Family ties, political bias linked US Supreme Court justices to Bush camp

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It is a well-known fact that the five Supreme Court justices who threw the presidential election to George W. Bush in their ruling December 12 were appointed by Republican presidents—three by Ronald Reagan, one by Bush's father, and one by Richard Nixon (William Rehnquist, later elevated to chief justice by Reagan).

Less publicized have been the intimate personal connections which link the Supreme Court majority to the Bush campaign and the Republican Party, connections that would, in an ordinary criminal or civil case, require judges to recuse themselves from any decision.

Justice Clarence Thomas was nominated to the Supreme Court by President George Bush in 1990. He sat silent through all the proceedings on the Florida recount, as he does generally at all oral arguments, then signed the opinion written by Rehnquist, upholding all the legal claims made by the Bush campaign. Only three justices—Rehnquist, Antonin Scalia and Thomas—went so far as to support the claim that any court-supervised recount of votes in Florida would be unconstitutional because the state legislature, not the people of Florida, has the sole power to decide who gets the state's electoral votes.

While Thomas was deliberating the case—or waiting to sign on to the decision arrived at by Scalia and Rehnquist—Thomas's wife Virginia was at her job at the Heritage Foundation, a right-wing think tank, collecting résumés for appointments in a possible Bush administration.

While this job would have been wasted effort in the event Gore had won the presidency, and Virginia Thomas stands to benefit greatly with Bush in the White House, both the justice and his wife denied any conflict of interest. In response to press inquiries, Mrs. Thomas said she rarely discussed Supreme Court cases with her husband.

A federal appellate judge, Gilbert S. Merritt of the United States Court of Appeals for the Sixth Circuit, a friend of Gore and a Democratic appointee, said that Thomas should have recused himself. “The spouse has obviously got a substantial interest that could be affected by the outcome,” he told the *New York Times*. “You should disqualify yourself. I think he'd be subject to some kind of investigation in the Senate.”

But a spokesman for Vice President Al Gore said he had no comment on accusations of a conflict of interest. “The Vice President has the highest regard for the independent judiciary, so we're not going to comment on the various questions that have been raised,” said Mark Fabiani, a Gore campaign representative.

Section 455 of Title 28 of the United States Code, “Disqualification of Justices, Judges or Magistrates,” requires court officers to excuse themselves if a spouse has “an interest that could be substantially affected by the outcome of the proceeding.”

Besides Thomas, Scalia also took part in the decision while a close relative had a substantial interest in the outcome. Scalia's son Eugene is a partner in the Washington office of Gibson, Dunn & Crutcher, where one of the senior partners is Theodore B. Olson, who argued Bush's case before the Supreme Court.

Scalia refused to recuse himself from *Bush v. Gore*, although the lead lawyer for the plaintiff was, in effect, his son's boss. He took the same position in the various legal proceedings that accompanied the impeachment of Bill Clinton, beginning with the Supreme Court's decision to permit Paula Jones to proceed with her lawsuit against Clinton for sexual harassment, in which Olson provided legal assistance.

The personal conflicts-of-interest involving Thomas and Scalia were one-day wonders in the media, then

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quickly dropped after the two justices supplied Bush's margin of victory in the 5-4 decision to halt the Florida recount. This kid-glove treatment is in marked contrast to the use of minor or even imaginary ethical infractions to witch-hunt cabinet-level officials during Clinton's eight years in the White House.

Independent counsel investigations were carried out into the affairs of Interior Secretary Bruce Babbitt, Labor Secretary Alexis Herman, Housing and Urban Development Secretary Henry Cisneros, and, of course, Bill and Hillary Clinton, on much flimsier evidence than is already apparent in relation to the Supreme Court justices.

Agriculture Secretary Mike Espy was forced to resign from the cabinet, subjected to a four-year inquiry and a public trial before he was acquitted on all charges. More than $7 million was expended to investigate Espy's acceptance of Super Bowl tickets and a few airplane rides from agribusiness interests in Arkansas and supporters in Mississippi, his home state.

Only a generation ago, Supreme Court Justice Abe Fortas was compelled to resign after it was revealed that he had given private legal advice to financier Louis Wolfson and received payments from the Wolfson family foundation while on the high court. Fortas was a corrupt Democratic Party crony of President Lyndon Johnson, but he never took part in any case directly affecting Wolfson's interests, let alone his own family's, as Thomas and Scalia have done in *Bush v. Gore*.

Another confirmation of the naked political bias in the Supreme Court decision comes in a report in the current issue of *Newsweek* magazine, citing comments made by Justice Sandra Day O'Connor on the night of the election, November 7. O'Connor and her husband were hosting a party when she heard Dan Rather on CBS call Florida for Democrat Al Gore. “This is terrible,” she exclaimed, according to two eyewitnesses. She told a guest that the election was “over,” since Gore had already carried two other big “battleground” states, Illinois and Michigan.

The Supreme Court Justice then walked away from the TV set, while her husband John explained that she was upset because they wanted to retire to Arizona, but had been waiting so that a Republican president could name a successor. O'Connor, 70, has been on the court since 1981. Before that she was Republican majority leader in the Arizona State Senate.

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