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Obama's Next Justice

Whom will he pick, and what will it mean for November?

Justice John Paul Stevens has announced his retirement, which means that President Obama gets to make another Supreme Court appointment. Whom will he nominate, and what will be his choice's effects on the near future (i.e. the November midterms) and the long-term ideological trajectory of the Court? NATIONAL REVIEW ONLINE asked the experts.

JONATHAN H. ADLER

The last time around, President Obama picked a fairly reliable liberal appellate court judge in Sonia Sotomayor. During her confirmation hearings, Judge Sotomayor backed away from some of her more controversial statements and declined to defend the president's endorsement of "empathy" on the bench. Will things be different this time around?

President Obama will almost certainly select another liberal nominee. Justice Stevens may have started off as a moderate justice, but he evolved into the Court's leading liberal. The president is unlikely to select anyone who is not at least as reliable a liberal vote. The question is whether he will pick a justice willing to push the Court farther to the left and articulate a liberal jurisprudential vision — and whether his nominee will be willing to defend such an

approach before the Senate Judiciary Committee. Whatever course he takes, his nominee is almost certain to get through. Senate Republicans are unlikely to mount a successful filibuster — they might not even try — but they can use the confirmation hearings to further educate the American people about what's at stake in judicial nominations, and perhaps bolster the case for Republican gains in November.

— NRO contributing editor Jonathan H. Adler is professor of law and director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law.

JAMES R. COPLAND

The judicial confirmation process is in many respects a theater of the absurd. Both supporters and opponents of nominees have an incentive to distort legal writings and records, as the nominees themselves obfuscate and dodge in an effort to avoid a "gotcha" moment.

These daffy events do, however, give those of us who care about judicial principles a rare platform to articulate our ideas and try to explain to the public how judges should think about the Constitution, statutes, and litigation. Thus defining the public conception of judging is perhaps the greatest opportunity presented to us on the right in the pending drama, given that the president's nominee is all but certain to be confirmed.

Make no mistake: The president will select a justice on the left. A former lecturer at Chicago Law School and editor of the *Harvard Law Review*, President Obama understands the import of this choice and will not treat it as casually as did the last two Republican presidents (who came up with David Souter and Harriet Miers, respectively).

That said, it's unlikely that Obama will make a highly controversial selection, given the looming fall elections and his remaining domestic-policy agenda. It's one thing for him to select my law-school classmate Goodwin Liu for the appellate bench, which gets little notice; it would be another thing entirely to nominate my old law-school prof Harold Koh to the high bench and publicly align his already-besieged party with the wacky ideas of the international-law academic community. Solicitor General Elena Kagan is the bettors' choice and makes a lot of sense, tactically: She's already been through a confirmation, has little paper trail to attack, and could be expected to have conservative luminaries from Harvard spring to her defense.

— James R. Copland is the director of the Center for Legal Policy at the Manhattan Institute.

TED FRANK

One striking thing about the Obama administration is the extent to

which it has modeled itself after the television series *The West Wing* — right down to picking silly fights with talk-show hosts.

Obama could do it again. The fictional President Bartlet, faced with the political problem of two Supreme Court vacancies, picks someone Republicans would like in addition to his conventionally liberal choice. Having already nominated a conventional liberal in Justice Sotomayor, Obama could demonstrate his bipartisan chops by nominating the greatest living jurist — his fellow Chicagoan, Reagan appointee Judge Frank Easterbrook.

Judge Easterbrook is 61, older than any Supreme Court nominee since 1972, and, in his 25 years on the bench, he has become famous for such principled stands as upholding the constitutionality of a Chicago ban on spray paint even as he ridiculed it as a ludicrous law. If Obama forces swing-state Democrats in the Senate to vote for the confirmation of a judicial activist out of the popular mainstream, he'll make the 2010 midterms even more painful for his party than they're already expected to be. On the other hand, Obama can recapture independents for an increasingly marginalized Democratic party by proving that he values merit more than politics (including identity politics) in the nomination process. Think how relieved Senators Specter, Reid, Lincoln, and Bennet would be.

— Ted Frank is president of the Center for Class Action Fairness.

RICHARD W. GARNETT

Justice John Paul Stevens's retirement means that President Obama will put at least as many new justices on the Supreme Court in the first 18 months of his presidency as either George W. Bush or Bill Clinton did in their respective eight years.

Some might say that the impact of this appointment will be small, on the theory that the president will simply replace one liberal with another, but the president will be replacing a 90-year-old liberal Justice with a much younger one, reducing the ability of future presidents with more conservative judicial views to break the Court's current philosophical gridlock. The fact that it is President Obama and not, say, a President McCain who is choosing the replacements for Justices Souter and Stevens means, for one thing, that the chances the Court will ever correct its tragic mistake in *Roe v. Wade* have diminished dramatically. It means that important positive steps — in the religious-liberty arena, for example — remain vulnerable. By replacing Justices Souter and Stevens — and before too long, most people assume, Justice Ginsburg — the president is putting any future conservative successor on defense, in the position of having to replace conservative justices with others.

Justice Stevens did not influence the Court's decisions or doctrine through the consistent application of an overarching judicial philosophy. Instead, his influence was primarily a product of the fact that he was, for more than a decade, the senior justice in a bloc of four liberal-leaning colleagues at a time when two others were —

in controversial cases, anyway — prone to "swinging" from one camp to the other. Unsurprisingly, many of President Obama's supporters would like to see him nominate a replacement who has the potential to actually move the Court, ideologically, in the direction they prefer. We will see.

— Richard W. Garnett is professor of law and associate dean at Notre Dame Law School.

STEPHANIE HESSLER

These are a few questions that senators on the Judiciary Committee should ask the next Supreme Court nominee during the confirmation hearings:

1. *What is the role of the Supreme Court in national-security matters? Should the Court give deference to the executive branch in foreign-policy decisions?* Today's Supreme Court is deeply divided about the judicial branch's role in national security. While traditionally the Court deferred to the elected branches in foreign-policy matters, in some of the most contentious decisions since September 11 the Supreme Court has struck down counterterrorism policies implemented by the elected branches.

2. *What is your view of the scope of Congress's power under the Commerce Clause? What are the limits on Congress?* In the health-care bill, Congress took an unprecedented view of the scope of its powers under the Commerce Clause. Never before has Congress used its commerce power to mandate that individuals enter into economic transactions with other private entities. Whether Congress has this power will be the pressing Commerce Clause question for the next few years.

3. *Should judges interpret the U.S. Constitution by reference to contemporary foreign and international law?* There is a deep divide among the current Supreme Court justices on the use of contemporary foreign and international law to interpret the Constitution. In two of the most high-profile cases of the past decade, the Supreme Court relied on foreign law to construe the Constitution. Such reliance on foreign sources conflicts with the text and structure of the Constitution and with fundamental notions of democratic self-governance.

4. *Do you agree with President Obama that judges should decide cases based on "empathy" for certain parties and by following their "hearts," or do you believe they should evenhandedly apply the law?* In a striking moment during Justice Sotomayor's confirmation hearing, she rejected President Obama's judicial philosophy, saying that she "wouldn't approach the issue of judging in the way the president does," and said that the job of a judge is to apply the law.

— Stephanie Hessler served as a constitutional lawyer for the Senate Judiciary Committee during Justice Alito's Supreme Court nomination hearings and is an adjunct fellow at the Manhattan

Institute.

CURT LEVEY

Perhaps the most interesting aspect of the upcoming Supreme Court confirmation fight will be its interplay with electoral politics at a time when Democratic senators from swing states are feeling vulnerable. If Obama chooses Diane Wood or someone else far to the left, red- and purple-state Democratic senators up for reelection — e.g., Blanche Lincoln — or otherwise vulnerable at home — e.g., Ben Nelson — will have to choose between party loyalty and a much-needed opportunity to put some distance between themselves and the liberal wing of their party.

Either way, there is a political advantage for Republicans. If red-state Democrats have to explain to their constituents why they supported a Supreme Court nominee who favors gay marriage and partial-birth abortion and opposes the death penalty and the War on Terror, Republicans benefit. On the other hand, if red-state Democrats oppose a far-left nominee, a bruising confirmation fight is ensured. Again, Republicans benefit.

— Curt Levey is executive director of the Committee for Justice.

NEOMI RAO

This second Supreme Court retirement in less than a year provides an excellent opportunity to elevate the confirmation debate. Senators should seize the opportunity and ask the nominee, not about specific cases, but about his or her judicial philosophy.

The hearings for Chief Justice Roberts and Justices Alito and Sotomayor provide a blueprint for any potential nominee. Judicial nominees know they have to allege fidelity to the law. But the harder question, of course, is what they mean by fidelity to the law. Does fidelity to the law allow the meaning of the Constitution to evolve over time? Does it mean that laws should be interpreted empathetically, as President Obama has suggested? What happens when a proper interpretation of the law leads to an outcome the judge finds undesirable? Honest answers to these questions can highlight the differences between judges who emphasize the rule of law and others who have a more "flexible" approach.

The confirmation process often just skims the surface of judicial philosophy. The Senate and the American people should require more from the process that selects members of the Supreme Court, who will be deciding the most important legal and social issues for many years to come.

— Neomi Rao is an assistant professor at George Mason Law School, former associate White House counsel, and former counsel on nominations to the U.S. Senate Committee on the Judiciary.

RALPH REED

The retirement of Justice John Paul Stevens, the leading liberal light on the Supreme Court, was anything but a surprise to those working in the cottage industry of public-policy advocacy groups engaged in judicial-confirmation battles. But although it came as anything but a shock, Stevens's timing was fascinating. Stevens made clear in earlier interviews with the *Washington Post* and the *New York Times* that he would retire while Barack Obama was president. Yesterday's announcement ups the ante: He is purposely quitting while Democrats still have a 59-seat majority in the U.S. Senate, hoping to make the confirmation of a dedicated liberal nominee smoother.

Stevens may have been too cute by half. It is a safe assumption that Obama will tack left on this nominee to energize his base and maximize the value of the vacancy. But by dropping the battle over choosing his successor before the November elections — while Democrats are on defense and Barack Obama's job-approval rating has plummeted to 44 percent in the most recent CBS News poll — Stevens may have assured this vacancy further motivates conservatives at the grassroots to elect a Republican Congress.

— Ralph E. Reed Jr. is CEO of Century Strategies and chairman of Faith and Freedom Coalition. His next political thriller, The Confirmation*, is scheduled for publication in August 2010.*

WILLIAM SAUNDERS

The resignation comes as no surprise. Nor, I think, will Obama's choice be. He will select someone he believes will be a reliable vote to uphold a very expansive abortion "right," as Stevens was. Abortion was imposed upon us by what is widely regarded as one of the worst decisions in U.S. history, because it lacks any basis in our Constitution. *Roe v. Wade* is the quintessential example of judicial activism.

For years, radicals have seen the courts, not the legislatures, as the best way to achieve the social reforms they advocate. Why? Because legislatures are not likely to make radical changes. Radicals see the Constitution as a "living document," which Supreme Court justices are to expound upon and expand as they see fit, to the greater good of us all.

This is, of course, profoundly anti-democratic and really has no support in the Constitution (we have three coequal branches of the national government; the Constitution does not enshrine rule by the Supreme Court).

The job of the Senate is to probe the nominee on this point and to reject him unless they are convinced he will respect the people's inherent right to govern themselves. We don't need any more Platonic guardians.

— William Saunders is senior vice president of legal affairs for Americans United for Life.

ILYA SHAPIRO

John Paul Stevens will be remembered as a jurist of unquestionable integrity but questionable legal judgment. While lucid and vigorous to the present day and admirably writing the first drafts of his opinions, in case after case Justice Stevens sided with government action over individual rights and with his own preferences over the dictates of the law. And for some reason — probably both his seniority and his continued drift to the left — almost all his most significant (hugely flawed) opinions have come in the last five or ten years.

From the First Amendment (*Citizens United*) to the Second Amendment (*Heller*), from executive-agency power (*Chevron*) to federalism (*Morrison*, *Raich*), Gerald Ford's moderate Republican showed that he had completed his apotheosis into liberal lion. Even in criminal cases — where he has been staunchly pro-defendant — he is not very concerned about restraining the government at the front end (*Kyllo*). And on those issues where friends of liberty and limited government can disagree in good faith as a matter of policy, such as the death penalty, Stevens has asserted his policy views instead of following the Constitution.

Stevens's replacement will have big shoes to fill. Let's hope that she or he uses them to walk in a different direction, at least on some issues.

— Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.

EUGENE VOLOKH

What lies ahead? The November 2010 election lies ahead. The senators' eyes will be on that election, both for themselves and their colleagues in both houses of Congress.

The questions senators ask will therefore not be aimed at blocking the nominee — the nominee will almost certainly be confirmed, given the Democrats' majority and the Republicans' likely unwillingness to try a filibuster. Nor will the senators' questions be aimed at informing themselves. Every trial lawyer knows: Don't ask a witness a question unless you already know the answer.

The purpose of questions in this context is to communicate with the audience, not to enlighten the questioner. The Republicans will try to communicate that the Democrats are out of step with you, the voters. The Democrats will try to communicate that they are the party that you, the voters, should trust.

This dynamic, coupled with the Democrats' seemingly diminished

popularity and their likely weakness with the voters on social issues (such as gay rights), suggests that President Obama probably won’t pick someone with much of a record on social issues. But I’ve been surprised by such things before, and may well be this time.

— Eugene Volokh is a professor of law at UCLA School of Law. He blogs at the Volokh Conspiracy.