

SCOTUS CONSERVATIVES IN ANONYMOUS DISARRAY

I expressed skepticism about the part of Jan Crawford's story confirming John Roberts flipped his vote on ObamaCare that claimed Roberts had no role in writing the dissent.

Finally, there is Crawford's not entirely convincing explanation for the relics in the dissent that seem to suggest Roberts had a hand in crafting the dissent, too.

The two sources say suggestions that parts of the dissent were originally Roberts' actual majority decision for the Court are inaccurate, and that the dissent was a true joint effort.

The fact that the joint dissent doesn't mention Roberts' majority was not a sign of sloppiness, the sources said, but instead was a signal the conservatives no longer wished to engage in debate with him.

If true, those relics, which violate normal protocol for referring to other opinions, reflect a very big affront to Roberts' governing opinion.

Salon now has a single anonymous source disputing Crawford's two anonymous sources on this point.

Crawford's sources insist on the claim that the joint dissent was authored specifically in response to Roberts' majority opinion, without any participation from him at any point in the drafting process that created it. It

would, after all, be fairly preposterous for the four dissenters to jointly “author” an opinion that was in large part written originally by the author of the majority opinion to which the joint dissenters were now so flamboyantly objecting.

Yet that, I am told by a source within the court with direct knowledge of the drafting process, is exactly what happened. My source insists that “most of the material in the first three quarters of the joint dissent was drafted in Chief Justice Roberts’ chambers in April and May.” Only the last portion of what eventually became the joint dissent was drafted without any participation by the chief justice.

[snip]

Roberts’ chamber did much of the drafting of the [first 46 pages of the dissent, which don’t mention Roberts’ opinion], and none of the [last 19 pages, which do mention it]. In short, it appears Chief Justice Roberts ended up in large part authoring both the majority opinion and the dissent in *National Federation of Independent Business v. Sebelius*.

Set aside the fact we’ve got a anonymous leak war going on, with neither side inherently garnering credibility. Set aside what Salon’s report, if correct, would suggest about Roberts.

I want to focus on what it means that comity in the court has broken down in this way. If Crawford’s report comes, as many suspected, from the conservative justices themselves, it would suggest they leaked a transparently illogical cover story (in that it didn’t explain the relics that made everyone suspicious about the dissent in the first place). They not only broke SCOTUS protocol about leaks, but did so and,

reportedly, lied in doing so.

Then you've got a quick response from someone—could this be a Roberts clerk? one of the other conservatives?—calling out that purported lie.

To what end? To shift the emphasis on Roberts' fickleness? To try to tone down the confrontational claims at the heart of the Crawford piece? And if another of the conservatives is behind the Salon report, then how do the original leakers feel about the story? What are the political objectives of each side of this anonymous leak war?

And all this is just what we can see through the screen of anonymity. The rancor this expresses must be worse in person.

Even if it's all anonymous, I gotta say, I'm glad this leak fest has revealed the conservative justices in all their bitchy glory.

Update: Lyle Denniston hits some of these same issues, though based solely on the Crawford article before the Salon one came out. In addition to pointing out some more reasons to doubt the story in Crawford about who wrote the dissent when, has this to say about the impact of this leak war.

Whatever the facts about the drafting of the opinions, their sequencing, and their legal points, the fact that all of this internal deliberation has been shared with a news reporter by someone "with specific knowledge" is a departure from the Court's norm of keeping such things to itself, and that alone can leave a trail of bitterness and recrimination. When the famous book *The Brethren* came out in 1979, filled with revelations about internal deliberations, the Court's internal dealings were affected for months, and the Justices even closed off some of their hallways and denied media access to them. There also were long-running

recriminations over who had been the source or sources.

But the prospect of lingering impact of the CBS story is not due only to the fact of the leaks. The content itself is a public rebuke of Roberts, from inside the Court, and amounts to a direct challenge to his ability to lead the Court and to take steps – if that was what his position on the health care law was intended to do – to insulate the Court from the partisan polarization that so dominates the rest of Washington