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OBAMA V MCCAIN: THE SHAPE OF THE COURT TO COME

BY

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In 1803 the fledgling country called the United States of America was stumbling to its feet. She had been attempting to assemble a government of three equal parts. The second attempt at writing a plan for government, called the Constitution, was still having the wrinkles smoothed out. It contained the specifications for an Executive branch headed by the President, a Legislative branch containing the United States Senate and the United States House of Representatives, and a Judicial branch containing the courts. It was this latter branch, the Judicial, that was having the greatest difficulty in realizing the exact nature of the power that had been assigned to it.

It is said that it was quite difficult to get members of the legal profession to even agree to sit on the court to hear cases. This all changed on that day in 1803 when Chief Justice John Marshall rendered the courts unanimous (4-0) opinion in the case of Marbury v Madison. Quite simply, this complicated case involving all three branches of government established the principle of Judicial Review which enabled the United States Supreme Court to determine the constitutionality of acts of the Executive and Legislative branches. In essence from that point forward the Constitution as a plan of governance means what the Supreme Court says it means.

This is a Presidential election year and as usual we seem to have gotten caught up in the myriad of 24-hour news channel-generated issues that seem to hatch over night. These feed our new skill of evaluating the political correctness of what a candidate says, what his preacher says and who his friends past, present

or future might be. However, perhaps the biggest issue afoot in this election year might certainly be the future of that nine judge panel called the Supreme Court - that same body whose function continues to be interpreting the meaning and applicability of the Constitution. As if we needed a reminder, the Supreme Court, in a five to four decision, recently held that it is permissible under the Constitution for foreigners being held at Guantanamo Bay in the special category of "enemy combatants" to petition to be tried in U. S. Courts. As such, it is assumed that these detainees would acquire many of the same powers of procedural due process as United States citizens. As one would expect, two sides quickly formed to defend or decry the respective positions on this holding by the Court. Given the current health and age status of several on the Supreme Court this Presidential election will be crucial to determine the makeup of the court for many decades to come.

The President appoints members of the Supreme Court who then must be confirmed by the Senate before they may serve. In the past, superior legal intelligence was the chief criterion for appointment to the court. In some ways it may be maintained that the age of acting upon hyper-partisanship began with the Ronald Reagan appointment and subsequent Senate rejection of Robert Bork to the Supreme Court. Many thought this rejection was for purely ideological reasons because Bork was widely recognized for his splendid legal mind. Now the Supreme Court is viewed as a partisan playing field almost as much as the much more visible Congress. In particular, the leadership of the active evangelical voting block, which is highly Republican in ideological terms, has anticipated for years an opportunity to gain a Supreme Court majority sympathetic to its wishes. Foremost of these desires is the overturning of the 1973 abortion case, Roe v Wade.

As the court now stands, seven of the nine justices were appointed by Republican Presidents. Four of the justices are considered decidedly conservative, meaning that they are strict constructionists who advocate a very narrow interpretation of the Constitution and one that is clearly based on precedent. These include Chief Justice John Roberts, Justice Clarence Thomas, Justice Antonin Scalia, and Justice Samuel Alito, Jr. Justices Ginsburg, Breyer, Stevens, and Souter tend to find themselves in opposition to this group as the more moderate or activist members. Anthony Kennedy is known as the "swing vote". As such, Kennedy is often the tie-breaker between the above two fairly entrenched sides. Heading into November the situation is this. Justice Stevens is 88 years old. Justice Ginsburg has experienced significant health problems in recent years. Six of the Justices are over 68 years of age.

The next President almost certainly will have two selections and quite possibly more later. The implications are clear. A McCain win and the conservatives would realize their dream of a solid, perhaps six to three majority on the court. A victory by Barack Obama and the ideological pendulum would in all likelihood swing back toward the judicial activist side. There will be a problem for McCain, however, in that the Democratic majority in the Senate will in all likelihood widen and thus block any overly conservative McCain appointment. Remember too that these appointees once confirmed may serve for life so any excesses may not be corrected for decades.

Thanks to Justice Marshal, the Constitution says what the court says it does and the likelihood of either McCain or Obama having two selections is huge.

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