



Constitutional Opinions

An Issue of Supreme Importance for 2016

Conservatives need pay attention now: the Supreme Court's future will be on the ballot too.

By Allen Mendenhall – 4.15.15

The time has come for politicians to announce their candidacy for president. In the following weeks we can expect more names to be tossed into the hat of presidential hopefuls. Already Senator Ted Cruz and Senator Rand Paul have proclaimed their desire to lead our country. Hillary Clinton made her candidacy official Sunday, and Senator Marco Rubio announced on Monday night.

The 2016 election is shaping up to be the most pivotal in decades, including for reasons not everyone is talking about.

It's true that Republicans will challenge Obama's legacy and that everything from Obamacare to payday loans will receive renewed and energetic scrutiny on the campaign trail.

Yet these won't be the most pressing domestic issues facing the next president. Even more important will be is the president's judicial philosophy. That's because the probability is high that the nation's next chief executive administration will nominate at least three candidates to the U.S. Supreme Court.

Although confidence in the Court is at an all-time low, voters do not seem particularly concerned about the Court's future composition. Perhaps the typical voter does not understand the role the president plays in nominating justices. Perhaps the goings-on of the judicial branch seem distant and aloof and out of the purview of our everyday worries. Perhaps most people are too short-sighted to consider the long-term and far-reaching effects that a president can have on the legal system. Whatever the reason, voters should re-prioritize. Conservatives should move this issue to the forefront of the debates.

When the president is inaugurated in January 2017, Justice Ruth Bader Ginsburg, widely thought to be in poor health, will be two months shy of her 84th birthday; Justice Antonin Scalia and Justice Anthony Kennedy will be 80; and Justice Stephen Breyer will be 78. Is it reasonable to expect these justices to serve out four more years under another administration?

Justice Ginsburg and Justice Breyer are considered members of the left wing of the Court whereas Justice Scalia is considered to be on the right. Justice Kennedy is famously known as the Court's "swing vote."

If a Republican wins in 2016 election, he could replace two liberal members of the Court, leaving just two other remaining: Justice Sonia Sotomayor and Justice Elena Kagan. If Justice Kennedy were also to step down during the next administration, a Republican president could further expand the conservative wing of the Court to seven, making room for a vast majority in contentious cases. If the right wing of the Court enjoyed a 7-2 majority today, for instance, there would be less media speculation about how the Court would decide cases on same-sex marriage, religious freedom, immigration, or campaign finance.

The Senate Judiciary Committee, which conducts hearings on presidential nominees to the High Court, currently consists of 11 Republicans and 9 Democrats. Republicans hold a 54-member majority in the Senate, the governing body that confirms presidential nominees to the Court. If these numbers remain unchanged or only slightly changed under a Republican president, that president would have wide latitude to nominate candidates who have tested and principled commitments to conservatism.

Let's say the presidential election favored a Democrat. A Democratic president could simply replace the departing Justice Ginsburg or Justice Breyer with a jurist in their mold, in effect filling a liberal seat with another liberal. If a Democratic president were up against a Republican Senate, however, his or her nominees would have to appear less liberal than Justice Ginsburg to ensure their confirmation.

Replacing Justice Scalia, arguably the most conservative justice on the Court, with a liberal would be transformative. Although depicted as an unpredictable moderate, Justice Kennedy was nominated by a Republican and more often than not votes with the right wing of the Court. Replacing him with a liberal justice would be a victory for the left. It is possible for the left wing of the Court to gain a 6-3 majority if a Democrat succeeds President Obama.

It's not inconceivable that in the time he last left, President Obama could name at least one successor to the Court. Barring some unforeseen illness or act of God, however, that is unlikely to happen this late in his presidency. Justice Ginsburg insists on remaining on the Court, and Justice Breyer still has some healthy, productive years ahead of him.

Judges' and justices' judicial philosophies are not easily pressed into two sides—conservative or liberal, Republican or Democrat—because law itself usually is not reducible to raw politics or naked partisanship, and a judge's job entails more than interpreting the language of legislative enactments. Law deals with the complex interactions of people and institutions under disputed circumstances that are portrayed and recounted from different perspectives; therefore, law rarely fits cleanly within simplistic political frameworks.

For this reason, among others, it can be difficult to predict how potential justices will rule from the bench if they are installed on the Court. Chief Justice Earl Warren ushered in the progressive "Warren Court Era" even though he had served as the Republican Governor of California and, in 1948, as the vice-presidential running mate of presidential candidate Thomas E. Dewey. More recently President George H.W. Bush nominated Justice David Souter to the Court. Justice Souter tended to vote consistently with the liberal members of the Court.

The Senate confirmation process has grown more contentious in recent years, and that has made it more difficult for another Souter to slip by the president. But it has also watered down our nominees, whose lack of a paper trail is considered a benefit rather than evidence of a lack of conviction or philosophical knowledge (lawyers are trained, not educated). It has come to a point where if you're confirmable, you're not reliable, and if you're reliable, you're not confirmable. Chief Justice John Roberts' acrobatic attempt to uphold the individual mandate in Obamacare on the ground that it was a "tax" reveals just how squishy and unpredictable our justices have become.

There is, of course, the trouble with categorizing: What does it mean to be a "conservative" or a "liberal" judge or justice? Our presidential candidates may have different answers. In January Senator Paul declared himself a "judicial activist," a label that is gaining favor among libertarians. He appears to have backed away from that position, recently bemoaning "out-of-control, unelected federal judges." Activist judges, at any rate, can be on the right or the left.

Ted Cruz has not advertised his judicial philosophy yet, but by doing so he could set himself apart because of his vast legal experience, including his service as the Solicitor General of Texas. Two potential Republican candidates, Marco Rubio and Lindsey Graham, are also attorneys, but Rubio's legal experience, or non-experience, is subject to question, and Graham has been out of the legal field for some time—although he serves on the Senate Judiciary Committee and has intimate knowledge of the Senate confirmation prospects for potential nominees.

It matters a great deal what our presidential candidates believe about the hermeneutics and jurisprudence embraced by potential Supreme Court justices. In the coming months voters will have the power to force candidates to address their judicial philosophy. The candidates must articulate clearly, thoroughly, and honestly what qualities they admire

in judges because those qualities might just shape the nation's political landscape for decades to come.

Conservatives have much to lose or gain this election in terms of the judiciary. Supreme Court nominations should be a top priority for Republicans when debate season arrives.

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