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Should Obama pick a liberal for court?

STORY HIGHLIGHTS

- The senior justice on the U.S. Supreme Court, John Paul Stevens, is retiring
- Stevens' decision leaves a vacancy on a divided court
- Experts weigh in on his legacy and issues relating to his replacement
- The vacancy hands the Obama administration a difficult decision in a midterm election year

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(CNN) -- As if this year's political climate wasn't heated enough, the retirement of Supreme Court Justice John Paul Stevens hands the Obama administration another difficult and high-stakes decision.

Here are a range of opinions CNN.com gathered on Stevens' legacy and his replacement.

Ed Rollins, a senior political contributor for CNN, is senior presidential fellow at the Kalikow Center for the Study of the American Presidency at Hofstra University. He was White House political director for President Reagan and chairman of the National Republican Congressional Committee:

Justice John Paul Stevens' widely anticipated announcement Friday morning of his retirement after 35 years on the court, gives the president and his party another challenge going into the fall elections.

Who the president nominates and how ferocious the confirmation battle becomes, could become a giant distraction to the many embattled senators (mostly Democrats) running for re-election this year. It adds an enormous burden to Majority Leader Harry Reid's re-election efforts, uphill at best already. And it certainly adds a burden to get other legislative items through the Congress this fall.

President Obama's first choice for the court, Sonia Sotomayor was a relatively easy confirmation battle in part because she was judged as extremely qualified, she was the first Hispanic member of the court and obviously, being the third woman to serve didn't hurt either.

This choice of the 112th Justice to serve on the court, will be more of a battle. The president will be pressured by his liberal supporters to put a strong liberal on the court to be a counterweight to the conservative majority led by Chief Justice Roberts.

Although appointed by President Ford, Justice Stevens was considered one of the more liberal members of the court. The Senate obviously is in a battle mood, just having gone through the health care war. Even though it was 23 years ago that President Reagan's choice of the extremely qualified judge and legal scholar Robert Bork went down to defeat by a vote of 42 to 58 on partisan lines, the memories of that battle have remained fresh and the lessons are still relevant.

If the president picks a centrist, the battle will be over quickly and a bipartisan confirmation is possible. If he picks a liberal extremist, his supporters on the left will be happy, but the battle would be on and the bloodshed will distract every troubled Senate incumbent all the way to election day.

Patricia Millett, a partner at Akin, Gump, Strauss, Hauer & Feld who co-chairs its Supreme Court practice. She has practiced extensively before the Supreme Court, where she has briefed approximately 70 cases and argued 28 cases. She spent 11 years appearing before the court as an Assistant Solicitor General during the Clinton and George W. Bush Administrations:

Imagine a Supreme Court nominee confirmed by the Senate in just 19 days by a vote of 98 to 0.

That is how Justice John Paul Stevens started his 34-year-career on the court. Suffice it to say that his replacement's nomination will not go so smoothly, no matter who is chosen. Supreme Court nominations have become political crucibles for both the administration and the loyal

opposition.

The political controversy that erupted over the controversial decision of the Supreme Court this January in *Citizens United v. FEC* means that both the nominee and the court itself will be under exacting scrutiny this summer. This also marks President Obama's best opportunity to break from the mold of appointing former court of appeals judges to the court.

Solicitor General Elena Kagan is an obvious front-runner for the slot. She now has the year of experience before the Supreme Court and -- importantly -- working with the administration, that she lacked last year when Justice David Souter retired. Plus she has the powerful intellect, unimpeachable credentials, and high-profile bipartisan supporters that have the political stars aligning behind her.

But before we rush into the nomination fray, it is good to pause and celebrate the enormous service that [Justice Stevens](#) has provided to the court and to the country. He has lived the life of a genuinely humble, unassuming public servant for four decades.

His polite and respectful judicial demeanor accompany a powerful intellect and an inside-the-court savvy that have made him a powerful force on the court.

As an advocate before the court, I can attest that no other justice could deliver a death-blow question to an attorney during oral argument with such an avuncular demeanor. His questions could be Venus flytraps. But he always asked those questions out of deep concern for the law's evolution and the role of the court in enforcing and preserving the Constitution. I will miss him tremendously.

Douglas Kmiec, U.S. Ambassador to Malta and a professor of constitutional law on leave from Pepperdine Law School He is former dean and St. Thomas More Professor of Law at The Catholic University of America in Washington, D.C., Kmiec was nominated by President Reagan and confirmed by the U.S. Senate as Assistant Attorney General Office of Legal Counsel (OLC), U.S. Department of Justice (1988-89):

Who will replace John Paul Stevens? The best answer is what Jefferson said when he was asked in Paris as ambassador if he was the one replacing Franklin: "Why Madame," said Jefferson, "Dr. Franklin can be succeeded, he cannot be replaced.

Stevens' genteel, gentlemanly way has passed from our time; his open-minded willingness to see sides to cases well beyond the contending positions has known no equal among all who have had the privilege of sitting with him on the bench; and his understated intelligence always wrapped tightly in a smile and a head inclined manifesting complete attention toward every advocate to whom he posed a question -- which was every advocate -- will not be seen in even the finest candidate available to the president.

Justice Stevens' love for the court and his enormous respect for the judiciary was seldom worn on the sleeve of his robe. It did not have to be, for the unadulterated clarity and even-handedness of his questions illustrated a level of preparation that gave proof daily that his nomination and confirmation was no mere fluke, for it too reflected what existed in another era, presidents who would actually be embarrassed if someone thought they were making an attempt to pack a bench with a given ideology.

Gerald Ford, our only un-elected president, managed in his singular appointment to the court to find a gem of a justice because Stevens was and is a gem of a man.

I believe the president, in replacing Justice Stevens, may be encouraged to look beyond the usual places, and if so, looking to a highly accomplished practitioner of the law would honor the entire profession.

Carter G. Phillips is a nominee with Stevens' gifts but also the ability to form majority coalitions far more regularly. He is a soft-spoken, enormously respected, progressively-minded practitioner, and in my judgment, Phillips should be the president's top candidate.

[Phillips](#) has more appearances before the court from private practice than anyone. And Phillips is listened to. I have noted elsewhere how his brief literally saved affirmative action in higher education. The president is an impact player. He cannot change the numerical liberal-conservative split in replacing Stevens, but he can bring to the court a justice who can make the big plays and win the close contests, and that's Phillips.

Phillips, drawing upon his uniformly respected advocacy, should be filibuster-proof and upon appointment, the equal of John Roberts, and importantly, in command of the kind of logic and intellect [Justice Anthony] Kennedy would find hard to resist. Majorities of Phillips, Kennedy, Ginsburg, Breyer and Sotomayor would not be far behind.

Phillips would also bring a needed practitioner's wisdom to the court, by likely relying upon methods of interpretation that grapple, like Stevens, with the here and now consequences of judicial outcome rather than being premised upon fancifully abstract notions of original understanding selectively applied.

These are my personal views of course, not necessarily those of the president or the Department of State.

Julian E. Zelizer, professor of history and public affairs at Princeton University's Woodrow Wilson School:

The moment that Justice Stevens announced his retirement, the political landscape for President Obama changed. The congressional fight over his replacement could easily dominate politics in the next few months. The confirmation process could become as much a defining issue in the midterm elections as health care.

Since the 1960s, the confirmation process for [Supreme Court](#) nominees has become highly polarized. Some of the most bitter partisan fights have taken place over the people who presidents select to serve on the high court.

In addition to differences over the qualifications of the nomination or concerns about their philosophical outlook, Republicans could decide to make Justice Stevens' replacement the political issue for their party.

With a filibuster at hand, some Republican senators are ready to go to war. The second ranking Senate Republican John Kyl has refused to rule out a filibuster. "It will all depend on what kind of a person it is," Kyl told Fox News. As President Obama learned with Justice Sotomayor, regardless of who he nominates, the right is prepared to characterize he or she as left of center. This fight comes right after the battle over health care fueled a resurgence of conservative activism.

But in thinking about the politics, Republicans should be cautious. It would be a mistake to believe that the nomination will only play into Republican hands. Just as the passage of health care revived the spirit of liberal Democrats, a debate over a Supreme Court nomination -- as long as President Obama selects someone who commands broad support from Democrats -- could energize party activists and hand Obama a defining issue through which to take on Republicans.

Indeed, Republicans should remember how important these issues have been in their own history. In 1987, Democrats defeated President Reagan's appointment of Robert Bork. Sen. Ted Kennedy headed a tough campaign that depicted Bork as a danger to liberty and equality in America. Republicans were furious with how Democrats handled the nomination. They believed that liberal politicians and interest groups had unfairly brought down a qualified nominee. The fight mobilized conservatives for decades to come.

If President Obama makes a strong selection and Republicans overplay their hand, liberal Democrats will find an issue worth fighting for heading into the 2010 elections.

Ilya Shapiro, senior fellow in Constitutional Studies and editor-in-chief of the Cato Supreme Court Review at the Cato Institute, a libertarian-leaning think tank.

As the oldest-ever and soon-to-be second-longest-serving justice, John Paul Stevens deserves to take a bow for a long and honorable career in the private and public sectors.

Although he enjoys his job and seems to be in excellent health -- not many men half his age swim daily, play singles tennis thrice weekly, or draft their own legal writings -- it seems that he took this bow for reasons of political expediency (wanting his successor to be nominated by a liberal president, and perhaps with a more heavily Democratic Senate). And that, unfortunately, may be his jurisprudential legacy: Contrary to the myth he himself perpetuates, Justice Stevens did not remain a moderate conservative as the court allegedly moved right. Instead, he "grew" in office, moving from a country-club Republican --whatever that legal doctrine might be -- to becoming the court's liberal leader.

While a man of great integrity and professionalism, he came to ratify the trampling of those very individual rights he claims to cherish. In areas including property rights (Kelo), the Second Amendment (Heller), free speech (Citizens United and Texas v. Johnson, the flag-burning case), executive agency power (Chevron), and federalism (dissents in Lopez and Morrison, majority in Raich), Stevens again and again came out on the side of the government. Even in criminal procedure cases -- where he rightly has a pro-defendant reputation -- he is not as concerned about restraining the government at the front end.

On those issues where friends of liberty can disagree in good faith as a matter of policy, such as the death penalty, Stevens explicitly and unabashedly asserts his own policy preferences instead of following the Constitution.

And so, as the Constitution looms large in this election year more than most, voters will now have the opportunity to ponder the consequences of the flawed legal judgments of the venerable John Paul Stevens.

Ed Whelan, a former law clerk to Supreme Court Justice Antonin Scalia, is president of the Ethics and Public Policy Center, a nonprofit organization which describes itself as an "institute dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy." He served during President George W. Bush's first term as Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice:

The three leading candidates to fill Justice Stevens's seat are widely thought to be Seventh Circuit Judge Diane Wood, Solicitor General (and former Harvard Law School dean) Elena Kagan, and D.C. Circuit Judge Merrick Garland.

Wood has an incendiary record on a broad array of hot-button issues. No judge in the country has a more extreme record on abortion, including rulings on protests at abortion clinics that triggered successive 8-1 and 8-0 reversals by the Supreme Court.

Wood has made clear that she's ready to invent a federal constitutional right to same-sex marriage and to rule that the inclusion of "under God" in the Pledge of Allegiance would impermissibly make the United States "a nation that has adopted monotheism as its official state dogma."

She believes that it's proper for the Supreme Court to invent new rights, and dilute old ones, in order to comport with whatever foreign and international laws she favors. And she's softheaded on national-security matters.

Kagan has generally been much more guarded about her own legal and policy views. She's clearly sounder than Wood on national-security matters and executive power generally.

The one notable exception to her cryptic record on social issues is the matter of gay rights: Kagan has resorted to vehement rhetoric and wild legal arguments against the Don't Ask, Don't Tell law, and as Solicitor General she's taken actions that threaten to undermine that law

as well as the Defense of Marriage Act.

Garland seems by far the best of the three candidates -- and the best of the broader set of candidates whom President Obama might plausibly nominate.

Renée M. Landers, faculty director and professor of law at Suffolk University Law School in Boston, Massachusetts:

The Supreme Court and the country will lose more than the longest serving Justice when Justice Stevens retires after 34 years at the conclusion of the Supreme Court's current term.

First, with his departure, the court will lose one important aspect of diversity. Among the current justices, only Justice Stevens does not have an Ivy League law degree. Few would argue, however, that Justice Stevens is any less sophisticated in his approach to constitutional analysis because he attended Northwestern and not an Ivy League law school.

Second, Justice Stevens brought a level of civility to the court's jurisprudence that will be difficult to replace. In 2008, I wrote a short piece for the Suffolk University Law Review where I commented on the conciliatory role Justice Stevens seemed to play on the court. In two cases that year, while siding with majority opinions written by conservative Justices, Justice Stevens wrote separately to voice his agreement with aspects of a dissenting justice's opinion.

In *Riegel v. Medtronic* the court decided the statute requiring premarket approval by the FDA of medical devices preempted state tort remedies, perhaps more extensively than the statute's authors had intended. Justice Stevens wrote a concurrence to voice his agreement with Justice Ginsburg's pointed dissent showing that the history and principal purpose of the changes to federal law had been to provide additional protections to consumers, not to remove existing protections, such as state tort law.

In another case, involving the effect of certain treaty obligations on state courts, *Medellin v. Texas*, Justice Stevens wrote, "There is a great deal of wisdom in Justice Breyer's dissent. ... Moreover, I think this case presents a closer question than the court's opinion allows."

It appears that Justice Stevens was effectively trying to build bridges to span the ideological and philosophical distances separating the majority and dissenting justices in those cases. On a court that will likely continue to be divided by strong differences, his mediating influence will be sorely missed.

The opinions expressed in this article are solely those of the authors.

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