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Souter Steps Down

Late today, President Obama said he intended to pick a replacement for Justice David Souter who has a "sharp and independent" mind and can balance "empathy" with honoring "our constitutional traditions."

Now, the process of selecting someone to replace Justice Souter is among my most serious responsibilities as President. So I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives -- whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.

I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this nation was founded, and who brings a thoughtful understanding of how to apply them in our time.

As I make this decision, I intend to consult with members of both parties across the political spectrum. And it is my hope that we can swear in our new Supreme Court Justice in time for him or her to be seated by the first Monday in October when the Court's new term begins.

Appointed by George H.W. Bush, Souter became a reliable liberal vote on the court and posited himself as an advocate of a constitution that breathes and whose principles are to be informed by modern facts and evidence. He is known by legal scholars as a moderate, but he votes often with the liberal wing. Conservatives hate him.

By all accounts, Mr. Souter was not terribly pleased with the prospect of spending the remainder of his active life on the court. He will return to quiet New Hampshire.

Let's face facts: there are many qualified center-left jurists who are women. Obama will be under enormous pressure to name a woman to replace Mr. Souter, especially given the illness of Justice Ruth Bader Ginsberg. Justice John Paul Stevens is 89.

Somewhat opaquely, Obama, a constitutional law lecturer, has said that the single most important qualification his appointments must possess is empathy for those who are less fortunate. In September, Obama told an audience that he is "committed to appointing judges who understand how law operates in our daily lives, judges who will uphold the values at the core of our Constitution."

So would Obama appoint an academic? A long-time bench-sitter? Someone with a mixture of experience?

The new associate justice will probably be called upon to decide the constitutionality of Bagram airbase detentions, the scope of the government's authority to define a national security fact, perhaps the status of gay marriage -- and much more.

His first judicial appointment may tell us about his newest decision: Obama nominated Indiana Supreme Court Chief Justice David Hamilton to the 7th circuit; the White House portrayed Hamilton as a jurist respected by Republicans and Democrats alike, although Republicans in Washington were skeptical.

If Obama appoints a thoroughgoing liberal, Republicans will give him the fight of his life -- though

ne might, by the time of the vote, have 60 Democrats to avoid a filibuster. A more moderate pick would disappoint his liberal base. In reality, Obama can appoint anyone he wants. Democrats are already pushing back at the notion of a GOP filibuster, pointing to comments made by prominent Republicans who warned Democrats against blocking President Bush's nominees. A bigger challenge for Republicans: with Arlen Specter moving to the Democratic side of the aisle, his veteran nominee-vetting staff will probably not be inclined to help minority Republicans.

Among those who might make the list of replacements: incoming solicitor general **Elena Kagan**, formerly the dean of the Harvard Law School, **Cass Sunstein**, a brilliant constitutional law prof who now works at Obama's Office of Management and Budget, Secretary of State **Hillary Clinton**, appellate judge **Diane Wood**, and **Leah Ward Sears**, the chief justice of Georgia's Supreme Court. A dark horse might be **Judge Nicholas Garaufis** of the Eastern District of New York. Less known but equally potent candidates would be Stanford's **Pam Karlan**, an intellectually brilliant liberal, and **Johnnie Rawlinson**, an appeals court judge and the first African American woman appointed to that circuit. Of all these candidates, Wood and Karlan are probably the brightest lights, and Wood would be most palatable to conservatives. Cato's Ilya Shapiro, a former Wood student, said that she'd offer a "seriousness of purpose and no ideological ax to grind, this making her the best nominee for supporters of constitutionalism.

If Obama has a short list, it is probably much longer than mine, and includes many judges I haven't considered.

Watch for Vice President Joe Biden, a former chair of the Judiciary Committee in the Senate, to play a significant role in this process. Biden's chief of staff, Ron Klain, has more experience vetting potential nominees than just about anyone else in Washington, and the process of compiling an initial list of nominees has been given to his office.

So what's the process going to be like? Will it be partially public -- the White House having decided to selectively leak the names of certain more conservative jurists that Obama meets? Will he meet with a range of folks? Will he meet with a pro-life judge? Or -- does he segregate politics from the process entirely?

First, Obama compiles his list. Then, he tries to keep the list a secret. Does he begin to compile vetting teams before Souter formally steps down? Unclear -- although the VP's office already has some staff capacity.

The public will be treated to a three-act play; Act 1 -- who SHOULD Obama pick? Act 2 -- who DOES Obama pick? Act 3 -- what does the GOP do? Spoiler alert! Don't call this a battle; Obama's going to get his nominee confirmed. The question is whether he does so while enhancing his status and his party.