

# Opinion

## Nominees reflect Reagan's conservatism

There is a joke about flipping coins that goes like this: Heads I win, tails you lose. In Washington, the rules of that joke are about to be applied to President Reagan's Supreme Court nominations: He has picked them for their ideology, but the Senate cannot reject them for the same reason.



**Richard Cohen**

In nominating Antonin Scalia to be an associate justice of the Supreme Court and William Rehnquist to be the chief justice, Reagan chose men who share — even exceed — his conservative ideology and who, the actuarial tables inform us, will be around to implement it. Both were chosen by the President right off the bat. They met, they chatted and Reagan popped the question. He interviewed no one else.

Almost immediately, the adjective-du-jour in newspapers was "brilliant" and, for sure, Scalia's and Rehnquist's credentials demand re-

spect. But so do their ideologies. It is that — not just their brilliance — that led the President to nominate them. There is a conservatism without a smile and a shoe shine — a brittle ideology that shimmers with intellectual energy but whose consequences will not be ameliorated by political considerations. They are both the ultimate Reagan — the one, despite his daunting popularity, that the country has never quite accepted. If Reagan cannot be Reagan, then he has chosen surrogates who can.

The charge against liberals and their fellow travelers in the legal community — judicial activists — is that in pursuit of a particular principle they trample more worthy ones. For instance, in securing the rights of criminal defendants (the unconvicted), they are accused of ignoring the rights of the community. And there have been cases, especially when it comes to rules of evidence (the so-called exclusionary rule), where guilty people were given a walk because the police failed to dot an evidentiary "i".

But Rehnquist and, from the evidence, Scalia, too, are the mirror image of the judicial activists they so energetically oppose. In the name of judicial restraint or its kissing cousin, states'

rights, they would deny a woman the right to an abortion — maybe even one who has been raped or whose child, as with Tay Sachs disease, is doomed to an agonizing death.

The same holds in other areas. In a bizarre application of his brilliance, Rehnquist once wrote a memo to Justice Robert Jackson urging him to vote against desegregation of the schools in the South. Whatever the legal theory cited, the results would have been plain: a loss of individual rights. Rehnquist has also voted to limit the rights of criminal defendants, homosexuals, blacks and women — and even to limit their ability to argue their case in court.

Scalia is in the Rehnquist mold. In speeches, he has championed a stingy interpretation of the First Amendment. And in a libel case involving the Washington Post, he joined one other appeals court judge in a tortured opinion that would, if sustained, hobble the ability of the press to publish controversial investigative articles.

Supreme Court appointments are where the President gets to play for keeps — where the momentary concerns of the present come to haunt the future. Yet some senators act as if it would be dirty pool to consider the ideology of the men involved and what their effect would be

on the people they are elected to represent. They talk as if ideology exists in a vacuum — as if the President's presumed right to choose an ideological soul mate takes precedence over the consequences of that ideology. Sen. William Proxmire (D-Wis.), going for his own Golden Fleece award, put it this way: "What the hell, everybody's got to be something."

But that "something" has elements in it that the country, and the Congress, have time after time rejected. As Harvard constitutional scholar Laurence Tribe has pointed out, in choosing judges, the President can succeed where he has failed either by amendment (school prayer, abortion) or by legislation. Previous Senates appreciated that their obligation concerning a court nominee was no different than the one concerning legislation: Even George Washington had a nominee (John Rutledge) rejected because his views were unacceptable to the Senate.

The brilliance of Reagan's nominees is not in dispute. But their ideology is a different matter entirely. A Senate that cannot judge them the same way the President did is playing by absurd rules. Heads Reagan wins.

Tails we all lose.  
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### Reagan, Goldwater mold future court

## Appointees reflect Republican influence

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namics. The players are strong-willed professionals reasoning about hot issues in the cool climate of a written Constitution, changing statutes and a vast body of case law. The building of coalitions is influenced by intellectual nuance and the power of personality. On both counts, Scalia and Rehnquist will augment the power of conservative jurisprudence.

Scalia is an intellectual in a way that Burger is not: by training and inclination. Scalia has taught at several of the finest law schools. He has the theoretical turn of mind that deepens analytic powers and does not dispose a judge to

try to split all differences. That disposition can make intellectuals ineffective politicians but forceful judges. With Scalia leavening the Court, it may be less inclined to torture itself, and all who love logic, with ever-more-baroque criteria for distinguishing permissible from impermissible "race-conscious" state action.

No one ever looked more like a Chief Justice than Burger, who if he ever as an infant played in a sandbox must have done so in striped trousers and a swallowtail coat. Rehnquist's clothes come from the factory pre-rumpled. The New York Times located Rehnquist on "the Court's extreme right wing." (The Times style book probably says

the phrase "the Court's extreme left wing" is an oxymoron.) Actually, Rehnquist has neither the abrasive philosophy nor, as important, the jagged temperament of an extremist.

What he has is the keenest mind on the Court, which is why critics complain that he writes too well. When person A cannot cope with person B's arguments, A says B is not wise, only articulate. In the administration of the Court Rehnquist's affability and intellectual effervescence will enhance his effectiveness.

The rise of Rehnquist to the pinnacle of his profession, with the last ascent achieved from the hand of Ronald Reagan, illustrates the geology of our polit-

ics. Rehnquist, an Arizonan, was pulled toward public life by the conservative movement energized by another Arizonan, Barry Goldwater, whose 1964 campaign brought political prominence to Ronald Reagan.

Rehnquist serves now with another Arizonan, a law-school classmate who was active in state politics, Sandra Day O'Connor. As Barry Goldwater takes his leave of Washington, he sees around him abundant evidence that the significance of 1964 is not that he lost 45 states, but that he won the Republican Party and, doing so, seeded the future.

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## Letters

### Reader miffed by Royko's reference to 'biddies'

Shame on Mike Royko! "...biddies who have only their cats for company?" The word "biddy" is a negative term and connotes women who are unhappy, lonely and unfulfilled and would prefer men to cats. But in actuality whether many of these women choose cats over

many of the men they have met or been married to, or because of circumstances they find themselves with only cats is unimportant. What is important is that some women have learned to prefer cats because cats are independent and allow women independence,

freedom of choice and solitude without really being alone. What do you call men who prefer cats — single men! No negative labels. Mike Royko is a jerk!

Mona Hall  
L A II  
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