



“Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind.”

Hugo Black, *Turner v. United States*, 1970

“In Defense of Life?” Potential U.S. Supreme Court Nominees

During his campaign, President Obama stated that he would appoint U.S. Supreme Court justices in the mold of Justices Ruth Bader Ginsburg and David Souter, two of the Court’s most ardent abortion rights supporters. President Obama further stated that he finds himself compelled “to side with Justice [Stephen] Breyer’s view of the Constitution –that it is not a static but rather a living document, and must be read in the context of an ever-changing world.”

On March 17, 2009, true to his expressed intent to appoint pro-abortion judges who will interpret the American Constitution in light of ever-evolving circumstances rather than the original intent of the Framers, President Obama used his first judicial appointment to select radically pro-abortion U.S. District Court Judge David Hamilton to fill a vacancy on the U.S. Court of Appeals for the Seventh Circuit.

Moreover, less than four months after taking office, the new Administration and abortion advocates are already employing a variety of executive, budgetary, and legislative means to implement the expansive aims of the controversial *Freedom of Choice Act* (FOCA) which seeks to impose unrestricted, unregulated, unapologetic, and taxpayer-funded abortion-on-demand on an unwilling American public.

Clearly, the ability to appoint federal judges – including U.S. Supreme Court Justices -- is a powerful means toward the end of imposing “FOCA by Stealth,” advancing its radical aims piecemeal and surreptitiously instead of as one legislative package that can be fully evaluated and debated by the American public, individually and through our elected representatives. We expect a judicial activist, once seated on the Court, to work to write FOCA into the Constitution, elevating abortion to the status of a fundamental right, on the same plane as freedom of speech.

The Probable “Short List”

Solicitor General of the United States, Elena Kagan

Despite authoring a 1993 law review article acknowledging that the harms inherent in abortion are open to debate, Solicitor General Elena Kagan, the former dean of Harvard Law School, has publicly and repeatedly criticized *Rust v. Sullivan*, a 1991 U.S Supreme Court decision upholding federal regulations that prohibit recipients of Title X family planning funds from counseling on or referring women for abortions. Ignoring the American public’s opposition to the use of taxpayer dollars to directly or indirectly

subsidize abortion, Kagan argued that the regulations amounted to the subsidization of “anti-abortion” speech.

Earlier, while serving as a clerk for U.S. Supreme Court Justice Thurgood Marshall, Kagan wrote a memo suggesting that faith-based groups – specifically those that operate pregnancy care centers – should not play a role in counseling pregnant teens because they would not be able to do so without injecting their religious beliefs.

The Honorable Diane Wood, U.S. Court of Appeals for the Seventh Circuit

As a judge with the Seventh Circuit Court of Appeal, Judge Wood has placed her pro-abortion ideology above her judicial duty in cases involving common-sense restrictions on abortion and also in cases involving the rights of pro-life demonstrators.

In 1998, Judge Wood issued written opinions disputing the constitutionality of partial-birth abortion bans that had recently been enacted in Illinois and Wisconsin. Moreover, in a 2002 case challenging an Indiana informed consent law – one that was nearly identical to a similar law upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey* – Wood dissented from her fellow judges’ decision to permit enforcement of the law and opined that the law was unconstitutional (without distinguishing it in any meaningful way from a law that the U.S. Supreme Court had deemed constitutional nearly 6 years earlier).

Further, in *NOW v. Scheidler*, Judge Wood ruled that the *Racketeer Influenced and Corrupt Organizations Act* (RICO), a federal law enforcement tool designed to counter the activity of organized crime, was properly applied against pro-life demonstrators. This “novel” and controversial approach was later summarily rejected by the U.S. Supreme Court.

U.S. Secretary of Homeland Security, Janet Napolitano

Recently, Secretary Napolitano, who was formerly both the Attorney General and the Governor of Arizona, released a report to the nation’s law enforcement community that branded some pro-life activists as potential “domestic terrorists.”

As Governor of Arizona, she routinely vetoed legislation that imposed common-sense and medically-supported regulations on abortion including bans on the dangerous and gruesome practice of partial-birth abortion (on two separate occasions); measures designed to strengthen the state’s parental consent requirement by, for example, providing uniform standards for Arizona judges to use when considering petitions for judicial bypass of the requirement (also on two separate occasions); a requirement that women considering abortion be counseled on the pain that the unborn child may feel during the procedure; a measure prohibiting the use of taxpayer dollars to purchase health insurance coverage for abortions for government employees; and a measure protecting healthcare providers who decline to prescribe or dispense contraceptives including so-

called “emergency contraceptives” based on ethical, moral, or religious objections. All of these vetoes occurred in just 4 years: from 2005 to 2008.

The Honorable Leah Ward Sears, Chief Justice of the Georgia Supreme Court

Justice Sears has been a member of the Georgia judiciary since 1985 and was appointed to the Georgia Supreme Court in 1992 by then-Governor Zell Miller. She has twice won re-election and was elected Chief Justice in 2005. She will be retiring from the court in June 2009.

Justice Sears has not issued any known decision on life-related issues (except capital punishment). However, in privacy-related cases, Justice Sears has evidenced a broad conception of substantive constitutional privacy – the very basis upon which *Roe v. Wade* is predicated. For example, in 1998, Justice Sears voted to overturn the state’s ban on sodomy. In her concurring opinion, Justice Sears referred to the responsibility of courts to protect constitutional rights against “morals legislation” from the majority. Throughout her judicial career and by her own admission, she has viewed the courts as the protector of the “little guy” against the public majority.

The Honorable Sonia Sotomayor, U.S. Court of Appeals for the Second Circuit

Despite 17 years on the bench, Judge Sotomayor has never directly decided whether a law regulating abortion was constitutional. She has, however, decided a few cases that indirectly implicate abortion rights.

Writing for the Second Circuit, Judge Sotomayor upheld the *Mexico City Policy* which prohibited foreign non-governmental organizations (NGOs) from using federal funding to promote abortion overseas. In a constitutional challenge brought by the Center for Reproductive Rights (CRR), an American abortion advocacy group that routinely argues that “abortion is the law of the world,” Judge Sotomayor first rejected a claim that the policy burdened the First Amendment rights of domestic pro-abortion groups, finding that no First Amendment rights were implicated. The significance of this part of her opinion, however, may be minimal because the issue was largely controlled by the Second Circuit’s earlier opinion in a similar challenge to the policy.

More interesting was Justice Sotomayor’s response to CRR’s second claim that the policy violated the Equal Protection Clause by impermissibly burdening the “rights of domestic abortion groups relative to domestic anti-abortion groups.” Rejecting this new argument, Justice Sotomayor wrote that because the challenge involved neither a suspect class nor a fundamental right, a deferential “rational basis” test was appropriate. She then acknowledged the ability of the government to adopt anti-abortion policies, noting “there can be no question that the classification survives rational basis review. The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.”

Finally, Judge Sotomayor wrote an opinion overturning, in part, a district court's grant of summary judgment against a group of anti-abortion protestors, albeit on an issue far removed from abortion jurisprudence. When a group of protestors sued the city of West Hartford, CT alleging its police officers used excessive force at a peaceful protest, the district court issued a summary judgment in favor of the defendants on all theories of liability. Writing for the Second Circuit, Judge Sotomayor reversed the district court's summary judgment order against the protestors and remanded the case for further proceedings.

Other Potential Nominees:

Governor Jennifer Granholm of Michigan

Governor Granholm has stated that she “fully supports” *Roe v. Wade* and that she believes that the abortion decision is “[a] matter of health between a woman and her doctor.” In 2002, when she first ran for Governor of Michigan, she pledged to defend access to abortion and to support an increase in the number of abortion clinics operating in the state, declaring that she would “rather work on a decrease in demand (for abortion), not supply.”

She has been described by the *Detroit Free Press* as an “ardent supporter” of abortion. She counts the pro-abortion group, Emily's List, as one of her major political contributors.

Further, Governor Granholm has repeatedly vetoed common-sense abortion restrictions and regulations – measures supported by a majority of her constituents – including a state ban on partial-birth abortion (on two occasions), as well as a measure that delineated specific procedures to be used when Michigan judges considered petitions for judicial bypass of the state's parental consent requirement and that also sought to limit the ability of minors to “shop” for a judge who would “rubber-stamp” (rather than properly evaluate) their requests to exclude their parents or guardian from involvement in their abortion decisions.

Governor Deval Patrick of Massachusetts

Governor Patrick was elected in 2006 with the full support and endorsement of the National Organization of Women (NOW), the National Abortion Rights Action League (NARAL), and Planned Parenthood. He strongly supports both abortion and destructive embryonic research. In 2006, while running for office, he publicly criticized former Massachusetts Governor Mitt Romney for his veto of a bill that would have provided state funding for destructive embryonic research and instead proposed a state bond measure to fund the controversial and ethically-problematic practice.

In response to a constituent's question regarding his support for abortion, Patrick responded that he believes that the abortion decision should be made by the woman and not the government and implied that voters were “far less concerned” with abortion than

other more practical issues such as the economy. In 2007, Patrick signed into law a measure increasing so-called “buffer zones” around abortion clinics and limiting the First Amendment rights of pro-life demonstrators.

Kathleen M. Sullivan, Stanford Law School

Professor Sullivan, who has no judicial experience, published an article in the August 1992 *New Jersey Law Journal*, commenting on the U.S. Supreme Court’s decision in *Planned Parenthood v. Casey* and arguing that legal status of abortion should be decided by the courts, particularly the U.S. Supreme Court, and not the American people through the democratic process. Sullivan argued that “women’s reproductive freedom” was “too precious and fragile” to be “left to politics.”

In that same article, she inaccurately described the radical *Freedom of Choice Act* (FOCA) as a mere “codification of the protections of *Roe*” and, relying on a purportedly “pro-choice” electorate, asserted that then-President George H.W. Bush would veto the measure (the version of FOCA then pending before Congress) at the Republican Party’s “peril” in the November 1992 national elections.

Cass Sunstein, White House Office of Management and Budget, Office of Information and Regulator Affairs

Echoing the views of Dawn Johnsen, one of President Obama’s most radical pro-abortion nominees to the U.S. Department of Justice, Sunstein (who graduated from Harvard Law School in 1978) has publicly argued that laws restricting abortion “co-opt women’s bodies for the protection of fetuses” and “selectively turn women’s reproductive capacities into something for the use and control of others.” Failure to accept this premise – he argues – accepts an out-dated line of thought that renders women “involuntary childbearers.”

Sunstein’s voluminous writings suggest that he believes that the so-called “right to die” is a fundamental constitutional right. He has also opined that the debate over the “right to die” is the next great “arena for the struggle to define the scope of fundamental rights under the Due Process Clause.”