THE SCOTUS MERRYGOROUND: IS GINSBURG SHUFFLE COMING?

The UPI has an article up with the startling headline "Ruth Bader Ginsburg stepping down in 2015". The article, which is really more of a pondering question, is bylined today by Michael Kirkland and paints the scenario of a Ruth Bader Ginsburg retirement in 2015 so that Obama has sufficient time left in his second term to appoint and confirm a successor.

Although referenced rather obliquely in his article, Kirkland's basis is premised entirely on the thoughts and predictions of SCOTUS, AND SCOTUSblog, longtime pro Tom Goldstein in a SCOTUSblog post he did last Tuesday, February 14th. Goldstein may be only one voice thinking out loud, but he carries the bona fides to warrant serious consideration here.

Goldstein points to the confluence of Ginsburg's age, health, and personal career tracking with that of Justice Louis Brandeis. And the thought that Ginsburg will want to see that her replacement is chosen by a Democratic President. Goldstein's thought process, originally laid out in the comprehensive February 14th entry at SCOTUSblog, is worth reading. Assuming Obama is reelected, which is still a pretty decent bet at this point (certainly capable of changing though), it is hard to find fault with Goldstein's logic; in fact, it is rather

compelling. I also agree with Tom that none of the current conservative bloc, including swing man Tony Kennedy, are going anywhere anytime soon.

Where I do differ from Goldstein, however, is in his prediction for what would transpire upon the theorized Ginsburg tactical retirement:

> Assuming that President Obama is re-elected and that Justice Ginsburg does retire at some point in the next Administration, who will be the next nominee? One thing is certain: it will be a woman. It is inconceivable that a Democratic administration with any reasonable choice would cause the gender balance of the Supreme Court to revert to seven men and two women. Relatedly, appointing three women in a row to the Court is excellent politics.
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> President Obama will also have a strong desire to pick an ethnically or racially diverse nominee. It would be disappointing for the nation's first African-American President to make two white appointments, leaving the Court with seven white members. A more diverse Court is a better legacy. Given that the President already appointed the first Latina Justice, most likely is an African-American or Asian-American nominee. That said, I think race and ethnicity are plus factors, rather than an imperative like gender.

I am not sure I buy Goldstein's certainty of yet another female Supreme Court nominee from Barack Obama. I am just not convinced Obama appoints a third woman in a row, color or not. It sure makes it easier that it would be to fill a "female seat", Ginsburg's, I guess, and Obama clearly wanted to see three women justices on the court. But he crossed said threshold, and knowing one of them may not be there so long into the future likely played into the strength

of his desire to appoint a second woman after Sonia Sotomayor. Such is quite a different thing from having an abiding determination to insure there are *always* three women on the Supreme bench.

Further, it *really* restricts the pool of potential nominees and plays into a plethora of counter arguments and attacks of quota instead of merit based selection. The stereotyping criticism could be potentially brutal. So, while Tom Goldstein is convinced the field is so narrowed to women, and further narrowed to women of color, I do not think such is the case at all; in fact, Obama may arguably be more likely to appoint a man after having nominated two women in a row.

I will come back to the most likely candidates in a minute, but would like to address Goldstein's musing and conclusion of the likely nominee. Tom inputs all the data into his cranial computer and spits out current California Attorney General Kamala Harris as the perfect choice. She is young, has proven electability politically, has a legal background and has the "color" factor. She also likely has some chits of cachet from falling in line for the unconscionable Foreclosure Settlement Obama and his Administration crave so desperately. But Harris has no judicial experience, but does have a reputation as an extremely aggressive Democratic political climber. That is a tough sell and, as Tom notes, Harris clearly has her eye on the California Governor's mansion.

Goldstein covers the list of other possibilities if the selection is indeed a woman, especially one of color. The list is not long or that great. Amy Klobuchar is a possibility I suppose, and Obama has never shown much care about raiding critical Democratic majorities in the Senate; so maybe. Two sleepers may be Mary Murguia, currently on the 9th Circuit and Jacqueline Nguyen, nominated for the 9th, but currently still a District judge in CDCA. Murguia seems very unlikely to me. Nguyen,

however, would be especially intriguing as she is young, has an excellent educational and professional resume, and is Asian in lineage. Naming the first Asian American, male or female, to the court would be another notable first for Obama, and he looks for that.

Other women in the potential field that Goldstein does not mention are Teresa Roseborough, a lawyer in private practice in Atlanta, but with impeccable experience including a stint as DAAG in the OLC and Leah Sears, another Atlanta attorney who was formerly Chief Justice of the Supreme Court of Georgia. Both Roseborough and Sears are of color and are very well respected (Walt Dellinger is a huge fan of Roseborough's).

Which brings the discussion back to the main point of this post, namely I think Goldstein's certainly of another woman nominee is wrong for the reasons stated above as to stereotyping and the relatively few candidates it leaves to choose from. And if the field is open to men, then there are too many possibilities to ponder individually.

I think Obama would love to appoint Cass Sunstein, and while Sunstein would be a difficult confirmation, Obama may be willing to fight for his friend. For any progressive, Sunstein would be a catastrophically bad choice, which is likely a positive to Obama and his "insider brain trust". The other possibility to fear is Merrick Garland of the DC Circuit, who has already been heavily vetted by the Obama regime (along with Elena Kagan for John Paul Stevens' seat). Garland is a horribly mushy, moderate centrist, and borders on being too old for lengthy service. Garland would be another Kagan in that, even though a Democratic selection, he would substantially move the Court to the right from the Justice he is replacing. Garland would be a safe, and confirmable choice (Orrin Hatch loves him just to give you an idea).

Garland is a real possibility, both because of

his centrist appeal to Obama and his confirmability. And herein lies the other point I wish to make in this discussion, the flimsiness of Barack Obama's relentless mindset of dogged centrism and playing it safe compromise to chalk up any claim of victory, even if it is diluted to absurdity. It is the enduring hallmark of the "success" of the Obama Presidency.

One of the other hallmarks of Obama's Presidency is also, save for his two Supreme nominees Sotomayor and Kagan, dereliction of duty and attention to judicial policy and nominee confirmations. The state of rot and decay ongoing in the liberal federal judiciary is shocking, and Obama literally has abandoned the cause. All the way back in early August of 2010, I noted:

> In fact, reshaping the Federal judiciary away from the hard conservative Federalist society bent that has been installed and meticulously grown by the Reagan and two Bush Administrations was one of the primary rallying cries for Democrats, including the Obama campaign, during the 2008 election. And, yes, there has been significant and unified Republican obstructionism; that is absolutely a factor. The problem is that there has been little if any fight put up by the Obama Administration and instead mostly weak resignation.

There has been little, if any whatsoever, relative improvement since then, and none in terms or realizing what the Republicans have done to seed the overall ideology of the Federal Judiciary, and take affirmative steps to counter it. Over time, it may prove to be the biggest and most egregious failure of Barack Obama. Quite a thought for a man who made so much of his supposed background as a "professor of Constitutional law". The truth, instead, has been more a flippant opportunism toward established Constitutional restraints and a

malignant neglect of the judiciary composition and direction.

Republicans now have a deep and established bench of conservative jurists and shining stars to tap. Who is the liberal answer to Brett Kavanaugh? We had one in the making with Goodwin Liu, and Obama did not lift a finger to support Liu, he abandoned and hung Liu out to dry like Dawn Johnsen.

As my friend Dahlia Lithwick has pointed out:

> The vast majority of disputes are resolved by the federal appellate courts, which are the last stop for almost every federal litigant in the country. And the one legacy of which George W. Bush can be most proud is his fundamental transformation of the lower federal judiciary—a change that happened almost completely undetected by the left. At a Federalist Society meeting in 2008, Bush boasted that he had seated more than a third of the federal judges expected to be serving when he left office, most of them younger and more conservative than their colleagues, all tenured for life and in control of the majority of the federal circuit courts of appeals. The consequences of that change at the appeals court level were as profound as they were unnoticed.
> ….
> The current administration has not done much to restore the ideological balance of the federal appeals courts. For one thing, this was never Obama's priority the way it was for Bush, his father, and Ronald Reagan.

That is exactly right, and it ingrains and serves the corporatist and authoritarian mentality corrupting this country at its fundamental core. The Republicans have a couple dozen Brett Kavanaughs teed up waiting in the wings, and liberals cannot muster even one

Goodwin Liu.

Judicial policy matters. If progressives and liberals have any common sense in the least, they will start pressing hard for a better one from Barack Obama.