

## Politics

# G.O.P. Weighs Political Price of Court Fight

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WASHINGTON — The retirement of Justice [John Paul Stevens](#) presents a test for Republicans as much as it does for [President Obama](#) as they weigh how much they want to wage a high-profile battle over ideological issues in the months before crucial midterm elections.

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In the aftermath of the polarized health care debate, some Republican leaders said they were reluctant to give Democrats further ammunition to portray them as knee-jerk obstructionists. But they also want to harness the populist anger at Mr. Obama's policies and are wary of alienating their base when they need it most.

As they balance these competing imperatives, Republicans said they planned to move deliberately at first and avoid declarations that could box them in. With Democrats' poll numbers down, Republicans said they did not necessarily want a fight for the sake of a fight, and they left open the possibility that Mr. Obama might pick someone they could largely support.

"We need to do our due diligence, and we need to probably bend over backwards both in appearance and in reality to give the nominee a fair process," said Senator [John Cornyn](#) of Texas, a member of the Judiciary Committee and chairman of the National Republican Senatorial Committee.

Likewise, some conservatives who led the fight against Justice [Sonia Sotomayor's](#) confirmation last year said they should learn from mistakes made then, like making grand claims about raising vast sums of money only to find that Republican senators were not as committed to an all-out battle.

"We will all be laughed at — including laughed at by Republican senators — by raising the war cries too loud and too early, when in fact the senators will not deliver what we are promising," said Manuel Miranda of the Third Branch Network, who organizes regular conference calls of like-minded conservatives about judicial nominations. Instead, he said, conservatives should take a more "modest" and "measured" approach at first.

Mr. Obama appears to be leaning toward choices intended to avoid provoking Republicans. Still, any [Supreme Court](#) vacancy energizes the most committed advocates on both sides, particularly over issues like abortion, guns and religion.

The Family Research Council, a leading conservative group, sent an alert to members on Friday and will ask supporters to begin contacting senators. "If he selects

someone with a radical judicial philosophy, the fabric of our already divided country will be torn even more,” Tony Perkins, the group’s president, said in an interview.

Ilya Shapiro, a constitutional scholar at the libertarian [Cato Institute](#), said the new health care law would play into the debate, especially given legal challenges to the program.

Even if Republicans cannot stop an Obama nominee, the fight could shape the fall campaign. “I think Republicans are going to try to take advantage of the Tea Partiers’ anger at what is a populist view of a government that is out of control,” Mr. Shapiro said. “They will try to make this a debate whoever the nominee is — not in the sense of trying to derail the nominee, but just to showcase the issues and to make the case that this is why you need to elect Republicans in the fall.”

Representative [Mike Pence](#) of Indiana, chairman of the House Republican Conference, pointed out that the Supreme Court could eventually “decide whether the federal government has the power to compel Americans to purchase health insurance,” and so, he said, “now is the time to have a thorough debate over the course and direction of the court.”

Republicans said they saw little prospect of a [filibuster](#) unless they could make the case that the nominee was far out of the mainstream. A filibuster would be hard to justify, they said, after Republicans assailed Democrats for blocking votes on President [George W. Bush](#)’s judicial nominees.

But they noted that Mr. Obama voted as a senator to filibuster Mr. Bush’s nomination of [Samuel A. Alito Jr.](#), so they could rationalize one if necessary. “In truly extraordinary cases, I reserve the prerogative to vote no on confirmation or even to vote to deny an up-or-down vote,” said Senator [Lamar Alexander](#), Republican of Tennessee.

The court vacancy was barely raised on Saturday at the Southern Republican Leadership Conference in New Orleans, where hundreds of party activists met to strategize for the midterm election campaign. The relative silence on the issue underscored the sensitivity as Republicans decided how to respond to the nomination.

“No matter what new liberal the president appoints to take Justice Stevens’ place,” said Gov. [Haley Barbour](#) of Mississippi, “I like our chances in the [United States](#)

[Supreme Court](#) that we have a Constitution that requires limited government.” By all accounts, the three front-runners are Solicitor General [Elena Kagan](#) and two appeals court judges, [Diane P. Wood](#) of Chicago and [Merrick B. Garland](#) of Washington. The main choices of liberals are not in the top tier.

Ms. Kagan, considered by some Democrats as the most likely candidate, could be hard for Republicans to block given her lack of a judicial paper trail and her support from conservatives who appreciated her opening the doors to them when she was the dean of [Harvard](#) Law School.

Judge Garland, who is well known and well regarded in Washington’s political and legal circles, is widely seen by Republicans and Democrats as the safest choice, most likely to draw overwhelming bipartisan support. Judge Wood, who is less known in Washington, would be the favorite of liberals among the top three and has written decisions on abortion and religion that would generate more fire from the right.

“This nomination, I don’t think they’ll have that hard of a time,” said [John D. Podesta](#), president of the Center for American Progress and an adviser to the White House. “It’ll be hard to hold 41 Republicans against these candidates. They’re pretty solid.”

Senator [Charles E. Schumer](#) of New York, a Democratic leader who shepherded Justice Sotomayor through confirmation, said the focus should be finding a nominee who could influence Justice [Anthony M. Kennedy](#), the swing vote on the closely divided nine-member court, rather than selecting a firebrand who writes powerful dissents.

“One of the most important qualities for the new justice is the ability to win over Justice Kennedy,” Mr. Schumer said. In other words, he added, “somebody who’s going to be one of the five and not one of the four.”

But Republicans could accomplish goals short of actually denying Mr. Obama his choice. A confirmation fight could take up valuable Senate time and complicate the rest of Mr. Obama’s legislative agenda. A top Republican lawmaker said it might give Republicans leverage to negotiate a compromise over regulation of financial markets, so Democrats could clear the decks to take up the nomination this summer.

A confirmation fight on social issues like [same-sex marriage](#) or judicial activism could also create political problems for Democrats running in conservative states, like Senators [Blanche Lincoln](#) of Arkansas and [Michael Bennet](#) of Colorado.

Some conservatives argued that they had already framed Mr. Obama's choice. "One clear lesson from the Sotomayor process," said M. Edward Whelan III, president of the Ethics and Public Policy Center, "is the political appeal of the traditional understanding of the judicial role, as Sotomayor tried to sound like a judicial conservative in her confirmation hearing."

*Reporting was contributed by Charlie Savage and Sheryl Gay Stolberg from Washington and Jeff Zeleny from New Orleans.*

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