

How the Presidential Election Will Impact the Supreme Court

The winner in November may name one or more new justices. Shouldn't the voters get to hear more about it?

Damon W. Root | October 24, 2012

President Barack Obama and his Republican opponent Mitt Romney sparred over matters large and small in this month's three presidential debates, yet when it came to one of the most pressing issues in American politics, the two candidates were strangely quiet. There was not a single discussion about the president's central role in appointing new justices to the U.S. Supreme Court.

That silence makes even less sense when you consider the demographic forces at work. Of the Court's nine sitting members, four are now in their 70s, including 79-year-old Justice Ruth Bader Ginsburg, who recently underwent treatment for pancreatic cancer, a notoriously deadly affliction. America's next president may well have the opportunity to name one or more new justices to the High Court. Shouldn't the voters get to hear something about it?

Let's say Obama is reelected and Justice Antonin Scalia, now 76, ends up retiring for health reasons at some point during Obama's second term. As things currently stand, there are four votes on the Supreme Court to strike down the 2010 decision in *Citizens United v. Federal Election Commission*, which Scalia joined, and where the Court voided multiple restrictions on political speech by corporations and unions. In fact, just last term, Justice Ginsburg and Justice Stephen Breyer publicly urged their colleagues to accept a campaign finance case from Montana where the state's Supreme Court [rejected](#) *Citizens United* entirely. Agreeing to hear the Montana case, Ginsburg wrote in a statement joined by Breyer, "will give the Court the opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway." Instead, a majority of the justices voted to summarily reverse the Montana ruling. If an Obama nominee replaces Scalia, however, the next challenge to *Citizens United* will face a far more receptive audience.

Crossing over to the other side of the aisle, let's say Romney wins and Ginsburg subsequently steps down. As the liberal University of California law professor Adam Winkler recently [observed](#), "a conservative replacement for Ginsburg would give the Scalia bloc on the Court a solid five votes, even without Kennedy."

The abortion-affirming 1973 decision in *Roe v. Wade* is perhaps the most prominent ruling under threat in that scenario, though a Romney replacement for Ginsburg would also be likely to move the Court in a more government-friendly direction on issues relating to executive power and the war on terror.

And speaking of 76-year-old Justice Anthony Kennedy, libertarians in particular should give thought to his eventual retirement. Although he's no card-carrying member of the limited-government movement—as evinced by his votes [in favor](#) of broad eminent domain powers and [against](#) letting states set their own medical marijuana policies—Kennedy is nonetheless the one justice currently on the bench who at least occasionally favors the basic libertarian mix of social and economic freedom.

Indeed, sometimes Kennedy even employs explicitly libertarian arguments. In his 2003 majority opinion in *Lawrence v. Texas*, for example, which struck down that state's sodomy ban, Kennedy repeatedly cited the powerful [friend of the court brief](#) filed by the libertarian Cato Institute, which explained why the Texas law was an unconstitutional exercise of state power.

Similarly, when the Supreme Court heard oral argument last March over the constitutionality of the Patient Protection and Affordable Care Act's individual mandate, it was Kennedy whose statements most closely tracked the libertarian legal movement's [opposition](#) to the law's unprecedented reach. "Here the government is saying that the Federal Government has a duty to tell the individual citizen that it must act," Kennedy told Solicitor General Donald Verrilli, "and that changes the relationship of the Federal Government to the individual in a very fundamental way."

It's not easy to imagine either Obama or Romney selecting a Supreme Court nominee who will follow in Kennedy's unique footsteps.

So the stakes are high when it comes to the future of the Supreme Court. Too bad the voters didn't hear anything about it during 270 minutes of televised candidate chatter.

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