

Supreme Court: Obama Faces Decision With Lasting Impact

By Adriel Bettelheim, CQ Staff

No single appointment has the potential to define a presidency more than the naming a Supreme Court justice. But for all its headline-grabbing qualities, the decision rests on a fairly fluid set of political considerations: a prospective candidates' personal qualities, past experience and political instincts.

President Obama surely is prepared to undertake such an examination.

In spite of the economic crisis, two wars and an almost unimaginably crowded domestic agenda, the president knew long before he took office that he'd probably have to fill a vacancy on the high court early in his first term.

And at a time when he has abundant political capital, experts say Obama views the retirement of Justice [David H. Souter](#) as an opportunity to select a judicial activist who's committed to upholding decisions revered by the political left.

Though such an appointment will almost certainly lead to acrimonious hearings and a potentially lengthy confirmation fight, it also promises to strengthen Obama's political base while challenging an already weakened Senate Republican caucus to try to scuttle the nomination.

Senate Democrats considered the strategy when they were the minority party during the confirmation hearings of John G. Roberts Jr. and Samuel A. Alito, but concluded it was both tactically difficult and politically dicey, because of the way it could portray them as partisan and obstructionist.

"Republicans will do their best to talk up the issues and at the end of the day get 30 or 35 votes against, but nobody's actually going to try to block the nominee," predicted [Richard Samp, chief counsel of the conservative Washington Legal Foundation.](#)

Obama spoke with Souter on Friday afternoon and afterward interrupted the daily White House press briefing to announce the justice's retirement and praise Souter's "good sense of humor . . . integrity, equanimity and compassion."

"I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook. It is also about how our laws affect the daily realities of people's lives," said Obama, a former constitutional law professor. "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."

White House press secretary Robert Gibbs said one recent decision that didn't reflect such an understanding came in the 2007 case of Lily Ledbetter, in which the Supreme Court ruled against Ledbetter's pay disparity claim because the statute of limitations had run out by the time she discovered the discrepancy.

In January, the first bill Obama signed into law lifted the cap on compensatory and punitive damages that women may be awarded in wage discrimination cases.

As a candidate, Obama said he would not appoint a nominee who does not subscribe to the right of privacy established in *Roe v. Wade*, the 1973 Supreme Court case that found the Constitution protects access to abortions, and Gibbs said Friday the president would abide by that pledge. However, Obama did not make judicial nominations a prominent part of his campaign.

Sarah Binder, a senior fellow in governance studies at the Brookings Institution, said Obama will likely try to select a justice who is reliably left of center but not a liberal icon.

"I don't think the administration is well served by distraction," Binder said. "They need all the support they can get for their economic plans, health care and other agenda items. Getting distracted by a confirmation battle is not constructive, and this is an administration that like the trains to run on time."

Administration officials intend to send the nomination to the Senate before July, in an effort to ensure their nominee is seated in time for the next court term, the first Monday of October.

Though Obama appears to have much riding in his favor, the success of any nomination hinges on the administration's vetting process — which comes under the purview of White House Counsel Greg Craig — and with the president's own comfort level with his pick.

Thomas C. Goldstein, a partner in the Supreme Court practice of Akin Gump Strauss Hauer & Feld, predicts the president will seek someone smart, qualified, younger than 60 and, probably, female, to restore the gender balance that existed before Justice Sandra Day O'Connor retired, in 2006.

But [Goldstein speculates](#) the candidate will come from a big and diverse list that White House officials began assembling soon after Obama was sworn in — even before [Justice Ruth Bader Ginsburg triggered talk of a court vacancy when she underwent surgery](#) for pancreatic cancer in February.

The administration's vetting process came into question following the withdrawals of high-profile nominees like [ex-Senate Democratic Leader Tom Daschle](#) due to tax problems. But a Supreme Court pick merits other, more arcane considerations.

Typically, the safest picks are sitting federal judges, who've said enough in rulings to offer clues about their ideological leanings but still tend to confine their remarks to the narrow parameters of each case. "Most good judges stick to the facts and don't say things that are too outlandish," said Samp.

A riskier strategy would be to select a legal scholar who has staked out broad and more provocative positions in law journal articles and elsewhere. This fact was borne out during the 1987 confirmation hearings of [Robert H. Bork](#), a conservative jurist whose notions of a limited role for federal judges inflamed political passions and triggered a three and a-half month battle that ended in when the Senate defeated his nomination, 42-58.

Obama also might opt to select a politician with little or no judicial experience, whose past work syncs up with his vision of a jurist with compassion and real-world perspective. Individuals who might fit this description include several of the president's Democratic colleagues from his Senate days like [Claire McCaskill](#) of Missouri and [Amy Klobuchar](#) of Minnesota, or Michigan Democratic Gov. [Jennifer M. Granholm](#).

It's unclear how much input Vice President [Joseph R. Biden Jr.](#) will have in the selection. Biden, a Senate Judiciary chairman from 1987 to 1995, presided over the contentious confirmation hearings of Bork and Justice [Clarence Thomas](#), as well as those of [Anthony M. Kennedy](#), Souter, Ginsburg and [Stephen G. Breyer](#). At a minimum, he is likely to use his contact with longtime colleagues to help smooth the nominee's way.

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