

# leftpage

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## The Real Question in the November Election: What Happens to the Supreme Court?

Senator John McCain assured a group in York, Pa., reports Jason Linkins of *The Huffington Post*, that there were going to be “two to three vacancies on the Supreme Court soon, according to people who decide these things,” though who those “people” are was not made clear.

Linkins suggests McCain has close contact with the Grim Reaper himself! And though McCain’s claim borders on the comical, it does, however, lead to a matter demanding—and getting—considerable, serious attention.

What might happen to the Supreme Court in the next several years if any of the judges were to retire, or worse, die? Several of the Supreme Court justices are 70 or older: John Paul Stevens (88), Ruth Bader Ginsburg (75), Antonin Gregory Scalia (72), Anthony McLeod Kennedy (72), and Stephen Breyer (70). David Hackett Souter is 69, shy only a year of the 70 mark.

Supreme Court justices are nominated by the president, confirmed by the senate, and serve during good behavior. Their terms end with resignation, retirement, conviction on impeachment, or death.

It seems likely that a conservative president would nominate a conservative judge and a liberal president would nominate a liberal judge. Of the nine Supreme Court justices, only two have been nominated by a Democrat, namely Justices Ginsberg and Breyer, both nominated by President Clinton. As one might expect, they are both considered part of the liberal wing of the court.

The seven others were nominated by Republican presidents and most make up the conservative wing of the court, save for Souter, who was nominated by President George H. W. Bush but is considered a swing-voter, and Stevens, who, though he calls himself a judicial conservative, is widely thought of as part of the court’s liberal faction.

But herein lies the problem, from both

a liberal and a conservative perspective: With so many justices nearing the age where retirement is likely and imminent, the idea that the Supreme Court can swing to either the right or the left via presidential nomination becomes believable—and worrisome. It is already bottom-heavy with conservatives.

The Supreme Court is the highest judicial authority in the United States. It is one of three branches of U.S. federal government, the other two being legislative and executive. The three branches of government are intended to work via a system of checks and balances that insures against government tyranny and that supports the rights of individuals.

What this means is the Supreme Court is not supposed to be political. Its role is judicial, using the Constitution and constitutional precedent as its guide. It deals with matters pertaining to the federal government, state disputes, and can determine if legislation or executive action at any level of the government is unconstitutional.

Many have decried decisions of the Supreme Court as being partisan, claiming Supreme Court justices, in some cases, have overstepped their authority as judges by attempting to rewrite or interpret the law according to political bias. Liberal-minded judges are slammed as judicial activists, and so are conservative judges. Judicial restraint and non-partisan voting is painted with glowing colors and praise.

Indeed, it is the court’s obligation to insure laws and mandates are made in accordance with the Constitution. But reading that document and interpreting it within today’s context or within a specific situation isn’t necessarily a straightforward task. Nor is suppressing one’s biases to the point where they carry no credence.

Similar concerns of reading and understanding the Constitution hold true about our holy scriptures: Do we take them

literally? Or do we allow them to evolve as living documents?

“An eye for an eye” (Ex. 21:23, 24) exhorts the Old Testament. Known as the law of retribution or the law of equivalency in the early Israelite legal system, it has evolved to mean punishment should befit the crime. Writes scholar Ángel Manuel Rodríguez for the Biblical Research Institute, “Apart from this, the formulation ‘an eye for an eye, a tooth for a tooth,’ etc., seems to have been a technical phrase used to express the idea of equivalency, leaving the court to determine the nature and extent of the equivalence.”

Cass R. Sunstein, professor of law at Harvard Law School, undertook a study to determine just how partisan our Supreme Court justices are. The questions he hoped to answer were who was partisan and who was neutral. By analyzing over 20,000 judicial decisions, Sunstein and his team looked for patterns of partisan bias by “studying whether and when judges vote to uphold decisions of federal agencies, in areas including environmental protection, labor, telecommunications, discrimination and occupational safety.”

They used a simple test: “If a decision was challenged by a public-interest group, like the Sierra Club or Environmental Defense, we counted it as conservative. If it was challenged by a corporation, like Exxon or General Motors, we counted it as liberal.”

Their findings? Justice Clarence Thomas, a conservative, is the most partisan in his voting habits; Justice Kennedy, the court’s swing-vote, the most neutral.

Sunstein also gives the award for judicial restraint to Justice Breyer, a liberal, and the award for judicial activism to Justice Scalia, a conservative.

Sunstein concluded, “Partisan voting is a serious problem in the federal judiciary.” And, furthermore, he warns, “Many decisions [of a new administration] will ultimately be challenged in federal court, and the Republican-appointed judges, who dominate the federal bench, could well prove to be a big obstacle.”

Whether this materializes is dependent upon the present panel of Supreme Court justices: whether they retire, with whom they are replaced, and by whom they are nominated.

One thing is likely to remain constant, and that’s partisan voting. ★