

### III. OBAMA & THE COURTS

What is the most important issue in this election for many pro-family/pro-life conservatives? Consider these two numbers:

- **Five** — That's the number of Supreme Court justices who will be 70 years old or older on Inauguration Day 2009. That number includes 80% (four out of five) of the left-leaning members of the high court. Those four liberal justices are Justice John Paul Stevens (88), Justice Ruth Bader Ginsburg (75), Justice Anthony Kennedy (71) and Justice Stephen Breyer (70). Justice David Souter is 69.
- **Twenty-six** — That's the average tenure in years of Supreme Court justices since 1970. While presidents remain in office for four or eight years, Supreme Court appointees have the opportunity to shape our laws for a generation or more.

The federal judiciary is one of this election's most important issues. It's important because court watchers predict that the next president will appoint at least two, maybe more, justices to the Supreme Court.

It's also important because so many values issues today, from the sanctity of human life and definition of marriage to Second Amendment rights and religious freedom, are determined by the courts. And the two candidates for president, John McCain and Barack Obama, differ so strikingly on the kind of judges they would appoint. Senator McCain points to Justices Alito and Roberts as his model jurists.

- **AGAINST CONSERVATIVE JUDGES**

Barack Obama has been equally clear about the kind of judges he would appoint to the federal courts. At the Saddleback forum, Pastor Rick Warren posed the question this way: "Which existing Supreme Court justice would you *not* have nominated?" Here was Obama's response:

"I would not have nominated Clarence Thomas. I don't think that he was as strong enough jurist or legal thinker at the time for that elevation, setting aside the fact that I profoundly disagree with his interpretations of a lot of the Constitution. I would not nominate Justice Scalia, although I don't think there's any doubt about his intellectual brilliance, because he and I just disagree."<sup>1</sup>

Notice how Senator Obama cited Justices Thomas and Scalia as the kind of justices he "would not nominate." They just happen to be the two justices who have done the most to push back against the constant leftwing attack on faith in the public square, who voted to uphold the 2003 federal ban on partial-birth abortions and who opposed the sweeping decision in *Lawrence v.*

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<sup>1</sup> CNN Transcripts, Saddleback Presidential Candidates Forum, Aug. 16, 2008  
<http://transcripts.cnn.com/TRANSCRIPTS/0808/16/se.02.html>

*Texas*, which created a constitutional right to homosexual sodomy, the case which many legal scholars believe will serve as the foundation for a future liberal court to impose same-sex “marriage” on all 50 states.

Here is Barack Obama’s voting record on key judicial nominations by President Bush:

- ✘ Against the confirmation of Priscilla Owen<sup>2</sup>
- ✘ Against the confirmation of Janice Rogers Brown<sup>3</sup>
- ✘ Against the confirmation of William Pryor<sup>4</sup>
- ✘ Against the confirmation of Chief Justice John Roberts<sup>5</sup>
- ✘ And Obama not only voted against the confirmation of Justice Samuel Alito, but he was among the 25 liberal senators who tried to filibuster Alito’s nomination.<sup>6</sup>

- AN ADVOCATE OF JUDICIAL ACTIVISM

In recent weeks, we have seen just how important the courts are in America’s cultural war. On June 26, 2008, a narrowly-divided Supreme Court handed down a 5-to-4 decision overturning Washington, D.C.’s ban on handguns. The court found that the Second Amendment guarantees the right of individuals to own firearms. Obama said he agreed with that ruling, which is odd given that Justice Antonin Scalia, who wrote the majority opinion and Justice Clarence Thomas, who joined him in the majority, are the two men Obama said he would never appoint!

So, what kind of judges would a “President Obama” appoint? At a Planned Parenthood conference in January 2007, Obama said:

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom ... the empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”<sup>7</sup>

In other words, Obama wants judges who do not feel constrained by the plain language of the law or the text of the Constitution. He wants individuals on the bench who will act instead on their “empathy,” on their own sense of right and wrong, irrespective of what the law says. He wants judges who will legislate from the bench. In much the same way as a sculptor uses a hammer and chisel to carve out a statue, Obama wants liberal activists who will not hesitate to

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<sup>2</sup> Senate Roll Call No. 128, 109th Congress, 1st Session

<sup>3</sup> Senate Roll Call No. 131, 109th Congress, 1st Session

<sup>4</sup> Senate Roll Call No. 133, 109th Congress, 1st Session

<sup>5</sup> Senate Roll Call No. 245, 109th Congress, 1st Session

<sup>6</sup> Senate Roll Call No. 1, 109<sup>th</sup> Congress, 2<sup>nd</sup> Session

<sup>7</sup> *MSNBC*, “Obama on Judges, Supreme Court,” Jul. 17, 2007 <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx>

wield their gavels to remake America in their image, chipping away at our cherished values and traditions with each blow.

In May, Obama was interviewed by *CNN's* Wolf Blitzer. When the conversation turned to the likelihood of the next president replacing 88-year-old Justice John Paul Stevens, Blitzer asked Obama who his model justices were, and he responded, "Well, you know, I think actually Justice Breyer, Justice Ginsburg are very sensible judges." Justice Breyer and Justice Ginsburg – two of the Supreme Court's most liberal members – are Barack Obama's model for "empathy-based" justices.

Remember the Supreme Court's decision striking down the D.C. gun ban – a decision Obama said he supported? Well, Justices Ginsburg and Breyer voted to uphold the gun ban. It's hard to get the right decisions with the wrong justices!

Here's a good example of just how out-of-touch Obama is when it comes to judges. A recent poll asked voters how judges should make their decisions – based on the written text of the Constitution or based on their "empathy," guided by their own "sense of fairness and justice." According to pollster Scott Rasmussen, 60% of those surveyed said judges should rule based on the written text of the law, while only 30% said their rulings should be based on their own sense of "empathy."<sup>8</sup> The American people rightly and overwhelmingly reject the notion of judicial activism, but Barack Obama embraces it whole-heartedly.

- SURRENDERING OUR SECURITY TO THE COURTS

In another 5-to-4 decision in June 2008, the Supreme Court's *Boumediene* opinion ruled that government must grant terrorist suspects access to the U.S. civilian court system. Supported by Justices Breyer and Ginsburg, that egregious decision means that the United States must now give radical Islamic terrorists more rights than we gave Nazi spies in World War II.

Barack Obama cheered the ruling as another "rejection of the Bush administration," and he said it was "an important step toward reestablishing our credibility as a nation committed to the rule of law."<sup>9</sup> Does Obama really believe his own rhetoric? Does he really think that poorly of his own country – that America is not committed to the rule of law?

Justice Scalia, in his dissenting opinion, was closer to the truth when he wrote, "America is at war with radical Islamists. ...today's opinion ... will make the war harder on us. It will almost certainly cause more Americans to be killed."<sup>10</sup>

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<sup>8</sup> Rasmussen Reports, "Supreme Court Update," Sept. 5, 2008

[http://www.rasmussenreports.com/public\\_content/politics/mood\\_of\\_america/supreme\\_court\\_ratings/supreme\\_court\\_update](http://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_ratings/supreme_court_update)

<sup>9</sup> RealClearPolitics blog, "Obama on SCOTUS Decision," June 12, 2008

[http://time-blog.com/real\\_clear\\_politics/2008/06/obama\\_on\\_scotus\\_decision.html](http://time-blog.com/real_clear_politics/2008/06/obama_on_scotus_decision.html)

<sup>10</sup> *BOUMEDIENE v. BUSH*, Scalia, J. dissenting, <http://supremecourtus.gov/opinions/07pdf/06-1195.pdf>

- WHY YOUR VOTE MATTERS

The U.S. Supreme Court is not the only court that matters. While the next president may appoint one or two new justices to the Supreme Court, it is often overlooked that the next president will appoint hundreds of judges to fill vacancies that will arise in the lower federal courts over the next four years. While the Supreme Court gets most of the publicity, the lower federal courts also make rulings on everything from abortion and marriage to immigration and gun rights. Voters need to know what criteria the candidates will use to select these judges.

Sadly, it has become commonplace for judges wielding raw political power to redefine our most basic values. That is how the Left succeeds. Since it cannot achieve its goals through the democratic process via the elected legislatures it shrugs off the people and goes to the courts, where it relies on political activists cloaked in black who answer to no one.

The 2008 election will be critical for conservatives, who realize that a gap often exists between what most Americans believe and what the law recognizes. With so many cultural issues being fought out in the courts, values voters see the judiciary as an important front in the battle for their values. But we must never forget that it is the men and women we elect to public office, to the White House and to the Senate, who nominate and confirm the judges who sit on our courts.

Simply put: **Elections Have Consequences!** The most important way for men and women of faith to influence the courts is to vote for candidates who will nominate and confirm only conservative judges who respect the limits of their own power and who will strictly adhere to the text of the Constitution.

In a blog post last year on the leftwing *Huffington Post*, *CNN* legal analyst Jeffrey Toobin wrote the following:

“The next three likely departures on the Court all come from its embattled liberal wing. John Paul Stevens, David Souter, and Ruth Bader Ginsburg are all expected to leave the Court in the next few years. ...The Constitution allows presidents to shape the Court in their images. All presidents try, and most succeed. Informed voters will recognize that they’ll not only be choosing a president in 2008, but shaping the Supreme Court for decades to come.”<sup>11</sup>

So, for the pro-family, pro-life movement, our most important goal ought to be to elect a president who is as committed as we are to putting conservative judges on the Supreme Court.

Here’s a concrete example of how the right appointments can lead to the right results. The case overturning the D.C. gun ban was decided by one vote. All five of the justices voting in favor of an individual right to own a firearm were appointed by Republican presidents. But that ruling could have turned out very differently.

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<sup>11</sup> *The Huffington Post*, “First Monday, First Tuesday,” Oct. 1, 2007  
[http://www.huffingtonpost.com/jeffrey-toobin/first-monday-first-tuesd\\_b\\_66533.html](http://www.huffingtonpost.com/jeffrey-toobin/first-monday-first-tuesd_b_66533.html)

For example, Chief Justice John Roberts, nominated by President Bush, was confirmed in September 2005. Justice Samuel Alito, nominated by President Bush, was confirmed in January 2006, after having survived a filibuster supported by Barack Obama.

Had John Kerry won the presidency in 2004, he would have made the appointments in 2005 and 2006, and he would not have selected John Roberts and Samuel Alito! Had “President Kerry’s” appointments voted with the court’s other liberals, the 5-to-4 ruling affirming your Second Amendment rights could have been a 6-to-3 decision to ban handguns.

Do you really want “President Obama” making Supreme Court appointments? Remember that when you go into the voting booth in November.

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