

After Souter

He played key role, but court needs more diversity

By Sherrilyn A. Ifill

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In the book *The Nine: Inside the Secret World of the Supreme Court*, Jeffrey Toobin wrote that Justice David Souter wept after the Supreme Court's nakedly political, legally indefensible and bitterly divided decision in *Bush v. Gore*. And apparently it's been downhill from there.

In his 18 years on the court, Mr. Souter has proved himself to be quite brilliant, and of course he became the stealth nominee who didn't turn out quite the way [President George H.W. Bush's](#) handlers expected. In fact, Mr. Souter emerged as one of the strongest and most principled moderate voices on the court (don't let anybody fool you - there are no real liberals on this court).

One of the most interesting aspects of Mr. Souter's tenure on the court is that he's demonstrated how a white, male Republican Northerner from a mostly rural state can become educated about, and even a champion for, the legal rights of minorities, women and the poor. If you listened to his questions during Wednesday's oral argument in *North Austin Municipal Utility District Number One v. Holder*, the case that may result in the dismantling of the 1965 Voting Rights Act, you heard the contribution of someone who's been paying attention to and learning about the interplay of race and politics in Southern states, and who's taken the time to learn something of the history that forms the critical context in which the Voting Rights Act was enacted and reauthorized. In this sense, Mr. Souter's tenure on the court is a real success story - not for liberals or moderates, but for the way the court should work.

At its best, the court can be a place where the interaction among justices of different backgrounds and viewpoints produces dynamic and informed decision-making. When Justice Thurgood Marshall retired in 1991, Justice Sandra Day O'Connor was particularly eloquent about the effect of Mr. Marshall's storytelling in the justices' conferences. Mr. Marshall's experiences as a black man growing up in segregated Maryland and as a civil rights lawyer traveling through the South opened up a world for his colleagues on the court, a world to which they had virtually no exposure. The stories Mr. Marshall told were not just his own, but those of the hundreds of clients he'd represented - black teachers and schoolchildren, criminal defendants wrongly accused, black lawyers, black Army privates facing court-martial in Korea, civil rights protesters, laborers, mothers and Pullman car porters. This is a key difference between Mr. Marshall's contribution to the court and that of Justice [Clarence Thomas](#). Mr. Marshall knew and could relate multiple and varied experiences of black life. Mr. Thomas talks about black life with his colleagues and in his opinions, but almost always only about his own life.

Which brings us to thinking about Mr. Souter's possible successor on the court. The appropriate question should be: What does the court need? What are the perspectives and experiences that are missing from the court? Three things strike me as critically important.

First, the court lacks an African-American justice who can articulate and literally "bring to the table" the unique perspective of how law interacts in the lives of black people. It's an important perspective because it is the basis upon which almost all of our civil rights laws were enacted. Without a force at the table during deliberations who can provide context and meaning to these important statutes - and who can do it with moral and intellectual power - we may find ourselves on the precipice of the end of federal civil rights law. If you look back at oral argument in the voting rights case that came before the court last week, and the almost hysterical solicitude several of the justices demonstrated for what they seemed to regard as a statutory unfair singling

out of Southern jurisdictions for special monitoring under the Voting Rights Act, the danger is clear.

Second, with the departure of Mr. Souter and that of Ms. O'Connor three years ago, the court now has no justices with state court experience. This is important. Many of the cases that come before the court arise from proceedings that began in state courts. Justices whose experiences are almost exclusively from federal courts simply don't know about how records are shaped in the crucible of state courts. They have no experience with state court civil or criminal practice rules. They don't know about the interaction and interplay between state courts and legislatures. And as the justices have demonstrated in a number of cases, they don't understand the pressures that come to bear on state court judges, who are often elected in hotly contested races and who must struggle mightily to maintain standards of impartiality and independence in the cases that come before them.

Lastly, the court needs a second woman. The selection of Judge Samuel A. Alito to succeed Mrs. O'Connor resulted in gender retrenchment on the court. Ms. Ginsburg read aloud from the bench her dissent in the now famous Lilly Ledbetter case two years ago, it was one of the most poignant moments in the court's history.

That was the case in which a majority of the justices struck down the gender pay bias claim of a woman employee at Goodyear Tire Co. because she didn't find out that her male colleagues were being paid considerably more than her until years after the pay bias began.

I sat on a panel with Ms. Ginsburg when she talked about her brethren's failure to understand how, in a male-dominated workplace, a woman would be unlikely to know the salaries of her male colleagues. Ms. Ginsburg had been, for years, a women's rights lawyer at the [American Civil Liberties Union](#), and she understood how gender bias in the workplace operates. A less ideological court would have listened and learned from her rich experience. But a five-justice majority threw out Ms. Ledbetter's claims.

At the urging of Mr. Obama, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, which will correct the Supreme Court's narrow interpretation of the statute. That's good news. But the point is that the court needs the perspectives and experiences of female justices. Ms. O'Connor, who was a good deal more conservative than Ms. Ginsburg, also understood gender bias and often talked about the fact that when she graduated from law school in the 1950s, firms wouldn't hire her, even though she'd graduated third in her class at Stanford.

A woman nominee is an imperative at this point. In fact, given the likelihood that Ms. Ginsburg will retire fairly soon as well, it's a good idea to queue up several woman candidates for the court.

For all these reasons, my short list of possible nominees is limited to black, female, current or former state appellate court justices. One enormously talented potential nominee, Chief Justice Leah Ward Sears of the Georgia Supreme Court, is already reportedly on the president's short list.

With all of the speculation swirling in the air, most of it focused on what would be politically advantageous for the president, we would all do well to stay focused on nominees who would be substantively advantageous for the court and the country. And we should give a respectful and grateful farewell to Justice David Souter.

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