



At Sidebar

by Jason P. Steed

The Most Important Election Ever?

In the run-up to the 1968 election, Chief Justice Earl

Warren announced his intent to retire. Warren had become a target for Richard Nixon and the Republicans on the campaign trail, and his retirement was meant to deprive Nixon of that target while giving President Lyndon Johnson—who had already declared that he would not be seeking re-election—the chance to name Warren's replacement before leaving office.

But in the wake of Warren's announcement, Johnson nominated his friend, Associate Justice Abe Fortas, to be the new Chief Justice. Fortas had been on the Court for only three years, and his relationship with Johnson invited scrutiny. Soon ethical issues were uncovered, scandal ensued, and Fortas' confirmation was derailed.

Nixon won the election and took office in January 1969. Despite Johnson's failure to successfully replace him before leaving, Warren followed through with his retirement. And Fortas was forced to resign to avoid impeachment. So, in his first year in office, Nixon had two vacancies to fill on the U.S. Supreme Court.

Nixon named Warren Burger as the new Chief Justice. But Nixon's first two choices to fill Fortas' seat were stymied, in part for their ties to segregation, so Fortas' seat remained vacant for most of the 1969–1970 term. In 1970, following Burger's recommendation, Nixon filled the seat with Harry Blackmun. (Burger and Blackmun became known as the “Minnesota Twins.”)

Just a year later, and within a week of each other in September 1971, Justices Hugo Black and John Harlan both announced their retirements. Black was in his 80s, Harlan was in his 70s, and both were suffering from deteriorating health. In fact, just 10 days after his announcement, Black suffered a stroke and died. And Harlan passed away a couple months later.

This gave Nixon two more seats to fill. In October 1971, Nixon nominated Lewis Powell (who had declined the nomination to fill Fortas' seat in 1969) to replace Black, and William Rehnquist (who was serving in Nixon's Office of Legal Counsel) to replace Harlan. Democrats hotly contested Rehnquist's nomination, but both nominees were confirmed within a couple months.

And just like that, Nixon had remade the Supreme Court in his first term in office. The Court had been trending leftward since

President Franklin Roosevelt's time in office, and the Warren Court had had at least six reliable liberal votes since the 1950s—three of those being Warren, Fortas, and Black. But Nixon had replaced them with Burger, Blackmun, and Powell—three solid conservatives. And he replaced Harlan with Rehnquist, who quickly established himself—often through solo dissents—as by far the *most* conservative member of the new Court. (Nixon's own advisor had said that Rehnquist was “way to the right of [Pat] Buchanan.”)

The three liberals who still remained from the Warren Court—Justices William Brennan, William Douglas, and Thurgood Marshall—continued to exert a strong influence on the Burger Court. And Blackmun, who voted with Burger more than 87 percent of the time and with Brennan just 13 percent of the time in closely divided cases during his first five terms on the Court, eventually drifted leftward until he was siding with Brennan 70 percent of the time. But still, there's no doubting that Nixon's appointments put the Court on a rightward-moving track, with a new conservative majority. And eventually Rehnquist would become the new Chief Justice, moving the Court even further rightward.

In other words, looking back at the ideological trajectory of the Court through the 1970s, 1980s, and 1990s, it's easy to see the 1968 election as a key turning point—an election that had an immense impact. Since Nixon, no president has made four appointments to the Court. (President Ronald Reagan, who came close with three appointments, needed two terms to get that many.)

So, viewed through the lens of Supreme Court appointments, was 1968 the most important presidential election ever? Or at least in modern history? Possibly. There was also 1932, when Roosevelt was elected and went on to make *eight* appointments to the Court (in his second and third terms)—including Justices Black and Douglas, and renowned Justices Felix Frankfurter and Robert Jackson—putting the Court on its leftward swing before Nixon came along to turn it around. And there was 1980, when Reagan was elected and went on to appoint the first female justice (Sandra Day O'Connor) and to replace Burger with Rehnquist as the new Chief, leading to the appointment of Antonin Scalia—arguably one

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of the most influential conservative justices in history. These, too, are contenders for “Most Important Election,” where the Supreme Court is concerned.

But now that the 2014 midterm elections are over and we’re entering the early stages of the next presidential campaign season, it’s worth taking a look at what’s coming in 2016.

Assuming Justice Ruth Bader Ginsburg does not retire before President Barack Obama leaves office—and so far she’s given every indication that she won’t—she’ll be 83 years old in 2016, and 84 before the 2016–2017 term is over. Scalia will be 80 in 2016, and 81 before the term is over. Justice Anthony Kennedy will also be 80 in 2016, and 81 by the end of the term. And Justice Stephen Breyer will be 78 in 2016, and 79 just after the 2016–2017 term ends.

In other words, in the new president’s first term (2017–2020), four sitting justices will be in their 80s. And four appointments will become even more likely if the new president is reelected to a second term. In fact, in a second term even a fifth appointment could enter the realm of possibility: by 2023, Justice Clarence Thomas will be 75.

As everyone knows, the Court currently has four reliable conservatives: Chief Justice John Roberts (who clerked for Rehnquist) and Justices Scalia, Thomas, and Samuel Alito. The Court also has four reliable liberals: Justices Ginsburg, Breyer, Sonia Sotomayor, and Elena Kagan. And Kennedy, who is typically characterized as a “swing” vote, is better characterized as simply a less reliable conservative: in the last six terms (2008–2013), in 73 ideologically divided cases decided 5-4, Kennedy voted 48 times (or 66 percent of the time) with the conservatives.

This is important because Kennedy is one of the justices likely to be leaving the Court under the new president. Replacing Kennedy alone will shift the Court’s balance. A Democrat elected in 2016 could change the Court’s somewhat reliable 5-4 conservative majority into a solid 6-3 *liberal* majority, by replacing Kennedy and Scalia. On the other hand, a Republican elected in 2016 could change the somewhat reliable 5-4 conservative majority into a formidable 7-2 conservative majority, by replacing Kennedy, Ginsburg, and Breyer. And if—say, for health reasons—Thomas were to call it quits with a Democrat in office, then the liberals likewise could have a shot at that 7-2 majority.

Either way, whether a Democrat or a Republican is elected, 2016 has the potential to have a much bigger impact on the makeup and trajectory of the Court than 1968—or than any other election in modern history. Proclamations of “Most Important Election Ever” are often overplayed, but for 2016 the proclamation might just be true.

On the other hand ...

As Ginsburg is showing us, there’s no reason to believe retirements can be predicted. If a Democrat is elected in 2016, there’s always the possibility that, health permitting, Scalia will wait at least until 2020 to retire—and he might even hold out through a second term, till 2024 (when he’ll be 88). Similarly, if a Republican is elected, both Ginsburg and Breyer could do the same thing—they’ll be 91 and 86, respectively, in 2024. (The oldest justice in history was Oliver Wendell Holmes, Jr., who retired at 90.) Meanwhile, Justice Kennedy surely loves being on the winning side of 95 percent of the Court’s decisions, and the deciding vote in all its high-profile cases, so he might choose to hang in there for as long as mortally possible, no matter who gets elected.

In other words, looking through the lens of Supreme Court appointments, 2016 has the potential to be the Most Important Election Ever—but it also has the potential to be entirely inconsequential. The four justices who, based on their ages, could *all* retire in the 2017–2020 presidential term, also could *all* end up waiting until the 2021–2024 term. Or they could stagger their retirements over the next three or even *four* terms. (If Breyer were to try to break Holmes’ record as oldest justice ever, he wouldn’t retire for another 15 years, in 2029.) Simply put: the next president could get as many as four or five appointments to the Court—or as few as *none*.

And this raises recurring and unavoidable questions: Why should one elected president (like Nixon) get as many as four Supreme Court appointments in a single term, while another

elected president (like Jimmy Carter) doesn’t get any? Given the importance that we put on predictability in the law, why should we be left to speculate blindly about judicial retirements and the impact the next election might have on our highest court? Should the executive’s appointment power, and the judiciary’s turnover, be so arbitrary? And do we really want Supreme Court justices to base their retirement decisions—or even to be *tempted* to base their retirement decisions—on partisan politics?

Things could be different. For example, if we had staggered 18-year terms for our Supreme Court justices, there would be a new appointment every two years. Vacancies would be predictable. Every elected president would fill two seats on the Court, every term. Those two appointments could still shift the Court’s balance, and we would still have partisan battles over nominees. But the intensity of those battles would be diminished. The arbitrary lopsidedness of one election (e.g., 1968) having a *far* greater impact on the Court than another (e.g., 1976) would be reduced. And the possibility that a single election could remake the Court for the next 40 to 50 years would be eliminated.

Wouldn’t that be preferable to what we have now, where we cannot know whether the next election will bring *status quo* or a revolution?

At the moment, of course, we have the system that we have, and we can only speculate about the impact of 2016 on the Court’s trajectory. But as federal-law practitioners, and as voters, we could start to pressure presidential and congressional candidates to take judicial term limits seriously. We still have time to make this an election issue. And just think: if 2016 presented an opportunity to remake the system for Supreme Court appointments—instead of merely an opportunity to change the makeup of the current Court—then 2016 really would be the Most Important Election Ever. ☉

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