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Column: Supreme Team

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Utah's currently configured high court reflects more unanimity than recent predecessors; Court:
Utah Justices Agree Most of the Time

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Utah Supreme Court Chief Justice Richard C. Howe believes in civility.

"If you can get along with people, you will enjoy life more and reach your goals," he says. "Develop a love for people even when you disagree with them."

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Howe's motto fits the mood and makeup of today's Utah Supreme Court, where the five justices act in unison appreciably more often than the previous bench, which included now-retired justices I. Daniel Stewart and Michael D. Zimmerman.

An analysis by The Salt Lake Tribune shows 91 percent of the new court's opinions to date have been unanimous -- 163 of 179 rulings. That represents a 17 percent increase when compared to a similar period of the previous court.

University of Utah professor John Flynn sees the court as more pragmatic since the departures in January 2000 of Stewart, a passionate dissenter, and Zimmerman, a dynamic former chief justice. Both men are intellectuals who enjoy debate, Flynn said.

"Academics like to argue about ideas; practical lawyers like to deal with the narrow, practical problem they have got and get it done with," he said. "This court seems to stick to the narrowest interpretation of an issue. That is perhaps the most marked difference between the prior composition and the current one."

The new court -- joined by Justices Michael J. Wilkins and Matthew B. Durrant -- sometimes keeps its unified front by focusing on a specific issue that can resolve a dispute rather than exploring broader questions that spark dissent.

With Zimmerman's retirement, the all-white court also became all-Mormon, in a state where about 70 percent of residents are at least nominally members of The Church of Jesus Christ of Latter-day Saints. Eleven percent of Utahns are racial and ethnic minorities.

But the court's shared religious beliefs and unanimous rulings disguise conflicts between the justices -- who differ on the value of dissent, in their political views and on a timely issue: the role of the chief justice.

Early next year, the court will secretly select a new leader and has a chance to make history if it chooses Justice Christine M. Durham, the state's first and only female justice. After 19 years on the court, Durham wants the job; the only other justice who expresses interest -- albeit cautiously -- is Wilkins.

And just as these justices have become familiar with each other, change is coming: Howe, 77, will retire when his term ends on Dec. 31, 2002, and Leonard H. Russon, 68, plans to retire at 70.

Each justice agreed to be interviewed by The Tribune before the new chief is chosen, providing insight into a group whose decisions influence Utahns statewide. As Utah's court of last resort, the justices hear appeals in death penalty cases, first-degree felony convictions, major civil litigation, rulings from the Public Service and Tax commissions, and also rule on discipline cases against lawyers and state judges.

Agreeing to Disagree: Although known for his kindness and courtesy, Howe is the most frequent dissenter on the new court.

The chief justice says he has noticed the court's increased consensus, but says it is not deliberate. "There is no effort in any way to have all unanimous opinions all the time," he said. "It's not because we have tried to do it. Maybe we think a bit more alike."

Howe values dissent as planting the seeds for change in the law.

"You dissent to express another side of things, and to lay the groundwork of overturning that decision at a later date," he said. "Someday the court could see judges who would feel differently."

Russon is the second-most common dissenter. He was the lone holdout recently when the court upheld a jury's \$145 million punitive damage award against State Farm Mutual Automobile Insurance Co.

"If I feel very strongly about something, I'm going to stick to my guns," he said. "It's not a game of who I can convince. We have real people and lives involved, so egos should not play a part at all. What is important is the truth, and if you as a justice feel an opinion is wrong, you have a duty to stand by the truth."

But the newest members of the court, both appointed by Gov. Mike Leavitt early last year, say they strive for unanimity.

"We try, I know I do, to make a concerted effort to attain unanimity," said Durrant. "I always prefer to issue a unanimous opinion. I like the clear message that that sends to the bar. In some cases, narrowing the opinion might result in a unanimous opinion. That is to say, no one changes his or her position, but if there is an issue of disagreement that does not need to be reached, we may simply elect not to reach it."

As the youngest justice at 44, Durrant has authored the greatest number of opinions for the new court and dissented the least -- just once since he has been on the high court.

Wilkins said he prefers consensus "whenever possible." He adds: "Some judges just like people to know they hold a view My opinion is those are a complete waste."

In deciding appeals, the justices read briefs written by attorneys and research by their clerks. They generally do not discuss cases until after they hear arguments from the lawyers. Afterward, they convene to discuss the case. If unanimity is not reached, a justice can write a dissent, trying to sway others away from the majority.

Durham speculates the relatively new group could be coming out of a honeymoon period.

"There has been a very noticeable phenomenon in the new court of openness to discussion, exchange, and to making an effort at consensus," she said. "I have attributed it to the fact that everyone is . . . feeling their way."

Three of the high court's justices -- Howe, Russon, and Durham -- have worked together for the past seven years, with Howe and Durham sharing the bench for just under two decades. Durham said that toward the end of the previous court, the justices knew each other's "intellectual bents" well.

"There was a tendency, as a result of that, not to be as eager to push for consensus," she said. "Whereas in the new court we don't know each other that well and one intends to anticipate more opportunities to persuade, perhaps, and I have seen that happen."

James Magleby, an attorney with Ballard, Spahr, Andrews & Ingersoll, co-authored a book profiling each of the members of the Utah Supreme Court from 1896 to 1996. Magleby said he sees dissents as an affirmation there is vigorous debate on the court.

"I like to know that the court is not unified or uniform on any one particular issue, because I think that's the strength of the court: There are five individuals on it," Magleby said.

It may be too early to tell if consensus will be the hallmark of the new court, Flynn said, noting much will depend on the types of cases they consider. "A court may for a period of time be relatively dissent-free," he said, "but then suddenly get hit with a period of big issue cases."

Narrow Label: Grasping a mug of coffee, Russon peers over his glasses, settles into his chair and scoffs at the label he has seen the court pick up in the media since last year -- the "all-Mormon" court. He sees the label as a narrow brand implying favoritism toward the LDS Church.

"I wouldn't like it if they called us an all-Democratic or Republican, male or female or all Catholic court," Russon said. "In my personal philosophy, it makes absolutely no difference. We are not dealing in religion, we are dealing in the law, and the law can come down and bite the church just as easily as anyone else."

But the common life experiences shared by members of this court cannot be denied.

Howe, Wilkins, and Russon were born and reared in Utah. The same three attended the University of Utah College of Law. All of the justices are married with children -- or grandchildren. Russon and Wilkins have served in the military, as did Durrant's father.

All five justices were raised in the LDS Church. Russon and Durrant served LDS missions; Wilkins won't say. Durham once considered a career as a theologian. "But then I couldn't figure out what the world was going to do with a female Mormon theologian," she said, "so that turned out not to have staying power as an ambition."

Zimmerman, who was Episcopalian when he served on the court, said religion alone does not define a justice's reasoning.

"Although I do think people held views as a result of their cultural conditioning, would I say that there were cases where Mormons and non-Mormons decided things another way because of that factor? I would say no," Zimmerman said. Being "Mormon is a factor, but it's certainly not the only factor."

Like his fellow justices, Wilkins eschews the all-Mormon characterization. "People who think the court is homogenous don't know the members of the court very well," he said.

A former Army intelligence officer, Wilkins, 53, worked as a Salt Lake City disc jockey at KNAK before deciding on a legal career. He has had a longtime interest in teaching and is not sure the high court is the final stop of his career. Energetic and decisive, he has almost completed a Ph.D. in political science.

Durham, 56, is often referred to as the first woman to sit on the high court. But she also brings a rich and varied background that includes high school in France, college at Wellesley College in Massachusetts, law school at Duke University in North Carolina, and personal determination: She juggled law school while raising two small children.

Durrant, a soft-spoken man partial to suspenders, earned his law degree at Harvard. His scholarly, measured manner seems far ahead of his 44 years. He grew up in Arkansas and Kentucky as the son of an Army enlisted man. He served an LDS mission in Japan and was valedictorian of his undergraduate

class at Brigham Young University.

Howe, born in South Cottonwood and raised during the Depression, distinctly remembers his parents making sure he remembered to respect others and be polite. Although he drifted toward horticulture as a youth who loved being out in the summer sunshine, he took an interest in law after a class at Granite High School.

Russon, 68, jokes that he became a lawyer after his aunts kept feeling the "knowledge bumps" in his head and told him he should go into the law. Raised in Salt Lake City, Russon joined the Navy during the Korean War and served on the USS Cassin Young for two years. He later completed an LDS mission in England.

Chief Justice: Utah's chief justice fills two roles, leading both the high court and the state's judicial system as the head of the policy-setting Judicial Council. The council, which includes judges from appellate, trial, juvenile and justice courts, approves new programs and sets the judicial branch's annual budget and legislative priorities.

During his tenure as chief justice, Howe has stayed firmly in the background, preferring to let his staff and the council take the lead on research and recommendations.

"I haven't personally gone to the judiciary very much," Howe said. "And I wouldn't ever want the Legislature to feel that I was up there lobbying."

Since becoming chief justice in 1998, Howe has raised the pay of court personnel and overseen the development of online filings, drug courts and victim-offender mediation.

He remains concerned about the high cost of legal services, which he feels threatens to make the courts a place for only the wealthy to resolve their disputes.

Howe will step down as chief justice on April 1. His successor will be chosen by secret ballot in late January or early February.

Both Durham and Wilkins say they view the role of the chief justice as evolving, dictated by a personal style and the challenges facing the judiciary.

"I don't think it's an easy choice," Wilkins said. "It has significant consequences for judges and the state."

They agree the next chief justice will face growing case loads, a shrinking budget and a more critical public perception of the justice system.

"There is a lot of pressure on the courts to explain their own legitimacy; it's not taken for granted anymore," Durham said. Wilkins agrees. "Courts don't explain themselves very well," he said. "Most people don't understand what we do, and television and movies are not accurate explanations of what we do."

Caption:
MATTERS OF OPINION The Utah Supreme Court, clockwise from left: Chief Justice Richard C. Howe, Justices Michael J. Wilkins, Matthew B. Durrant, Christine M. Durham and Associate Chief Justice Leonard H. Russon. The bench will change when Howe steps down next year.; Jump Page A15:

Utah Chief Justice Richard C. Howe, who is stepping down early next year, emphasizes "a love for people."

Francisco Kjolseth/The Salt Lake Tribune

Jump Page A14: Graphic: Utah Supreme Court Rulings; Current Court and Previous Court (illustration, chart)

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