



Written by [Steve Byas](#) on October 26, 2016

McCain Backtracks on Opposition to Any Clinton Supreme Court Pick

To no one's surprise, Senator John McCain (R-Ariz) quickly backtracked on a bold statement a few days ago, when he said, "I promise you that we will, we will be united against any Supreme Court nominee that Hillary Clinton — if she were president — would put up. This is why we need a majority."

McCain made his remarks to a Philadelphia radio station while campaigning for Senator Pat Toomey (R-Pa.), in support of Toomey's reelection bid.



But before pleasantly surprised constitutional conservatives could even raise their hand to pat McCain on the back, he quickly changed his tune, speaking through a spokesperson, Rachael Dean. She "clarified" McCain's earlier remarks by saying that McCain "believes you can only judge people by their record," pointing to Clinton's "clear record of supporting liberal judicial nominees."

With this in mind, she concluded, "Senator McCain will, of course, thoroughly examine the record of any Supreme Court nominee put before the Senate and vote for or against that individual based on their qualifications as he has done throughout his career."

Even the most dedicated constitutionalist would agree that were a President Hillary Clinton to nominate a clone of Antonin Scalia, it would be wise and acceptable to confirm such a person. However, considering Clinton's public statements, the chances of that happening are nil.

On the contrary, it is very clear that she intends to nominate judges who would implement her radical social agenda. "I do have a litmus test, I have a bunch of litmus tests, because the next president could get as many as three appointments," Clinton has said.

In the final debate with Donald Trump, she reemphasized her position that she will nominate only judges she is sure will agree with her political viewpoint. Moderator Brett Baier of Fox News asked one of the better questions in recent debate history, when he asked both Clinton and Trump, "Where do you want to see the court take the country? And secondly, what's your view of how the Constitution should be interpreted? Do the founders' words mean what they say or is it a living document to be applied flexibly according to changing circumstances?"

While she did not answer Baier's query directly, her response is nevertheless instructive. "You know, I think when we talk about the Supreme Court, it really raises the central question in this election, namely, what kind of country are we going to be? What kind of opportunities will we provide for our citizens? What kind of rights will Americans have?"

It should be noted that Clinton explicitly said that she intends for her Supreme Court picks to determine "what kind of country" we are going to have, and "What kind of rights will Americans have." Clinton's previous statements in which she has advocated for laws that are in conflict with the Second



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Amendment, indicates that she does not intend for Americans to enjoy the right to keep and bear arms. She has said that she considers gun laws in Australia as examples of the type of “common sense” gun laws she would like to see enacted in the United States. In Australia, entire classes of guns were confiscated!

Clinton continued in her response to Baier, “I feel strongly that the Supreme Court needs to stand on the side of the American people, not on the side of the powerful corporations and the wealthy.”

One would think the role of the judge is not to “side” with anyone, unless the Constitution and conforming statutes are on that person’s “side.” Here, it is clear that Clinton favors judicial bias. Judges in ancient Israel were explicitly forbidden to favor one “side” in a dispute, based on their wealth or lack thereof: “Ye shall not do unjustly in judgment: Thou shalt not favor the person of the poor, nor honor the person of the mighty, but thou shalt judge thy neighbor justly” (Leviticus 19:5). During his confirmation hearings, Supreme Court Chief Justice John Roberts got it right, echoing the Old Testament standard, when he said the little guy should win when the law favors him, and the big corporation should win when the law goes the other way.

Just what does Clinton mean by her support of a biased judiciary? “For me, that means that we need a Supreme Court that will stand up on behalf of women’s rights, on behalf of the rights of the LGBT community, that will stand up and say no to Citizens United.”

Clinton then becomes more specific, telling Baier that “at this point in our country’s history, it is important that we not reverse marriage equality, that we not reverse *Roe v. Wade*, that we stand up against Citizens United, we stand up for the rights of people in the workplace, that we stand up and basically say: The Supreme Court should represent all of us.”

Perhaps Clinton has forgotten that the federal government includes a House of *Representatives*, who are, along with the Senate, invested with the job of representing us. The job of the Supreme Court, on the other hand, is not to serve as some sort of super-legislature, substituting their judgment for the legislative branch, but to interpret and apply the Constitution and the laws passed “in pursuance thereof” to actual cases that arise in the federal court system.

Secondly, it is disingenuous for Clinton to say she is for a Supreme Court that represents “all of us,” when she has already said that it should take a “side” in cases that come before it. Clearly, she does not want the Court to represent unborn children, for she has already said she favors legalized abortion.

Finally, Clinton gave us a clear picture of how she sees the role of the Senate in the selection of judges to the federal courts. “I would hope that the Senate would do its job and confirm the nominee that President Obama has sent to them. That’s the way the Constitution fundamentally should operate.”

So the way the Constitution should “operate” is for the Senate to simply confirm the nominee sent to them by the president. If the Senate’s role is to simply confirm any person sent to them by the president, then why even allow the Senate to even have a vote at all?

Of course, Clinton (and Obama) had a different view when the president was a Republican and they were in the Senate. Both of them voted to filibuster the nomination of Judge Samuel Alito. This is proof that she actually believes there is a role for the Senate in the selection of federal judges, including those who sit on the Supreme Court — when it fits her bias.

Senator McCain’s remarks actually make perfect sense — both his original comments and his clarification. Hopefully, any senator who values the Constitution of the United States would vote against



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a Clinton nominee because she has made it clear that she intends to send them judges who will carry out her progressive agenda. On the other hand, were she to nominate a judge who actually takes the oath to uphold the Constitution seriously, McCain and the rest of the Senate should give them due consideration.

Senator Mike Lee (R-Utah) has argued that there is no real difference between Merrick Garland (whom Obama has nominated to the Supreme Court) and any judge Clinton would tap. “Not a single Democratic nominee to the U.S. Supreme Court since [Byron White in 1962, who was nominated by Democrat President John Kennedy] has voted independently.”

Even the liberal *Washington Post* editorialized against Clinton’s position. “As a potential president, Ms. Clinton should have more respect for the independence and dignity of the judiciary as a co-equal but non-political branch of government. Selecting judges is not just policymaking through other means — or, at least, it should not be.”

This brings us to the important question that the U.S. Senate will have to answer, should Hillary Clinton win the White House next month. Are they obligated to confirm just any nominee sent up Pennsylvania Avenue by the president? In Article II, Section 2 of the Constitution, the president is given the power to nominate “by, and with the advice and consent of the Senate ... judges of the Supreme Court.”

The refreshingly blunt statement by McCain, if widely adopted by other Republicans in the Senate, would constitute “advice” to the president, that advice being quite clear. If you, Hillary Rodham Clinton, send us a candidate for the Supreme Court who does not see as his or her role as to uphold the Constitution and the laws (made in pursuance thereof) of the United States, then we will not confirm that individual.

In fact, the Obama nomination of Judge Garland, and the Senate’s response, should serve as model for proper Senate behavior. If a President Clinton sends a person who is more of a community organizer than an impartial judge, then why even bother to waste the taxpayers’ money having hearings? She has told the Senate in her public statements that her intention is to nominate judges who will implement her radical political agenda. If she were to follow through with that promise, then it would be better for the Senate to allow the ninth position on the High Court to remain vacant.

The Constitution does not mandate a certain number of judges on the Supreme Court, although it has been nine, by statute, for the past 150 years. Clinton’s desire to have a compliant Supreme Court and a compliant Senate is not unprecedented, but the Senate should not give into her lust for power.

In 1937, the U.S. Senate, overwhelmingly Democratic-controlled, overwhelmingly rejected the effort by Democrat President Franklin Roosevelt to add six more members to the Supreme Court. Roosevelt was hopeful that his “court-packing” plan would lead to a more compliant Supreme Court, which had rejected some of his programs, such as the case when they had declared, 9-0, that the National Recovery Act was unconstitutional in the famous *Schechter v. United States* “sick chicken” case.

But that Senate, with a strong Democrat majority, told FDR no. Hopefully, a Republican-majority Senate would do the same thing, were a President Clinton to send them a nominee who shared her disrespect for the Constitution.



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