Supreme Decision

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"As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?" James Madison, Federalist No. 51

At the end of its annual term, the Supreme Court has proven itself once again as a "temperate and respectable body" of justices by delivering, among others, two landmark decisions. The first one demolishes the infamous Bush legacy of sacrificing the Constitution's article I section 9 Suspension clauses in its bogus "war against terror". The second one represents a literal interpretation of the Second Amendment as the unambiguous individual right to bear arms. The first decision has already inflamed political discussions and will no doubt be at the center of the presidential debates leading to the national election in November. Surprisingly, the second one has proved much less controversial, a sign of changing times in the American discourse.

On June 12, 2008, in its ruling in *Boumediene v. Bush*, the court recognized*habeas corpus* rights for the Guantánamo prisoners. Less than a week later, in another landmark ruling, *District of Columbia v. Heller*, it overturned the Washington DC ban on handguns by rejecting the view that the Second Amendment's "right to bear arms" applied only to the collective service in a "well regulated militia". Instead, it recognized it as an individual right.

Since most likely it will fall to the next president to replace some of the Supreme Court judges, Americans should put aside for a moment the media- induced frenzy about the candidates' increasingly fierce competition to get the last sound bite in, the minute-to-minute coverage of exchange of insults and name-calling, and reflect upon the far-reaching ideological consequences that electing one or the other candidate will have on the composition of the Supreme Court.

Both Supreme Court rulings were passed by a 5 to 4 vote, showing a

deeply divided court over matters that affect the essence of American constitutional system of government and will have long-term consequences for life in America. As it stands now, the court is evenly divided between a conservative and a liberal bloc of four justices each, with Anthony Kennedy delivering the decisive swing vote. Since the future of the court will be decided by the next election, this consideration should be given at least as much weigh as any other in the voters' choice for president.

In *Boumediene v. Bush*, the court delivered a critical decision in the protection of the basic right of any prisoner, including the ones in Guantánamo, to challenge their confinement before a federal judge. This constituted the court's third rejection of the Bush administration's policy on those it detains in its fight against terrorism. The Guantánamo base in Cuba, which has been controlled by the Unites States since the Spanish-American War (1898) under a long-term lease, was considered by this administration to hold a unique legal status that had allowed the Pentagon to avoid review of its activities by federal courts. By declaring unconstitutional a provision of the Military Commission Act of 2006 which denied jurisdiction to the federal courts on *habeas corpus* petitions by those detainees to challenge their designation as enemy combatants, the Court repudiated the fundamentals of the practice of using Guantánamo as a jail where federal jurisdiction could not reach.

The majority decision was written by Justice Anthony M. Kennedy, a Reagan appointee, who often plays the deciding role of "balancer", sometimes siding with the conservative bloc, sometimes with the progressive one. He was joined by the more liberal judges, John Paul Stevens, David H. Souter, Stephen G. Breyer and Ruth Bader Ginsburg. The dissenting opinion was authored by Justice Antonin Scalia, also a Reagan appointee and the most reactionary of the group, who stated, in apocalyptic terms, that the "nation will live to regret" this decision and that more Americans were going to be killed as a result of it. He was joined by George W. Bush's appointees, Samuel Alito and Chief Justice John G. Roberts.

In the second decision, *District of Columbia v. Heller*, after seven decades of holding that the Second Amendment's right to bear arms is a collective right (only as part of a "well-regulated militia"), the court now ruled that to keep arms at home for self protection is an individual right. This decision was criticized by authorities of the major U.S cities as a setback in their fight against crime and gun violence. However, both presidential candidates Obama and McCain praised the decision as an endorsement of individual rights. Obama emphasized the court's description of the right as "not absolute and subject to reasonable regulations enacted by local communities to keep their streets safe." Although most liberals do not share this view, the Democratic Party's platform in 2004 had already endorsed the Second Amendment as an individual right, as part of the strategy of appealing to the center of the political spectrum in general, and to independent voters in particular, on matters of security. In Senator Obama's case, even if it does not directly contradict any earlier

statements, the endorsement surprised some groups, since it does not fit his ideological profile. The media pundits interpreted it as his present strategy to capture the center of the political spectrum, which is probably correct. But it may also be a sign of how accurately Barack takes the pulse of the country. After episodes such as the Virginia Tech massacre that shook the country last year, many law-abiding citizens both young and old, both Republican and Democrat, have increasingly been vocal about the need to own a gun for self-protection.

It was now the turn of Antonin Scalia to write the majority decision. A Reagan appointee and, together with Clarence Thomas, the most ideologically conservative of the nine justices, Scalia argued that this is a fundamental constitutional right that takes certain policy choices off the table. While recognizing the problem of handgun violence in the country, Scalia maintained that the "intactness of the Constitution" takes precedence over any other concerns. Ironically, his dissenting opinion on *Boumediene v. Bush* shows no concern for the wholeness of the Constitution's Suspension clause on habeas corpus, a sign of how human contradiction is not the preserve of presidential candidates only.

The dissenting opinion to District *of Columbia v. Heller* by Justice John Paul Stevens, who was appointed by President Ford but most of the time votes with the liberal bloc, stated that the majority's decision was based on a "strained and unpersuasive reading of the Constitution", which omits any mention of other purpose (other than a "militia") related to the right to bear arms, such as hunting or personal self-defense. Justices Breyer, Souter and Baden-Ginsburg joined him in the dissenting opinion. Justice Kennedy sided with the conservative majority in this case.

The majority's decision has enormous symbolic significance. It overturned a 70-year old decision that had rejected the individual-right interpretation, but one that, in the popular debate was extremely controversial and divided people along ideological and regional lines. But in reality, the narrow way in which the Scalia decision was written gives enough reassurance that other gun-control laws and regulations will not be affected. For example, the prohibition of carrying concealed weapons is upheld, as are the federal ban on possession of machine guns and longstanding prohibitions on the possession of firearms by felons and the mentally ill. It has defused rather than inflamed the political debate, and both candidates have endorsed it. It is thus fair to say this was not a major setback for liberal-minded Americans.

On the other hand, the *Boumediene v. Bush* decision is a blow to all those who have made the "war on terror" a centerpiece of their new value system after 9-11. Senator Lindsay Graham (Republican from South Carolina) called it "irresponsible and outrageous" and said he would do anything in his power to have it overturned, even if that may take a Constitutional amendment.

The decision ignited a serious debate between the two presidential candidates.

While Obama praised the *Boumediene* decision, McCain was outraged by the court's decision to give rights to "unlawful combatants." He sent former Republican candidate and New York mayor Rudy Giuliani to represent him on CNN's American morning. Giuliani accused Obama of having a "pre-September 11th mentality". Obama later defended his position saying he clearly understands the threats America faces but emphasized the fact that it is the failed policies of George Bush that cause the US so many problems around the world. He added that McCain clearly would represent a continuation of those policies based on fear and his unwillingness to look toward the future.

This year the Supreme Court has delivered an equal amount of victories to each bloc. This balance may shift if some of the judges were to die or retire on the next eight years. Given that the conservatives are the youngest members of the Court (Roberts and Alito, the George W. appointees, are in their 50s, Thomas Clarence is 60 and Scalia is 72), a McCain presidency may have to replace some of the most reliable liberal judges (John Paul Stevens is 88, Ginsburg is 75) and thus shift the balance in the conservatives' direction. Of course, appointing Supreme Court judges is not an accurate science since, as seen by the decisions above, it is hard to predict, when nominating them, what thinking processes will determine their opinions. The greatest examples of this are Justice Kennedy, who was a Reagan appointee, but often leads the more liberal bloc, as well now retired Sandra Day O'Connor, another Reagan appointee that brought non-ideological balance to the Rehnquist court. At any given time, two opposing forces shape the judges' opinions: the pull of precedent that gives a binding continuity to court decisions, and the push of social change that propels some of the thinking forward, in accordance to the prevailing cultural mood. The final decision is then further shaped by the judges' erudition, idiosyncrasy and ideology.

Given the fragile balance present in the Roberts court, and with so many important cases decided by such a narrow margin, the power of the next President to set the future direction of the high court is a vital element that should enter into the voters' considerations next November 4th.Briefly put, the future of the Supreme Court and its ability to make the best decisions so that "reason, justice, and truth can regain their authority over the public mind", is in the hands of American voters.

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