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**HEADLINE:** Death Penalty: Court Roster May Be Key To Its Future

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**BODY:**

Disappointed supporters of capital punishment lashed out on Thursday at a ruling from the state's highest court that effectively suspended the state's death penalty. The judges in the court's 4-to-3 majority, they said, showed that they were out to sabotage capital punishment and would never approve an execution.

Death penalty opponents, in contrast, said the court had finally shown that it was not lost in a sea of technicalities and was finally focusing on fundamental injustices in the capital punishment law.

Both assertions may have been premature -- political theater designed, perhaps, to ratchet up pressure on the judges for the next case involving the death penalty.

But the debate demonstrated the central role that the State Court of Appeals is playing in deciding the fate of capital punishment and showed that a little-understood tribunal in Albany is clearly divided on the death penalty.

While some prosecutors, juries and legislators have been willing to condemn a handful of killers to death, as the court showed again on Thursday, it is the seven judges of the court who make the final decision. That decision, and the judges' role as the gatekeepers of death row, have turned a spotlight on the court, focusing attention on its makeup, subjecting it to public scrutiny and raising questions about its direction.

"I believe that the majority of the court in this case really did substitute their judgment for the judgment of elected officials of the State of New York," Gov. George E. Pataki said yesterday at a news conference in Oyster Bay, on Long Island. "I think that's just the wrong thing to do."

Mr. Pataki said if there was a way to repair the problem in the law identified by the court, he would try to pass an amendment quickly. On Thursday, the court ruled that the Legislature improperly required judges to tell jurors in capital cases that if they failed to reach a verdict during the penalty phase, the judge would impose a sentence that would leave the defendant eligible for parole after 20 to 25 years. The decision said the instruction effectively coerced jurors to vote for execution.

The court's four decisions overturning death sentences under the state's 1995 law have unveiled some of the judges' views on capital punishment. The court has never approved a death sentence. Even if the Legislature moves quickly to repair the flawed jury instructions cited by the court, lawyers say it could be half a dozen years or more before the court again faces the prospect of an execution.

That almost certainly means the court will include new judges by the time it reviews another jury's death sentence. That could make the death penalty an issue in the governor's race in two years; the governor appoints the court's judges.

"Whether the amended death penalty statute survives is absolutely going to depend on who the next governor is," said Vincent M. Bonventre, an Albany Law School professor who studies the court.

Some court watchers said capital punishment supporters had reason to be concerned about the court as it is now. The four judges who made up the majority on Thursday, they said, might be open to other challenges to other sections

of the death penalty law. "The reasonable prediction is they would invalidate several other provisions," said Eric M. Freedman, a Hofstra University law professor.

But by the time a new murder case works its way through a trial and into an appeal, each of the four judges who were in the majority on Thursday could be off the bench.

George Bundy Smith, a methodical former trial judge who wrote the majority opinion on Thursday, has become the court's most reliable critic of the death penalty. His 14-year term will end in 2006.

The term of the judge believed to be his closest ally on death penalty issues, Carmen Beauchamp Ciparick, once a Legal Aid lawyer, will expire in 2008.

The chief judge, Judith S. Kaye, who also voted with the majority, is often described as having grown more conservative. But some death penalty opponents say they think she has retained what they saw as an aversion to capital punishment in her early years on the bench in the 1980's. Her term ends in 2007.

All three of the judges were appointed by Gov. Mario M. Cuomo, the Democrat who was an opponent of capital punishment. Under New York law, a commission reviews candidates for the Court of Appeals and makes recommendations to the governor. The governor then nominates a candidate who must be approved by the State Senate.

Several lawyers said yesterday that they were most intrigued by the role of the fourth judge in the majority, Albert M. Rosenblatt, who is viewed as a swing vote on capital punishment. He was an appointee of Mr. Pataki, a Republican.

As a trial judge in Dutchess County, Judge Rosenblatt imposed the sentence in a case that led to a 1984 Court of Appeals decision that overturned what was left of the state's previous death penalty law. At the time, he suggested that he had reservations about capital punishment.

He alluded to those concerns in an opinion concurring with the majority that bristled at criticisms leveled by the dissenting judges. Judge Rosenblatt wrote that overturning the death sentence was "not part of some design to devise creative obstructions to the death penalty," as he said the dissenters had asserted.

"Many trial judges in the United States and in New York (myself included)," he wrote, "have not shrunk from imposing death sentences on defendants even though, as judges, we might have qualms about it." Judge Rosenblatt reaches the court's mandatory retirement age of 70 in 2006.

In what could be a new and long phase of New York's death penalty battle, the three judges who dissented could well win the argument through longevity. All Pataki appointees, they have much more time remaining on the court than the Cuomo appointees.

The term of the judge with the longest potential tenure, Susan Phillips Read, is not to end until 2017. She is considered a reliable vote for capital punishment. Another dissenter, Victoria A. Graffeo, is also considered a reliable pro-death penalty vote; her term expires in 2014.

Many lawyers were talking yesterday about Judge Robert S. Smith, the author of the three-judge dissenting opinion. Though he is known to be conservative, some death penalty supporters had openly expressed concerns about him after Mr. Pataki named him to the court last year because he had done work as a defense lawyer opposing capital sentences.

His dissent proved that he is far from an automatic critic of the death penalty. The 1995 law "scrupulously observed" constitutional rights, he wrote in his dissent.

Ever since he was named by Mr. Pataki, Judge Smith, now 59, has appeared anxious to dispel the suggestion that he might undermine the death penalty. During his confirmation hearing before the State Senate's judiciary committee in January he provided a hint of his views when a proponent of the death penalty asked if he would respect the Legislature's desire to have capital punishment.

"It is clearly not the function of the court," he testified, "either to sabotage the death penalty statute or to so micromanage the death penalty that it becomes unworkable."

The future of the death penalty in New York could depend on the way judges who sit on the court years from now answer that question. Judge Smith does not face mandatory retirement until 2014.

**URL:** <http://www.nytimes.com>

**GRAPHIC:** Photo: Gov. George Pataki, center, with the New York Court of Appeals. From left, Judges Susan Read, Albert Rosenblatt, George Bundy Smith, Judith Kaye, Carmen Ciparick, Victoria Graffeo and Robert Smith. (Photo by Associated Press)(pg. B2)

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