



The Real Chief Justice Roberts: Conciliator or Divider?

A Recent Fourth Amendment Holding Indicates That He May Be More Like Rehnquist Than Previously Thought

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Last week's decision in *Georgia v. Randolph*, a Fourth Amendment case of relatively limited import, has caused many Court observers to ask: "Will the real Chief Justice John Roberts please stand up?"

During his confirmation hearings, Roberts received broad praise for two qualities in particular. First, a politically diverse group of backers portrayed him as extraordinary collegial, even towards colleagues and fellow judges with whom he disagreed. And second, even Senators wary of Roberts' politics praised his careful and scholarly approach to legal reasoning.

For these reasons, many observers (myself included) hoped that Roberts would prove a welcome contrast to his predecessor and former boss, Chief Justice William Rehnquist, who had presided over a fractious Court while writing opinions largely devoid of nuanced legal reasoning.

Initial signs were encouraging. But the Court's decision in *Georgia v. Randolph* has indicated that Roberts might turn out to be a Rehnquist-like Chief Justice, after all.

Initial Signs that Roberts Might Be a Conciliator: Collegiality and Unanimity

At oral argument, Roberts has been the opposite of the often dour Rehnquist. The current Court is filled with lively, smart interlocutors, who throw in a fair number of clever witticisms as the argument proceeds. And Roberts, as the presiding justice, set a nice tone by both joining in the intellectual banter, and giving free rein to the active back-and-forth between the bench and the lawyers that gives real purpose to oral argument.

In its first few months, the Roberts Court also produced an unusually high number of unanimous opinions. One lamentable hallmark of the Rehnquist Court had been a tendency to issue badly splintered decisions in which the Justices, rather than producing a single, controlling majority opinion, decided cases by votes of 4-1-4 or 4-3-2. In the absence of a majority opinion commanding five votes (much less a strong majority of more than five), lower court judges and litigants were left to patch together a governing legal principle from a mass of separate concurrences.

But the early Roberts Court was different. It produced unanimous opinions even in cases that seemed potentially divisive. Take *FAIR v. Rumsfeld*, where universities had claimed a First Amendment right to exclude military recruiters from their campuses.

Most observers expected the universities to lose. But when Roberts mustered a unanimous Court for his opinion rejecting their claims, it seemed like strong evidence that a new, more politically cohesive era might be taking shape behind the scenes.

The Court's Recent Fourth Amendment Decision: Contentiousness Returns

One might have thought that [Georgia v. Randolph](#) would end with a whimper, not a bang. After all, it presented a narrow question.

In a previous case, the Court had ruled that the Fourth Amendment's protection against unreasonable searches and seizures did not prohibit police from searching a home after receiving permission from one co-occupant, even if another co-occupant was unavailable to consent. *Randolph* presented a variation on the same theme -- the police had received consent to search from one co-occupant, but the other co-occupant explicitly refused to give consent. Thus, the issue presented was simple: Could the police conduct the search despite this explicit objection?

Every federal Court of Appeals to address the question had said that the police could enter the home under these circumstances without violating the Fourth Amendment. In the courts' view, a person who shares his or her home with another person naturally surrenders to that other person the right to give permission to strangers, including the police, to enter the home.

But the Supreme Court disagreed - and was not nearly so unanimous as the federal appellate courts that had confronted the question. The justices produced five separate opinions, most of which are quite nasty in tone. And Roberts, far from standing above the fray, wrote a dissent - the first of his tenure -- that openly mocks the majority opinion. In short, it was back to the old contentiousness, after a brief respite.

Should the Return of Contentiousness on the Court Really Be Surprising?

Most surprising about all this is that we are surprised at all. Somehow we would like to think that the Court is immune from the bitter divisions that exist in the nation as a whole. And we would like to think that the justices, whatever their differences, thoroughly like and respect each other. Reasonable minds, after all, can disagree reasonably, can't they?

In recent years, in particular since the judicial meltdown in *Bush v. Gore*, the Court itself has tried project an image of internal harmony. As many of the justices surely realized, that decision called the Court's basic integrity into question - and a public show of internal healing was necessary to stem the reputational damage the justices had inflicted on themselves and the Court as an institution.

But the forces dividing the Court - the forces that led to *Bush v. Gore* in the first place - are far more powerful than these potentially unifying institutional concerns.

Twenty years ago, when Senate Democrats defeated the nomination of Robert Bork, the deep fissures in our legal culture burst volcanically into public view. They have erupted periodically since then -- in the Clarence Thomas hearings, in *Bush v. Gore*, and to a lesser extent, in the confirmation hearing for Justice Samuel Alito.

But even when they are not visible, these fissures still exist. The public ventings are mere glimpses of the constant battles being fought under the public radar by large political infrastructures that both liberals and conservatives have built.

The Battle Between Legal Infrastructures, Liberal and Conservative

In the last two decades, both liberals and conservatives have built far-reaching grassroots and intellectual institutions to further their agendas. Conservatives created their own set of public interest law firms - places like the **Washington Legal Foundation** - to match the liberals ACLU.

They also organized the Federalist Society and built it into a well-oiled machine for generating new legal ideas and identifying brilliant young legal thinkers to be groomed for stardom. And now, with the American Constitution Society, liberals are playing catch-up fast.

Inside the judiciary, through the process of hiring law clerks, appellate judges and Supreme Court justices of competing ideological stripes recruit, train, and give powerful credentials to junior officers in the ideological war that is modern politics.

Conservative professors feed conservative students to conservative judges who, in turn, feed their clerks to conservative justices. Liberals do the same. And depending on which political party is in power, these clerks graduate to positions of power in government and in business, then reach down to help the next generation.

In and around Washington, this is how the battle over judicial power and legal policy is being fought every day. And the stakes seem to get higher by the moment.

With conservatives in control of both the White House and Congress for the last five years, the balance of power has shifted dramatically to their side.

Almost every federal Court of Appeals is now comprised of a majority of conservative judges.

And inside the government, conservative lawyers have aggressively advanced the conservative agenda, whether in the form of pro-business class action reform, or policies designed to consolidate power in the Executive Branch - to give but two examples.

At the Supreme Court, meanwhile, the elevation of Justices Roberts and Alito has strengthened the right wing of an already fairly conservative bench.

Why Conservatives are Frustrated, and Liberals, Fearful

This success has engendered deep fears among liberals both that conservatives will achieve a semi-permanent dominance in government, and that they are tilting the country in a dangerously totalitarian direction. From the liberal perspective, the fights over the right to torture, to conduct warrantless wiretapping, to deny legal process to those the executive deems "enemy combatants" (even ones who are U.S. citizens), and to end a woman's right to choose are fights for the very soul of this country, and its commitment to the rule of law.

For conservatives, despite great success, there remains a sense of profound frustration and even fear.

The frustration comes from the reality that three Republican appointees, Sandra Day O'Connor, Anthony Kennedy, and David Souter, have prevented a real conservative counter-revolution in the law. They've done so by opting to take moderate and even,

in some cases, liberal stands on key issues, such as abortion, gay rights, separation of powers, states rights, affirmative action, and the role of religion in public life.

And the fear is that, thanks to a deeply unpopular war in Iraq and scandals at home, what had once seemed like a long-term conservative lock on national political power may well evaporate in the 2006 and 2008 elections.

The justices are not immune from these cross-currents. To the contrary, they are near their epicenter. They feel the dynamic within their own building, where liberal leader Justice John Paul Stevens approaches age 86, and Justice Kennedy, with O'Connor gone, bears the lonely burden of holding down the political center between the Court's conservative and liberal wings.

Small wonder that tempers flare publicly, even in small cases. In the next few months, much bigger cases will be decided. And when they are, the smoldering tensions will surface again. It can't be helped. The justices are like the rest of the nation - riven, angry, frustrated, and perhaps even a little scared about the future.

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