At the end of the second year of President Obama's second term, will Justice Ruth Bader Ginsburg decide to retire? Or, at the end of the second year of President Romney's first term, will Justice Antonin Scalia choose to call it a day?

Although the ages of those two justices — 79 and 76, respectively — and the looming presidential election have fueled speculation about possible retirements in the near future, most court watchers would be reluctant to put real money on either scenario. Both appear to be going strong — and remember, John Paul Stevens left the bench at age 90.

However, legal empiricists, political scientists and demographers would not so readily dismiss the likelihood of the septuagenarians — Ginsburg, Scalia, Anthony Kennedy and Stephen Breyer — and even Clarence Thomas, 64, leaving the U.S. Supreme Court in the next few years depending on who is the next president.

"It turns out they do care about politics," said legal empiricist James Lindgren of Northwestern University School of Law, co-author of a 2010 study, "Retirement and Death in Office of U.S. Supreme Court Justices."

Scalia confirmed Lindgren's comment, as least for himself, during an interview last summer on Fox News Sunday. He was asked if the politics of the sitting president would affect the timing of his retirement and he answered, "I would not like to be replaced by someone who immediately sets about undoing everything that I've tried to do for 25 years, 26 years, sure. I mean, I shouldn't have to tell you that. Unless you think I'm a fool."

Lindgren became interested in whether justices retire strategically when he worked on an article with Northwestern colleague Steven Calabresi about term limits for justices. He recruited University of Chicago demographer Ross Stolzenberg to see if they could find a way to reconsider what both men described as "inconsistent findings" during more than 70 years of "rancorous debate" in historical, legal and political research on the so-called " politicized departure hypothesis."

That theory suggests that Supreme Court justices tend to alter the timing of their retirements — and indirectly the probabilities of death in office — for the benefit of the political parties of the presidents who appointed them. The data model developed by Lindgren and Stolzenberg examined every justice's departure from office from 1789 through 2006.

**What the Experts Think**

Their study found that, on average, justices' retirement decisions are linked to age, health, tenure and pension benefits, just like most people's decisions. But unlike for most people, political climate also has an effect on the justices' retirement and death in office. Boiled down, they concluded: If the incumbent president is of the same party as the president who nominated the justice, and that
president is in the first two years of a four-year term, then the justice's odds of retirement are 2.6 times higher than when those two conditions are not present.

And when the incumbent president is of a different party than the president who appointed the justice, then the justice's death-in-office odds are about tripled, compared with when the appointing president and incumbent president are of the same party. "They were more likely to die in the last two years of that [opposing party] president's term, so they were hanging on hoping for turnover, sort of like, 'If you want this robe, you'll have to pry it from my cold, dead hands,' " Lindgren said.

HIGH STAKES

Although the Supreme Court has failed once again to become a political issue in a presidential campaign — meriting only one mention in a debate this fall and only between the vice presidential candidates — special interest groups have zeroed in on the implications of potential retirements and the election's outcome.

In an interview in the fall 2012 issue of The Objective Standard, Curt Levey, president of the conservative Committee for Justice, said there is a "strong likelihood" that Scalia or Kennedy will retire when they reach 80 and after Ginsburg leaves. "There are already four predictable, consistent liberals on the court," he said. "All Obama needs to do is replace Kennedy or Scalia, and he's got the votes to do pretty much whatever he wants, from making gay marriage a constitutional right to requiring taxpayer funding of abortion, et cetera."

And all Romney needs to do is to replace Ginsburg or another justice on the left, and the court's conservatives no longer need Kennedy to accomplish their goals, according to liberal and progressive groups, such as the Center for American Progress.

The Center, which recently released a report called "An Obama Supreme Court Versus a Romney High Court," warned that, if Romney wins, precedents such as the recent health care decision, the overruling of criminal laws against same-sex sexual conduct (Lawrence v. Texas) and Roe v. Wade could fall.

On the other hand, a retirement on the right during an Obama second term could mean the overruling of such decisions as Citizens United v. FEC and Boy Scouts v. Dale (upholding discrimination against gay scout leaders) as well as 5-4 rulings upholding forced arbitration and higher burdens on workers in job bias cases, suggests the report.

If Romney prevails, the report states, the court "would likely be controlled by Republican-nominated conservative judges for a generation or more," given the relative youthfulness of Chief Justice John Roberts Jr., 57, Justice Samuel Alito Jr., 62, and Thomas.

Ginsburg has said previously she would like to match the tenure of Justice Louis Brandeis, who also was appointed at age 60 and who retired at age 82 in 1939 after nearly 23 years on the bench. That plan would have her retirement in the third year of an Obama second term. But in recent interviews, including with The National Law Journal, she has indicated she might serve longer. Her work, she said, has kept her going, particularly since the death of her husband in 2010.

Age also has not slowed her down. She appears to enjoy her opinion assignment power as the senior associate justice when in dissent. And she has kept a busy travel schedule during the times when the court is not sitting.

Justices not only are affected by the political climate in their retirement decisions, but they should consider it, according to some court scholars.
Ginsburg was "reckless" not to retire earlier in an Obama term, because of the risk that Obama will not be re-elected and she will have to leave under a Republican president, said Artemus Ward, author of the 2003 book *Deciding to Leave: The Politics of Retirement from the United States Supreme Court*.

"If Obama is not re-elected, Ginsburg will have made a huge mistake," he added.

However, historian David Garrow of the University of Pittsburgh said, "Until the last four weeks, the thought that Obama might lose probably did not cross her mind. She can't be faulted for that."

None of the sitting justices is "within shouting distance of David Souter" in terms of desperately wanting to escape from the Supreme Court, Garrow said. It's even possible that Kennedy, Scalia and Thomas would stay on beyond the next four years, he said, adding, "Kennedy is going to stay forever."

The "biggest issue" for Scalia and Kennedy would be health, and both are in very good health, said Adam Winkler of the University of California at Los Angeles School of Law. "It could be that the retirement of [Sandra Day] O'Connor has been a warning to the justices not to retire too early," he added. "She retired largely to take care of her husband and to avoid two vacancies at the same time [Chief Justice William Rehnquist was seriously ill at the time], and neither of those plans worked out well for her. For someone who is used to that kind of power, it must be very difficult to give up."

In the Rehnquist Court, by contrast, many of the justices were influenced by the Potter Stewart example, which stood for the proposition that if you retire from the Supreme Court, you die soon thereafter.

**DOWN THE ROAD**

Likely nominees in an Obama second term or a Romney first term already are being floated by various groups, court watchers and politicians.

On the Democratic side, frequent names include Governor Deval Patrick of Massachusetts, Illinois Attorney General Lisa Madigan, California Chief Justice Tani Cantil-Sakauye, former Michigan Governor Jennifer Granholm, Senator Amy Klobuchar of Minnesota and Judge Mary Murguia of the U.S. Court of Appeals for the Ninth Circuit.

On the Republican side, the group includes Paul Clement and Viet Dinh of Bancroft, Senator Mike Lee of Utah, Judge Diane Sykes of the Seventh Circuit, Judge Brett Kavanaugh of the D.C. Circuit and Judge Jeffrey Sutton of the Sixth Circuit.

After Roberts was castigated for his decision upholding the individual mandate in the health care reform law, some Republicans, such as John Yoo of the University of California, Berkeley School of Law, suggested the next Republican president should be more careful in selecting the next high court nominee. Because of Roberts' ruling, "We're back to conservatives understanding that it can't just be any conservative nominee; it's got to be the right conservative nominee," said Levey in the *Objective Standard* interview.

It is hard to imagine the nomination and confirmation process becoming more politicized than it now is, said UCLA's Winkler.

Republicans, if they win the presidency, may focus more on judges as nominees for the high court, he suggested, explaining, "John Roberts was a judge but only for a few years. Perhaps they will look for a judge like Samuel Alito with a record on most of the major issues important to the Republican Party."

However, no litmus test can ensure that a nominee votes the party line, he added.
"When Roberts was nominated in 2005, you could not have foreseen the individual mandate, and if Republicans had foreseen it, the litmus test would have been that Roberts would uphold it because at the time it was a Republican idea," Winkler said. "I don't think you can accurately predict all the issues that come before a justice five to 19 years from now. I do think Republicans will be more determined than ever to get an archconservative, someone with a track record."

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