



cnsnews.comTM
THE RIGHT NEWS. RIGHT NOW.TM

Legal Experts: Trump Victory Signals More Conservative SCOTUS– If He Sticks to List

Barbara Hollingsworth

November 9, 2016

Donald Trump's victory over Hillary Clinton on Tuesday will likely alter the ideological makeup of the Supreme Court of the United States (SCOTUS) for at least the next two years and possibly the next few decades - if Trump sticks to a list of possible conservative nominees he unveiled during his presidential campaign.

“We can only hope that he continues listening to the same legal advisers that put together his nominee list,” said Ilya Shapiro, a fellow in constitutional studies at the CATO Institute, adding that whether Trump will actually do so is the “\$64,000 question”.

So far, “it’s unclear” what a President Trump will do, he added.

“He could listen to the people who put together the list, or he could play “Let’s Make a Deal’ with Democrats, compromising on Supreme Court nominees as leverage in return for support on immigration or some other priority,” Shapiro told CNSNews.com.

But Georgetown Law Center Professor Nicholas Rosenkranz told CNSNews that he believes Trump will follow through on his pledge to appoint a constitutional originalist to fill the seat left vacant by the death of Justice Antonin Scalia earlier this year.

“I don’t think he’ll want to upset the people who voted for him by departing from the list,” agreed University of Virginia Law Professor Saikrishna Prakash. “But even with right-of-center judges, the real question is how they will act 5, 10, 20 years from now.”

Supreme Court justices, who are appointed for life, do not always follow the agenda of the president who appointed them, and can in some instances act as a “potential check on a president that has gone too far,” as the court’s “quite unusual” 9-0 ruling against President Obama for his illegal Senate recess appointments made clear, he pointed out.

“Justices don’t want to appear to be in the pocket of the president who appointed them,” Prakash told CNSNews.

“If he keeps his word to pick someone from the list of two dozen names, he will restore the Supreme Court to the status quo before Justice Scalia’s passing,” John Yoo, a law professor at the University of California Berkeley, told CNSNews.

“But in the short-term, that does not mean that it will change the court’s mistaken views on affirmative action, abortion, gay marriage and a lot of other important social issues,” Yoo warned.

“Long term, he won’t be able to change the court’s hostility to constitutional texts and structure until Justices Kennedy, Ginsburg or Breyer retire. All three will be over 80 during Trump’s first term, so he may have four vacancies overall by his second term, which would be unprecedented,” he noted.

During the campaign, Trump pledged that if he were to be elected president, he would appoint “someone closest to [the late Justice Antonin] Scalia I can find” to fill Scalia’s still vacant seat.

“It will be a conservative person, a person with great intellect,” Trump said earlier this year on *Fox & Friends*. “And I would really use that as the model. As close to Scalia. I thought Scalia was terrific.

“He was a justice who did not believe in legislating from the bench and he is a person whom I held in the highest regard and will always greatly respect his intelligence and conviction to uphold the Constitution of our country,” Trump said.

Trump’s election “does look like an important victory for the conservative view” and will likely result in a shift back from a “moderately conservative to a conservative court,” UCLA Law Professor Eugene Volokh told CNSNews.

“And if Justice Ginsburg steps down, the court will be even more conservative,” he added. “We’re likely to see that for at least the next couple of decades.”

Due to the advanced ages of three sitting justices (Ruth Bader Ginsburg is 83, Anthony Kennedy is 80, and Stephen Breyer is 78) President-elect Trump may have the opportunity to nominate more than one conservative justice to the high court, which is currently split 4-4 between liberal-leaning and conservative-leaning justices.

If that happens, “the conservative position will endure for another 20 years,” Volokh predicted.

However, Prakash pointed out that there’s no guarantee that Ginsburg, Kennedy or Breyer will retire during the next two years, adding that Trump could lose his chance to move the court significantly to the right if the Senate flips Democratic in the 2018 mid-term election.

Trump has two years of relative freedom to reshape the court “Trump has two years of relative freedom to reshape the court,” Prakash told CNSNews. “He could possibly have a tremendous influence, but we will have to wait and see.”

Without waiting for more vacancies on the high court, the president-elect can have a more immediate effect on the federal judiciary with his lower court nominations and halt President

Obama's attempt to "stack the lower courts" – which hear 99 percent of all federal cases – with liberal judges, Yoo said.

"Republicans under George W. Bush built a deep bench of young conservatives. Trump can appoint them to the lower federal courts and make a very big impact right away," he said.

In light of Trump's unexpected victory, Senate Republicans' refusal to even consider President Obama's nomination of D.C. Court of Appeals Chief Judge Merrick Garland for Scalia's seat because it was an election year proved to be a winning strategy, other legal experts said.

Carrie Severino, chief counsel of the Judicial Crisis Network, thanked Senate Majority Leader Mitch McConnell (R-KY) and Judiciary Committee Chairman Chuck Grassley (R-IA), who was re-elected on Tuesday, for "giving the American people a voice in filling the vacancy by Justice Scalia's death."

"Not only that, but it didn't hurt vulnerable senators running for reelection," Shapiro wrote.

However, he warned that "Senate Democrats will now play similar hardball, which will likely cause McConnell to get rid of the filibuster for Supreme Court justices just as [former Senate Majority Leader] Harry Reid (D-NV) did for lower-court nominees when Democrats controlled the Senate."

Getting rid of the filibuster "works both ways," Prakash told CNSNews. "When the Democrats were in charge, they did it for lower court nominations. And if the Republicans think that the next Democratic majority leader will do it for Supreme Court nominations anyway, they may as well be first."

"There's no obvious answer" to the question of whether eliminating the filibuster is good for the country, he pointed out.

"If you think that it's better that Supreme Court justices reflect the majority preference – whatever it is – then you will be opposed to getting rid of the supermajority filibuster rule," Prakash said.

But Yoo says the filibuster will be used by Democrats to block conservative nominees. "The Democrats will try to filibuster any nominee in the mold of Justice Scalia or Justice Thomas," he pointed out.

"Republicans should eliminate the filibuster for Supreme Court nominees during President Trump's first term for the same number of years Democrats eliminated it to fill lower court appointments," he added. "If Hillary Clinton had won, they would already be discussing it. Republicans should give them their own medicine."

Nearly a quarter of Americans viewed Supreme Court appointments as the most important issue in this year's presidential election.

"In national exit polls, 21% call SCOTUS appointments most important factor in their vote; they favor Trump 57-40%," ABC News tweeted.

In May, Trump – who called Scalia “one of our great justices” - released a list of 11 potential Supreme Court nominees after consulting with the Federalist Society.

Trump said at the time that the list “is representative of the kind of constitutional principles I value” and is “first and foremost, based on constitutional principles, with input from highly respected conservatives and Republican Party leadership.”

In September, Trump added ten more names to his list, which was widely praised by conservatives: