

MESSAGE FROM THE CHAIR

by Kimberly Kupferer

Chair, State Bar Criminal Law Section Executive Committee

Equal Justice Under Law

The hallowed words carved into the marble facade of the front of the Supreme Court of the United States of America are "Equal Justice Under Law". I first saw these words as I marched in the NAACP silent march on Washington as a law student in the mid 1980's. Over the years "equal justice" has been a principle for which I have fought. This year with so much unrest in the federal government and with much new federal case law changing huge chunks of federal criminal practice as we know it, the question that has repeatedly surfaced for me is, "Just what is 'Equal Justice Under Law'?"

Is "Equal Justice Under Law" simply what the nine United States Supreme Court Justices that are currently sitting say it is? Is law controlled more by precedent or by the controlling political party or the individual moral compasses of each of the justices or by the current public opinion? Would we have had the amazing changes in this country started in the 1960's by the civil rights movement had the Supreme Court not had a majority of justices who interpreted the Constitution to apply to all Americans, not just those with white skin? Could we have had a completely different result in the area of civil rights had the Justices of the Supreme Court in the 1960's and 1970's been swayed by the court of public opinion or the political beliefs of those who nominated them to sit on the Court? Is there room for the President to appoint members to the highest court in the land based on cronicism or his belief that the Justice would share his same religious beliefs if our ultimate goal is to have "Equal Justice Under Law"?

Legal analysts are saying that the Justice who will be the replacement for Justice Sandra Day O'Connor could change legal history in overturning such landmark cases as *Roe vs. Wade*, the 1973 Texas case that dealt with a woman's right to choose whether or not to have an abortion. By appointing an ultra conservative

who opposes abortion the President could virtually guarantee an extreme swing to the right in the interpretation of cases with issues related to abortion, civil rights, privacy rights and criminal rights. The next question that comes to mind is should any one man or even political party for that matter, have such power to influence how the law is interpreted and applied in this country? With such an appointment system, can we assure each and every citizen that the Justices of the Supreme Court will apply the law in such a way to guarantee "Equal Justice" for all Americans?

In the *Roe vs. Wade* opinion written by Justice Blackmun, the Court acknowledged the problems inherent in judges deciding emotional and personal issues.

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate, not simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear

in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905):

'[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'"

(*Roe vs. Wade* (1973) 410 U.S. 113, 117.)

Is there a problem with the President having the power to appoint whoever he wants? Will this lead to a court filled with buddies of the various Commander in Chiefs? As a matter of fact, don't most people in power choose people they know and trust to put in key positions whether it be in government or the business world? Do we really want the most qualified candidates to serve on our highest bench? Maybe we won't be better off with Sam Alito as our next Supreme Court Justice rather than Harriet Miers. Certainly Alito, on paper is far more qualified for the position than Miers. But as a Southern woman, could Miers have added a perspective to the bench that will certainly be lost in another ultra conservative white man? Would having another woman's perspective, even that of a bible toting conservative, bring the court closer to it's goal of equal justice? Evangelist Pat Robertson touted Miers as a good Christian and threatened senators who voted against her with retribution in the next election. Is our President correct when he says that race and gender are absolutely irrelevant to the job of a Supreme Court Justice in defending his selection of Alito for the position? Should that same policy apply but even stronger with respect to the relevancy of the Justices religious beliefs—and wasn't that one of the criteria that President Bush used to bolster Harriet Miers credentials when conservatives were concerned?

I think the issue of the process of appointment of our Supreme Court Justices is not a liberal or a conservative issue. It is much more about preserving the integrity of our legal system and assuring that

never ever do we allow ourselves to be in the position where Supreme Court Justices are deciding cases based on personal religious views or political party views rather than an interpretation of case law and our Constitution. To use the words of Justice Blackmun, it is the job of the Justices "to resolve the issue by constitutional measurement, free of emotion and of predilection." Can we do that under our current system of appointment? Perhaps it is time to consider a bi-partisan approach to appointing our most important legal pundits in order to achieve justice for all.

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