the Senate would have a hard time to vote against the first female African-American nomination to the US Supreme Court. Just as the Senate in 1991 approved Bush (senior)'s nomination of Clarence Thomas notwithstanding his (less than) mediocre judicial and scholarly record and serious allegations of sexual harassment against him it is quite likely that the Senate could well approve Brown as a Supreme Court Justice if Bush (junior) were to nominate her.

In March 1993 in this writer's tribute article of the late Thurgood Marshall I 'predicted' that then newly inaugurated President Clinton

¹⁷ T Morrison, 'Must US Supreme Court Nominees First Serve on the Federal Court of Appeals?' http://writ.news.findlaw.com/commentary/20030731_morrison.html (accessed 5 August 2003).

¹⁸ *Ibid.* As of early August 2003 President Bush's nomination of Justice Janice Rogers Brown to the US Court of Appeals for the D.C Circuit has not been approved by the US Senate as yet.

could be the first Democrat President since Lyndon Johnson in 1967 to 'fill' a US Supreme Court vacancy.¹⁹ I stated that (at that time in February 1993) the oldest Justice in the Supreme Court the late Harry Blackmun (retired Justice Harry Blackmun died in March 1999)²⁰ who was then in his 84 years old is likely to retire as soon as the 1992-1993 Supreme Court term ended. I then 'predicted' that President Bill Clinton was likely to replace Blackmun with a female African-American jurist. As it was, Harry Blackmun made his announcement of retirement not in 1993 but in April 1994 stating that he would retire at the end of the 1993-1994 Supreme Court term.

In the same month the above article of mine on the late Thurgood Marshall was published (i.e. in March 1993) the then 75 year old the late Justice Byron White²¹ (Byron White died in April 2002) announced his retirement which would become effective at the end of the 1992-93 Supreme Court term. And President Clinton replaced him with a woman but *not* an African-American woman as I had (wrongly) predicted. Ruth Bader Ginsburg²² was the second woman and the first *Jewish* American woman that was appointed to the US Supreme Court.

The appointment of the first African-American woman to the US Supreme Court could yet be made by George W. Bush the current occupant of the White House. If such an appointment (i.e. that of Janice Rogers Brown) to the US Supreme Court were to take place, in terms of political orientation and judicial philosophy she would most likely be in the mould of Clarence Thomas and not that of the 'great jurist and champion of human rights' the late Thurgood Marshall (1908- 1993)²³ who graced the United States Supreme Court's bench from the years 1967 to 1991.

¹⁹ M Zan, 'Great Jurist and Champion of Human Rights: Thurgood Marshall', (April 1993), *Malaysian Law News*, 23, 26.

²⁰ A brief profile of the late Justice Harry Blackmun can be found in http://www.oyez.org/oyez/resource/legal_entity/98/ (accessed 15 February 2004).

²¹ A brief profile of the late Justices Byron White can be found in http://www.oyez.org/oyez/resource/legal_entity/93/ (accessed 15 February 2004).

²² A brief profile of Associate Justice Ruth Bader Ginsburg can be found in http://www.oyez.org/oyez/resource/legal_entity/107/ (accessed 15 February 2004).

²³ A brief profile of the late Justice Thurgood Marshall can be found in http://www.oyez.org/oyez/resource/legal_entity/96/ (accessed 15 February 2004).

When I recently wrote to an American (non-law) professor about the prospect of further appointments of right-wing Justices to the United States Supreme Court he predicted to the effect that unless there is a 'Democratic [Party] sweep' – which under the current circumstances is quite difficult to envisage – of the Senate in the 2004 elections it is very likely that Scalia would be the 'next Chief'²⁴ adding that 'these

²⁴ As of early 2004 Scalia has been involved in controversy regarding matters of judicial ethics and the appearance of bias. A case involving Vice President Dick Cheney has been before the Supreme Court and the Supreme Court had decided to review the lower court's decision involving Dick Cheney's business dealings. Three weeks after the Supreme Court decided to grant review Scalia went for a five-day hunting trip with Cheney. As of mid-February 2004 Scalia has adamantly refused to recuse himself from the case. See for eg Edward Lazarus 'Why Justice Scalia is Wrong to Refuse to Recuse himself from a Case Involving Dick Cheney and his Energy Task Force' <http://writ.news.findlaw.com/lazarus/> (accessed 15 February 2004). In his article Lazarus unfavourably compared Scalia's stubbornness and lack of integrity to Justice John Paul Stevens conscientious attempt to recuse himself in another case. Writes Lazarus: 'Stevens simply put Scalia to shame on this score': a point of relevance to the theme of this article concerning the desirability for Stevens' longevity and the undesirability – based on the unpalatable traits of Scalia – of him becoming a future Chief Justice.

Taking these facts into account even though it is not (at all) impossible that Bush would nominate Scalia as the next Chief Justice it is not very likely that Bush would nominate him, partly due to these controversies that occurred and partly due to Scalia's age. Since a few days after his victory President Bush has stated that he has 'earned political capital' in the 2004 elections it is likely that even if Scalia is not the nominee to replace the (as of early November 2004) ailing William Rehnquist there is no reason to doubt that Bush would most probably nominate a younger (even if it is not Clarence Thomas) and equally 'activist' right-wing person as a Chief Justice or Associate Justice. Professor Alan Lightman, a United States election politics expert when being interviewed live the 'morning after' the US election on BBC TV (BBC TV 3 November 2004) stated that Bush's promise in his election victory speech to reduce the bitter divisions during the election campaign and to reach out to those who do not vote for him would – when not if, and writing in early November 2004, soon this writer might add – be tested when Bush has the chance to appoint a new Chief Justice and/or Associate Justice. Would Bush nominate a moderate conservative to 'reach out' to Democrats and about 54 million voters who did *not* vote for him or would he nominate an activist right-wing judge (or non-judge for that matter since a Supreme Court nominee need not necessarily be a judge or even a lawyer)? Since the Bush 'coterie' including his Vice President Cheney is talking about a 'mandate' and Bush about 'political capital' it is (very) likely that a Bush nominee for any Supreme Court position would be a right-wing activist and that it would be approved by the Republican-dominated Senate.

are times that try (liberal) men's souls'.²⁵

Indeed mainly due to 'September 11' the Republicans now controlsblock the judicial extremists, and toast the health of the remaining Supreme Court moderates!'. The sentiments expressed in that sentence do reflect the concerns stated in the heading of the present writer's article about the focus on and the desirability of 'Stevens and moderate Justices Longevity': a sentiment initially expressed more than 18 months before the 2004 elections and quite sometime before the publication of Joanne Mariner's article. These sentiments –wishes if you will- have in the post 2004 US election become all the more pressing and relevant. both Houses of Congress and it seems likely that soon they may further 'solidify' their 'control' of the Supreme Court. If all three branches of government were to fall to the right-wing of the Republican Party as it seems likely (though of course not inevitable- 'hope always springs eternal in the human breast' as the English poet Shelley has written) then for liberals 'these times' in America will not only be times that 'try men's souls' but also it would almost be 'soul-crushing' times for them.²⁶

Just before I sent the final version of my article to the Editor I saw the article 'The Scalia Court' by Joanne Mariner in the find law web site. Joanne Mariner 'The Scalia Court' (8 November 2004) <http://writ.news.findlaw.com/mariner/20041108.html> (accessed 9 November 2004). The article has the sub-heading 'What if Antonin Scalia were to become Chief Justice?'. The last sentence of Mariner's article reads 'Hang tough, Senate Democrats, and remember these three essential steps: save the filibuster, block the judicial extremists, and toast the health of the remaining Supreme Court moderates!'. The sentiments expressed in that sentence do reflect the concerns stated in the heading of the present writer's article about the focus on and the desirability of 'Stevens and moderate Justices Longevity': a sentiment initially expressed more than 18 months before the 2004 elections and quite sometime before the publication of Joanne Mariner's article. These sentiments –wishes if you will- have in the post 2004 US election become all the more pressing and relevant.

²⁵ The quotation is a slight paraphrase of Thomas Paine's famous words 'These are times that try men's souls'.

²⁶ This article is dedicated to Dr Aye Aye Win, M.B.B.S, MSc, MRCP of Bo Gyoke Aung San Museum Street, Rangoon, Burma. Though a medical doctor she has reading interests beyond her professional field. For her sustained interest in my articles throughout the years I am pleased to dedicate this article to her.

Postscript:

An initial version of this article was written and submitted in February 2004 about 9 months before the quadrennial US Presidential elections, elections for all members of the House of Representatives, an election of 1/3 of the United States Senate which was scheduled for early November 2004. The writer has not modified most of what he analysed and predicted in the February 2004 'version'. Before the November 2004 election there was no vacancy in any of the seats of the United States Supreme Court. But just about a week before the elections of 2 November 2004 it was announced that the Chief Justice of the United States William Hubbs Rehnquist has a serious form of thorax cancer. Linda Greenhouse, Katherine Q. Seelye 'Rehnquist Treated for Thyroid Cancer Supreme Court Says' *New York Times*, 26 October 2004 www.nytimes.com (under News Item 'National', accessed 26 October 2004). Within a week of the announcement of Chief Justice Rehnquist's illness George W. Bush won the election (as the writer had predicted- and feared- in February 2004). It is now certain that Bush would have had the chance to appoint the next Chief Justice of the United States and may be up to four (perhaps) even five of the United States Supreme Court Justices. Due to the serious nature of Chief Justice Rehnquist's illness it is in fact possible that if- and when- by the time this article is published a new Chief Justice could have been nominated by Bush and since there would be 55 Republicans in the (in the new 100 seat United States Senate) it is more likely that even if Bush appoints, during his second term, hardline and activist conservative or right-wing judges (or non-judges for that matter since appointments to the United States Supreme Court need not be judges) to the Supreme Court they could be approved by the United States Senate and be confirmed as the Chief Justice and Associate Justices of the US Supreme Court. (12-11-2004)

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RIDING ON THE WINDS OF CHANGE: TRANSFORMING WARRANTIES INTO LESSER CONTRACTUAL TERMS

1.0 Introduction

A breach of warranty has drastic consequences. When a breach of warranty occurs, the insurer is automatically discharged from liability.

In many countries the war against this draconian remedy has begun. In Australia, the Australian Law Reform Commission in its Report No. 91 on *The Review of the Marine Insurance Act 1909*, recommended reforms in many areas of marine insurance and warranties were on top of the reform list, where the Commission recommended the abolition of this concept. A similar trend is also seen in Canada.

In the United Kingdom statistics show that the marine insurance market in London has been under significant threat for some time. The London market has lost its market share of the world marine insurance business due to the intense competition from France, Germany, Switzerland, Italy, Scandinavia, the USA and especially Norway.

Many of these alternative markets were able to offer marine insurance cover on the lowest available market rate and on the best possible terms. Norwegian law does not have the concept of warranties.

To remain competitive and to regain lost market share the IHC 2002 was introduced in the UK. These clauses have been viewed as more consumer-friendly; as there appears to be a drift away from the use of insurance warranties in these clauses.

2.0 The Principle of Automatic Discharge From Liability

In *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)*¹, the House of Lords held that

¹ [1991] 2 Lloyd's Rep. 191.