

# THE HUFFINGTON POST

## Conservative Legal Scholars Prefer A Liberal Supreme Court To A President Trump

*“The court is important, to be sure — but not nearly that important.”*

Michelle Fields

August 12, 2016

Some Republicans have argued that conservatives skeptical of Donald Trump should vote for him anyway, if only to prevent Hillary Clinton from nominating liberals to the Supreme Court. But the right’s leading legal scholars reject that idea: the risks of a President Trump would outweigh his influence on the high court.

“The only glimmer of hope in the Trump fiasco” is the list of 11 judges the candidate put forward as suitable Supreme Court nominees, said Richard Epstein, a Hoover Institution Fellow and professor at both New York University School of Law and the University of Chicago Law School. But that is based “on the questionable assumption that a man of his mercurial temperament and intellectual ignorance will keep to his word,” he said.

Even if a President Trump did honor that promise, “influence on the courts take time, and foreign affairs and domestic crises come up immediately,” Epstein said. And that’s not a risk the highly respected conservative legal scholar thinks is worth taking. “He is wholly unfit to deal with either of these two areas. In all other matters he is deficient,” Epstein added.

Trump’s campaign released the list of judges he would consider nominating to fill the vacancy created by the death of Justice Antonin Scalia in May. It was an attempt to appease conservative critics (though he later said he reserved the right to nominate someone not on the list). The list included six federal appeals court judges that then-President George W. Bush appointed and five state supreme court judges Republican governors selected. Conservatives in the media and in Congress roundly praised Trump’s list. Yet many right-leaning legal scholars tell The Huffington Post that, as important as the Supreme Court may be, it does not override all other issues when considering his candidacy.

“The Supreme Court—and judicial appointments more broadly—is probably the single best reason to vote for Trump,” said Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute. “But even then, there’s a lot of uncertainty. How hard would Trump push to get a nominee confirmed? What would he do if his first choice were rejected? Would he make a ‘fabulous deal’ to trade judicial appointments for other priorities?”

“Trump put out a genuinely excellent list of potential appointees, but how much can we trust that list?” Shapiro continued. “Even Ronald Reagan and George W. Bush, who were committed to appointing principled originalists and textualists, made mistakes; how would a president who knows nothing about the Constitution and thinks that judges ‘sign bills’ fare?”

These conservative legal luminaries distancing themselves from Trump has the potential to undermine one of the few remaining threads tying the candidate to the Republican establishment. For some senators, it may give an additional push to allow consideration of President Barack Obama’s nominee to the court, Merrick Garland, based on the belief that he would be better than any potential Clinton pick.

Trump, however, remains confident that skeptical Republicans will inevitably vote for him out of concern for the ideological makeup of the Supreme Court.

“Even if people don’t like me, they have to vote for me. They have no choice,” Trump said in July. “Even if you can’t stand Donald Trump, even if you think I’m the worst, you’re going to vote for me. You know why? Justices of the Supreme Court.”

Some conservatives, like radio host Hugh Hewitt, agree with Trump. Hewitt, who himself teaches constitutional law, argued in July that voting for Trump is a no-brainer because, “It’s the Supreme Court, stupid.” He suggested that if conservatives have “any doubts at all,” they should “take a course in con law.”

“If Hillary wins, the casebook you use to do so will simply be a history book, not a guide to how the Supreme Court should decide things based on precedent,” he wrote in his column for The Washington Examiner.

Prominent theology professor Wayne Grudem, of the Phoenix Seminary in Arizona, made a similar point. He wrote that a Clinton presidency would lead to an America that would, “no longer be ruled by the people and their elected representatives, but by unelected, unaccountable, activist judges who would dictate from the bench about whatever they were pleased to decree.”

But many of the country’s top right-leaning legal scholars — the people who understand the importance of the Supreme Court more than anyone — just don’t find that argument compelling.

“The court is important, to be sure — but not nearly that important,” said retired Temple University Law School Professor David Post, who now writes for the conservative website the Volokh Conspiracy. “With all due respect to my colleagues who might feel differently, this one strikes me as a no-brainer.” The next president might end up only filling a single seat on the court, Post said. “The idea that it makes sense to trade a single justice for all of Trump’s terrible baggage — his bullying, his ignorance, his appalling tendency to shoot his mouth off without thinking, and all the rest of it — strikes me as thoroughly preposterous,” he added.

Ilya Somin, who teaches law at George Mason University and also blogs for the [Volokh Conspiracy](#), argues that a Trump presidency might even be worse for the courts than a Clinton one.

“Trump has a terrible record on constitutional issues,” he said. “He seeks to gut freedom of speech and constitutional property rights, and undermine constitutional constraints on executive power even more than Bush and Obama have.”

“Moreover, over the long term, a Trump victory increases the likelihood that the GOP will become a big-government xenophobic party hostile to civil liberties and opposed to most constitutional constraints on government power — much like the far-right nationalist parties of Western Europe, whose platforms are very similar to his,” he continued. “Such a party is likely to do far more to undermine the Constitution than even a Hillary Clinton victory.”

Epstein believes that most of his fellow legal scholars aren’t buying the argument that conservatives must support Trump for fear of Clinton’s potential Supreme Court nominees.

“I am beginning to think that my views are now mainstream among serious defenders of any version of the conservative or classical liberal traditions,” Epstein said.