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Research Report

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SWP Comments, No. 49/2005

Provided in Cooperation with:

Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs, Berlin

Suggested Citation: Braml, Josef M. (2005) : A litmus test for Bush and the Republicans: The composition of the "new" U.S. Supreme Court, SWP Comments, No. 49/2005, Stiftung Wissenschaft und Politik (SWP), Berlin

This Version is available at:

<https://hdl.handle.net/10419/255982>

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A Litmus Test for Bush and the Republicans

The Composition of the “New” U.S. Supreme Court

Josef Braml

After Harriet Miers withdrew her candidacy for the U.S. Supreme Court, President Bush nominated Samuel Alito, who, unlike Miers, is supported by the conservative Republican “base.” While Bush was able to successfully maneuver his first Supreme Court nominee, John Roberts, through the Senate, as the successor to the deceased conservative Chief Justice Rehnquist, the succession of the outgoing Justice Sandra Day O’Connor has proven to be much more difficult because Samuel Alito, the current nominee, could fundamentally change the balance of power on the nine-member court, not least with respect to the politically-tricky abortion issue. The 1973 decision of the Supreme Court establishing the right to an abortion is, for many conservatives, a classic example of “judicial activism.” This nomination, on the one hand, has mobilized the Christian Right—the strongest group of voters among the Republicans—but on the other hand, it has also motivated the liberal pro-choice groups and the more moderate abortion opponents to get involved politically, as already can be seen in the run-up to Senate confirmation hearings in January 2006. The decisions that the President makes in this “culture war” will not only determine the starting point of his party in future elections, but will also influence the domestic and security policies of the USA beyond his term of office.

The declining approval rating for the President is making an already sensitive task even more difficult: George W. Bush must ensure that the appointment of his current nominee is not blocked by the opposition in the Senate and at the same time make sure that his own party sticks together. A significant criterion for the nomination is the position of the nominee on so-called “wedge issues,” such as the

separation of church and state and the right to an abortion, which not only polarize the nation but also put to the test the coherence and the future of the Republican voter coalition. Will the President succeed in the tightrope act of satisfying the Christian Right without offending the voters that are more pragmatic when it comes to religious and moral questions?

What are the possible political consequences of the “new” Supreme Court?

Diminishing Political Capital of the President

At the beginning of 2005 the U.S. President, strengthened by his re-election, announced that he had collected large quantities of “political capital.” Moreover, he promised to use it for the purposes of “his” voters. Close analysis of the election results make clear that George W. Bush’s voters most frequently cited moral values/religious convictions as the most important criterion of their voting decision, followed by terrorism. The decisive issues for the election could, however, prove to be two-sided because they also hide political dangers for Bush and the Republicans.

The war in Iraq—which President Bush portrayed to his followers as another battle in the long-term “War on Terror”—has increasingly become a political burden and undermines the President and his fellow Republicans’ “capital” in Congress, among them Congressmen and some Senators who have to run for re-election in less than a year. The politically explosive war in Iraq is putting the already fragile coalition of the Republicans to the test, particularly given that so far the unity of the party in foreign policy with respect to the war against terror was a good point around which to rally the far more fragile domestic policy coalition of the Republicans.

In domestic policy, the President is in danger of getting caught between the fronts of the so-called “culture war” which is fueled by issues relating to relations between the state and religion, sexual morals and, in particular, the right to an abortion. Losses for the Republicans in future elections could be the consequence.

Test of Endurance for the Republicans’ Voter Coalition

For pragmatically oriented strategists of the Christian Right such as Ralph Reed, chief

organizer of George W. Bush’s successful “grassroots” election campaign, the alliance with the Republican party remains a difficult balancing act: In the struggle for political power, which requires concessions, this group runs the risk of abandoning its moral principles, especially with respect to the abortion issue. These principles, which underlie the pledge for the political efforts, were important for mobilizing the base. Decisions by the Supreme Court—above all the establishment of the right to an abortion in the case of *Roe v. Wade* (1973)—were the initial impetus and the fuel for the political involvement of the Christian Right, which will not rest until the “unholy” decisions for abortion are reversed. On an everyday basis, however, it continues to be important for Evangelicals not to stir up fear in the population as a whole—let alone mobilize their political opponents. The Christian Right must be careful not to endanger the cohesion of its own political coalition.

For the Republican Party’s strategists, integrating the Christian Right without putting at risk the party’s cohesion remains a special challenge. It is a matter of bringing the broad spectrum of Republicans together: from the economic and value libertarians to the moral/social conservatives. This can, however, succeed only if one concentrates on political and economic topics which are common ground, and if one somewhat defuses divisive moral topics. The latter has so far been put into practice successfully by avoiding awkward topics like AIDS or abortion and shifting domestic attention to the foreign policy arena. Thus new fields of operation for the Christian Right were created without putting off moderate voters (for more details see SWP Research Paper 35/2004: Josef Braml, “The Religious Right in the United States: The Base of the Bush-Administration?”).

Within domestic discussions so-called “moral issues,” sexual morality topics such as abortion or homosexuality are not well-suited for Republicans to find a stable, com-

mon position. If the election strategy moves too far in the pro-life direction, moderate abortion opponents and pro-choice Republicans could be put off. In regard to homosexual marriage or state-sponsored domestic partnerships, homosexuals in particular strongly endorse further liberalization. The fight of the “true believers” against “modernity” and for “true values,” keeps economically and morally libertarian Republicans at a distance.

Abortion—a Decisive Question...

Above all, concerning the abortion issue, President Bush oscillates between the moderate positions of more liberal party members and the dogmatic attitude of the Christian Right. After he succeeded in outlawing “partial-birth abortion,” he slowed down further expectations by pointing out that Americans are not yet ready for a general prohibition on abortion. The “Partial-Birth Abortion Ban” makes abortion during the later stages of a pregnancy a punishable offence. The provisional legislative success was less risky for the President than restrictions on other abortion practices given that the majority of the American population supports the latest restriction on the right to an abortion established in 1973. At the same time, however, it is against further restrictions and against a general reversal of the leading decision.

During the election campaign the incumbent President did not take a clear position on *Roe v. Wade*. In contrast, his challenger John Kerry, through his voting record in the Senate and in the debate with the incumbent President, made it known that he supported the unrestricted retention of the right to an abortion. As a result, the liberal John Kerry was virtually the ideal “evil” opponent against whom the Republican Party strategists and the grassroots organizers of the Christian Right could mobilize their base.

George W. Bush’s “culture of life” election campaign was successful: The in-

cumbent President was able to enlarge his already strong Evangelical Christian base and broaden his Christian Right majority across different religious denominations. Bush’s share of white Evangelical voters (who make up a quarter of registered voters) increased from 71% in 2000 to 78% for his re-election in 2004. Beyond that Bush succeeded in increasing the share of Catholic voters (another quarter of the registered electorate), gaining even more votes from them than his Catholic challenger John Kerry: 52% versus 47% for Senator Kerry.

...for the Political Future of the “Moral Majority”

The political strategists of the Republicans and the Christian Right are accordingly motivated to one day increase the number of Catholic voters to match the number of conservative Evangelicals. If they succeed, they will have achieved their strategic aim of a cross-denominational “moral majority.” Long before Bush’s re-election there were numerous meetings between leading conservative Evangelicals and Catholic leaders. Traditionally, Catholics have tended to vote for the Democrats. This has changed gradually since the election of Reagan in 1980, who won a noticeable share of Catholic votes. “The Catholic vote continues to be a vote that is pretty much up for grabs between the two parties,” stated Gary Bauer, the leading Christian Right thinker and former domestic adviser to Ronald Reagan, in describing the long-term outlook.

Catholics are not only interesting to the Republican election strategists because of their current voting potential, but also because their share of the population showed the greatest increase—especially “Hispanics” (63% of them are Catholic and 16% Protestants, also including Evangelicals) whose number in the U.S. quadrupled in the last three decades (1970 9.6 million; 2000 35.3 million) according to the data of the Pew Hispanic Center.

On the occasion of the signing of the “Partial-Birth Abortion Ban” by President Bush, Archbishop Charles Chaput, Chairman of the U.S. Conference of Catholic Bishops’ Committee for Pro-Life Activities, applauded this law as a turning point: “President Bush’s signing of the Partial-Birth Abortion Ban Act marks the first time in three decades that our nation has placed any restriction on an abortion procedure.” For Archbishop Chaput it was a first “vital step in the right direction.”

Encouraged by this partial legislative success, the victories of the Republicans in recent elections, and the fact that in addition to the White House, both houses of Congress are in the Republican’s grip, conservative religious interest groups and voters now have higher expectations of the President and expect him to take their concerns to heart, especially with respect to the—for them—central issues concerning the nominations for the Supreme Court. They expect President Bush to take a clearer stance than his father or his predecessor Reagan because important issues for the Christian Right—such as abortion, homosexual marriage, the sexual privacy of homosexuals or whether the patriotic ritual of the “Pledge of Allegiance” in schools may include the phrase “one nation under God”—will not or cannot be resolved by Congress or the President, but by the Supreme Court as the final authority on the interpretation of the constitution.

The Nominations

In order to divide the opponents and possibly also the electorate of the Democrats, President Bush considered proposing a Hispanic candidate for the Supreme Court position: Alberto Gonzales, his former personal adviser and current Attorney General. But the President refrained from doing this in the end, because such a nomination would have also caused severe tensions within his own party. For many supporters of the Christian Right, a Supreme Court Justice cannot be conservative enough:

“We expect President Bush to appoint somebody that clearly is on our side in this cultural battle, somebody like Scalia,” Christian Right spokesman Bauer signaled as a clear warning for the President. Justice Antonin Scalia, an ultra-conservative Catholic, is convinced “that government derives its moral authority from God.” Hence, the Christian Right regards preventing Gonzales, who in their view is too liberal, from joining the Supreme Court as a success.

But Bush would also be well-advised not to send candidates with too extreme of a religious-moral position into the nomination process. In his term in office, the President has had to repeatedly withdraw nominees for higher judicial positions in the federal courts after they had been blocked in the Senate with the threat of filibusters by liberals of the Democratic opposition. Not until a bipartisan group of 14 Senators, the so-called “Gang of 14,” agreed on a provisional compromise, was there a temporary truce in the “culture war.” As a result of the truce the Senate approved three of the ten controversial nominations and the Democrats agreed not to filibuster them. In turn, seven Republican Senators committed themselves to refuse to follow their majority leader in the event he resorted to the “nuclear option”: Majority Leader Bill Frist threatened to change the procedural rules with a simple majority of 51 votes and thereby de facto get rid of Congressional scrutiny of judicial nominations. Under “extraordinary circumstances” the truce can, however, be called off. The circumstances under which this would occur are open to interpretation (for more details on the filibuster debate see SWP Comment 24/2005: Michael Kolkmann, “A Test for Bush’s Republican Majority: The ‘Filibuster’-Debate in the U.S. Senate”). Regarding nominations for the Supreme Court it is at least doubtful that the truce will last, particularly given that the nominations for the Supreme Court are far more significant in several respects than the other nominations thus far. It is still

feared that the abortion issue would once again be decisive and could prove divisive.

The President's moral conflicts of interest cannot be solved but rather managed and hidden from view. Not least because of this reason George W. Bush nominated candidates for the Supreme Court whose public opinions did not allow their clear classification into to one camp or the other in the abortion dispute. Thus Bush's opponents do not have at their disposal effective arguments that could jeopardize the nominations.

The first nomination (of John Roberts) went rather smoothly. In John Roberts, President Bush proposed a candidate to the Senate whose education and background made it difficult for the Democrats to disqualify him for religious fervor. Roberts certainly is a religious Catholic who also enjoys the full support of the Christian Right. He did however, not get into religious questions during the hearings in front of the Senate nor did he take a clear-cut position with respect to the abortion controversy.

After this success for the Republicans it will be more difficult to maneuver another candidate through the Senate. While in the case of Roberts a steady conservative justice (Chief Justice William Rehnquist) was replaced by a similar conservative, there is more at stake with the succession of Justice Sandra Day O'Connor, considered a liberal. In the course of her judicial activity the first woman on the Supreme Court, who was nominated by President Reagan, turned out to be "too liberal" in the view of conservatives. In many of the decisions important to the Christian Right she tipped the scales against them. With her succession, the balance of power of the nine-member court could change significantly. This is all the more reason for the Christian Right to turn its attention to her successor's "moral reliability."

The Christian Right therefore greeted Bush's nomination of Harriet Miers with more hesitation than they did John Roberts'. The nomination was put at risk

when one of her former opinions was made public: In addition to her pro-life pronouncements, statements came to light, in which she had pleaded for a woman's right to "self-determination" as well. "Though she attends an Evangelical church known for its pro-life position, during the same time period Harriet Miers advanced radical feminists and organizations that promote agendas that undermine respect for life and family," protested Wendy Wright, Executive Vice President of the organization Concerned Women for America (CWA), in a public statement against the nomination of Miers. Even James Dobson, who is very influential within the circles of the Christian Right, and who had initially pleaded for trusting the President, withdrew his support "based on what we now know about Miss Miers." A multitude of additional Christian Right interest groups—such as the Eagle Forum, the Family Research Council (FRC) and the Catholic group Fidelis—organized grassroots campaigns to put the Senators under massive pressure. Majority Leader Frist eventually notified the White House that Harriet Miers would not find a majority within his own party in the upcoming nomination hearings. The Christian Right Senator Sam Brownback who coordinates the Value Action Team (VAT)—a group of morally conservative Congressmen and Senators—informed the President that he hoped that the next nominee would have a more distinct conservative philosophy, above all concerning the abortion issue.

After Harriet Miers' withdrawal, President Bush nominated Samuel Alito, a "principled" candidate who represents the ideals of his party's base. Christian Right organizations like the CWA "wholeheartedly" support the nomination of the Catholic; they see in Alito an "originalist" who will orient himself around the initial "true" intentions of the constitution instead of developing its principles in accordance with the spirit of the age's—the *Zeitgeist's*—"activism." Unlike Miers, Alito has extensive work experience as a

judge and he is extremely familiar with constitutional issues.

Alito's background will make it difficult for political opponents to stigmatize him as an extremist and therefore prevent his candidacy by blocking his nomination in the Senate. The Senate already accepted him unanimously without any reservations in 1990 when he was nominated to be a judge on the Federal Court of Appeals. Alito's numerous opinions from his time on that court certainly could be used against him. If necessary, he could however refer to the fact that his opinions so far had been restricted by the jurisprudence of the Supreme Court.

Possible Consequences of the Nominations

The "new" Supreme Court, which will include two George W. Bush appointees (and perhaps more in the future), should extend the President's primary political aims beyond his term of office: projects such as the "war on terror," the reduction of national regulation of the economy and the establishment of a new "culture of life" in America are decisions of central meaning to the Supreme Court. At the same time, opinions of the Supreme Court about so-called "moral issues" have repercussions on the future political behavior of the Christian Right: the most important voters for the Republicans.

Room to Maneuver in the War on Terror

The legal status and the treatment of "enemy combatants" and the status of the Taliban and Al-Qaeda fighters incarcerated on the Marine Base at Guantanamo Bay in Cuba also implicate the authority of the judicial branch (for more details see, Josef Braml, "Rule of Law or Dictates by Fear: A German Perspective on American Civil Liberties in the War Against Terrorism," in: Fletcher Forum of World Affairs, Volume 27, Issue 2, Summer-Fall 2003, pp. 115-140; SWP Research Paper 5/2003: Josef

Braml, "USA: Zwischen Rechtsschutz und Staatsschutz"). Thus far, the Supreme Court has been rather reluctant to get involved, because it did not want to tie the hands of the Commander-in-Chief.

Chief Justice John Roberts is unlikely to place tight limits on measures that the President can take when it comes to domestic and foreign security. In any event, as a judge on the Court of Appeals, he helped to modify the judgment of a district court that invalidated the military tribunals ("military commissions") authorized by an Executive Order of the President and established for trying some Guantanamo Bay prisoners. However, there are no indications so far as to which approach Alito would take on the question of presidential power.

De-regulation of the Economy

The new Chief Justice, John Roberts, also acted as an advocate for free trade and industry; thus, thorough familiarity with the concerns of the business world is expected. The trade lobby therefore greeted Roberts' "real life" experience. The U.S. Chamber of Commerce welcomed the nomination of Samuel Alito just as warmly. Its president, Thomas Donohue, praised Alito's high qualifications and "urged" the Senate "to expedite their confirmation process." Donohue explained the Chamber's support, pointing out the "enormous impact" the Supreme Court has "on the way America does business."

Neither Roberts nor Alito showed concerns about being associated with the "Federalist Society," an association of conservatives, above all economic libertarian lawyers, whose aim among other things is to de-regulate American economic activity (among other things environmental restrictions) and to keep the state from interfering with the economy.

Abortion and the “Culture of Life”

It is difficult to determine in which form the abortion issue will reach the Supreme Court in the future and how it will ultimately be decided. Alito’s relevant decisions as a judge on the Court of Appeals in Philadelphia are not easily reduced to a common denominator. In 1991, in his most prominent decision in the case of *Planned Parenthood v. Casey*, he wrote a dissenting opinion on behalf of the right of a husband to be informed about his wife’s intention to have an abortion. A year later his minority position was rejected by a majority of the Supreme Court’s justices (among others Sandra Day O’Connor), repeatedly referring to the right to an abortion established in 1973. John Roberts’ position on the abortion issue is also not clear-cut.

For Karl Rove, the leading thinker behind the long-term Republican majority based on the Christian Right, there is no doubt that the judges nominated by Bush will make the “right” decisions in their future roles, also with respect to the abortion issue.

A Look at Future Elections

In the short term, with an eye to the midterm elections in 2006, Bush and the Republicans must be sure that the Christian Right is more or less satisfied with both nominations. However, they cannot propose any obviously ultra-conservative candidates. Otherwise, a political “culture war” would erupt, which could put off the moderate voters and help the political opposition to mobilize its own base. It is not out of the question to think that, during Bush’s presidency, additional, perhaps even liberal, justices would step down from the Supreme Court for age or health reasons. This would pose even greater challenges for the President.

In the long term, however, the future decisions of the newly reconstituted Supreme Court, especially in abortion-related matters, will co-determine whether Evangelical Christians—the base of the

recent election successes for Bush and the Republicans in Congress—stay loyal to the party or withdraw their trust again. If they were to become disillusioned with politics with respect to what are for them important questions about life, many Evangelical Protestants would return to political abstinence and thereby—given the tenuous balance of political power—prevent the long sought majorities of the Republicans.

Conclusion

In the opinion of the majority of observers in this country, as well as many commentators in the U.S., the President made major errors in the nomination process. If one considers the fundamental political dilemmas that Bush and his party have to cope with, one must admit that Bush handled the situation rather skillfully. After the first successful nomination, Bush might now see through a second one that is expected to be much more difficult. Thus Bush would, at least with respect to important domestic political issues, leave his party a good starting point that would make it possible for the party to prepare the moral grounds for future elections as well. And given that Supreme Court justices have their positions for life, George W. Bush can also leave his mark on other political fields such as trade and security policy and influence America well beyond the end of his presidency.

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ISSN 1861-1761