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## Sizing up the potential picks

By: **Josh Gerstein**

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The name game is on.

Justice John Paul Stevens' announcement Friday that he'll step down from the Supreme Court touched off the usual frenzy of speculation about who will don the robes next.

Already, the oppo research teams for the Republicans are going over their dossiers on the potential nominees – just as Democratic groups are trying to pick through their records to find the most appealing selling points for whoever President Barack Obama picks. Here's a look at how each candidate might fare, starting with the frontrunners:

### **Diane Wood, 7th Circuit Court of Appeals Judge**

*Her appeal to Obama and the base:* Wood has ruled in favor of abortion rights, religious minorities and immigrants. In sparring with conservative Judges Richard Posner and Frank Easterbook, Wood has also exhibited the kind of feistiness that some liberals would like to see more of from the liberal wing of the Supreme Court.

"Diane Wood probably would fit into the Stevens mold most thoroughly," said Robert Fennett, a law professor at Northwestern. "Certainly, the word on the streets is that she is liberal in her politics."

Wood taught at University of Chicago while Obama did and the pair are said to have good rapport. One drawback: at age 59,

Wood might not offer the generations of influence on the court some liberals would like to lock in.

*What conservatives will target:* Put simply, abortion.

"There is no judge in the country who has a more extreme record on abortion than Wood," said Ed Whelan of the conservative Ethics and Public Policy Center.

Wood has also offered up opinions and analysis outside of court that could land her in hot water. She's hinted that she may agree with the overturned 9th Circuit opinion which found unconstitutional the use of the words "under God" in the Pledge of Allegiance. She's also signaled that the government may have no valid interest in prohibiting same-sex marriage. "Wood has an inflammatory record on a broad range of culture-war issues," Whelan said.

Wood's record on another hot-button issue, gun control, is sparse, but she recently wrote an opinion upholding some

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gun registration rules. The right promises a big fight if Wood is the nominee. "It's a much higher risk nomination [for Obama]," said Jay Sekulow of the conservative American Center for Law & Justice.

## **Elena Kagan, Solicitor General, former Harvard Law dean**

*Appeal to Obama and the base:* A longtime and loyal Democrat who worked on policy issues in President Bill Clinton's White House, she is believed to be in sync with Obama's legal outlook. However, some view her as a centrist in light of her role in aspects of Clinton's triangulation on various social issues. She has never been a judge so lacks a long trail of a opinions to pick over.

"Elena Kagan has not shown a lot of her hand, so I think there'd be more uncertainty about her, but I think it'd probably be a pretty good bet she'd fit comfortably into the liberal side of things on lots of issues, but maybe not all," Bennett said. Kagan's only 49 so could be a force on the court for decades to come.

*What conservatives will target:* Gay rights would likely be a flashpoint given her advocacy for the rights of universities to kick military recruiters off campus on account of the military's ban on openly gay service members. She and other law professors signed a brief in 2005 urging the Supreme Court not to enforce the Solomon Amendment, which would have cut federal funding to schools which locked out the military. The Supreme Court ruled rejected her view, 9-0.

However, any criticism of Kagan from the

right could be tempered by the appreciation many conservatives feel for her efforts as dean of Harvard Law School to ensure that right-leaning professors got a fair shake. She has gotten favorable reviews from Ken Starr and Charles Fried. "The safest nominee among the ones most prominently named is Elena Kagan. She has insulated herself to a limited degree by her deanship at Harvard and her appointment of a few conservative or libertarian professors," said Roger Pilon of the Cato Institute.

## **Merrick Garland, D.C. Circuit Court of Appeals Judge, Former DOJ official**

*Appeal to Obama and the base:* Not a whole lot for liberals to get excited about, but some Garland backers say his temperament and easy interaction with more conservative colleagues on the D.C. Circuit would make him a consensus-builder on the Supreme Court – just the kind of thing Obama is said to be looking for as he seeks a justice who can sway swing-vote Anthony Kennedy.

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Garland, is very well connected and well respected in Democratic legal circles, and spent about a decade in the Justice Department, where he helped oversee the investigation into the bombing of the Oklahoma City federal building. A possible no-drama Obama choice, but one which might lead to sighs of disappointment from those seeking a liberal firebrand.

*What conservatives will go after:* With Garland, very little, it seems. “On some criminal cases, he has a more moderate streak, but having said that, it’s all very relative,” said Sekulow.

“There are certainly conservative groups that would oppose him, but there are also conservative groups that would very likely sit on their hands, because he is about the best that we can do,” said Curt Levey of the conservative Committee for Justice. “He is liberal, but overall – unlike a lot of the other people you hear mentioned – he doesn’t seem agenda driven.”

Garland won confirmation to his appeals court post, 76-23, back in 1997, and is said to have the blessing of Sen. Orrin Hatch (R-Utah.) Garland also benefits by having an army of former clerks from both political parties who are now in influential positions around Washington.

## Others Thought To Be Under Consideration

### Cass Sunstein, Office of Management and Budget Regulatory Czar

*Appeal to Obama and the base:* Sunstein is a true intellectual and unconventional thinker who could shake things up in the

court and might be able to put together unusual coalitions. He supports rights to education and health care and has even dabbled in animal rights. However, he has also endorsed some of the claims of broad executive power President George W. Bush made in the war on terror.

*What conservatives will go after:* Sunstein’s theory of “libertarian paternalism” is sure to be painted as a vehicle for government micro-management of people’s lives. The animal rights talk and writings suggesting government could infiltrate conspiracy-minded bulletin boards provided a lot of fodder for critics. Sunstein is actually popular with libertarian-conservative legal academics, but his prolific academic work probably makes him a non-starter.

### Janet Napolitano, Secretary of Homeland Security, former Arizona governor

*Appeal to Obama and the base:* Has DC and “real world” experience. Her Arizona roots could add geographical diversity to the court. Said to be friendly with Obama and was carefully vetted last time around.

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However, immigrants' rights activists remain skeptical of her and her department. They might be unenthusiastic about her nomination. Or they might be eager to see her join the court so someone else could head DHS. Only 52, but had breast cancer in 2000.

*What conservatives will go after:* Her awkward "the system worked" comments after the Christmas terrorism attempt. Such a discussion could revisit failures in intelligence and coordination on the part of the Obama Administration. The sideshow, bringing back a painful episode for the White House and Napolitano, might be too much for the White House to bear.

## **Harold Koh, State Department Law, former Yale Law dean**

*Appeal to Obama and the base:* Koh is a reliably liberal legal scholar who would make history by becoming the first Asian-American on the Supreme Court. He's a vigorous and unabashed defender of human rights and the rule of law in the war on terror.

*What conservatives will go after:* Koh's arguments for the role of foreign law in American courts will come under fire and might be publicly rebuked by some moderate Democratic senators. He's urged courts to find a right to same-sex marriage, in part by consulting foreign law, which is sure to create fireworks.

## **Others To Watch**

Gov. Jennifer Granholm (D-Mich.), Gov. Deval Patrick (D-Mass.), Former Georgia

Supreme Court Justice Leah Sears, Secretary of State Hillary Clinton, Sen. Amy Klobuchar (D-Minn.), Sen. Sheldon Whitehouse (D-R.I.).

*Kenneth Vogel contributed to this report.*

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