

SUPREME COURT: Enviro issues at stake in looming nomination fight

Though Justice David Souter's anticipated retirement from the Supreme Court is virtually certain to spark an ideological war and provide an early test of President Obama's political strength, it appears unlikely that it will dramatically alter the philosophical bent of the high court.

The 69-year-old justice, who was appointed by President George H.W. Bush, has long been viewed as one of the more liberal voices on the Supreme Court, and pundits say it appears unlikely that even an appointment by a Democratic president would dramatically shift the court to the left.

News of Souter's anticipated retirement at the end of the current court term first broke last night. The Supreme Court has yet to officially confirm those reports.

As with most other recent Supreme Court nominations, the fight is virtually certain to touch off a lengthy and heated battle between the two parties. And it could be something of a test run for other fights down the road, as other liberal groups hope -- if not expect -- that Obama will have a chance to name several other Supreme Court nominees during his time in office and reshape what they see as a largely conservative court.

Souter's replacement will be the first Supreme Court Justice appointed by a Democrat in 15 years. Only two of the nine current justices -- Ruth Bader Ginsburg and Stephen Breyer -- were appointed by Democratic presidents.

As a result, groups on the left -- including environmentalists -- have quickly begun gearing up for a chance to put their stamp on the Supreme Court.

"Justice Souter's retirement is also a reminder of the legacy a president leaves with his appointments," said Nan Aron, president of the left-leaning Alliance for Justice. "Justice Souter remained on the bench long after the president who appointed him left office. President Obama now has the opportunity to nominate someone worthy of his own historic legacy."

Souter typically sides with environmentalists on any number of issues; most notably, he was on the side of the majority in the *Massachusetts v. EPA* decision on greenhouse gas emissions.

Environmentalists, however, still view the vacancy as pivotal, largely because it will potentially allow the Obama administration to put someone on the bench who will be a voice on their issues for years to come. "President Obama's selection of a new justice will likely determine the fate of basic environmental safeguards for decades to come," said **Glenn Sugameli** of Earthjustice.

In particular, **Sugameli** pointed to topics such as access to courts to challenge various regulations and a wide range of potential cases involving the Endangered Species Act and land and water protection. Additionally, the court could take up cases regarding federal siting authority for electric transmission lines and other energy infrastructure as well as ongoing legal fights over water rights in the West and the roadless rule for national forests.

Sugameli also pointed out that with industry groups having relatively few allies in the White House or on Capitol Hill, they are increasingly likely to turn to the courts in an effort to overturn what they view as unfriendly business regulations.

Though those cases will start far below the Supreme Court level, **Sugameli** said many federal courts still are filled with nominees of President George W. Bush and other Republican presidents and could produce decisions that overturn Obama administration regulations, and may eventually make their way to the high court.

"This is the first time in a long time where the real right-wing groups or polluters do not have a friendly president and House or Senate on their side, and as a result, if they want to challenge new safeguards for the environment, I think there will be a lot of challenges to those safeguards in courts," **Sugameli** said.

He added, "The chances of [a friendly ruling] are fairly low, but they're probably better than trying to get the president or the Congress to do it, in many cases."

When Souter was confirmed to the court 18 years ago, he was little-known, and he has often sided with the more liberal members of the court and repeatedly drawn the ire of conservatives. Most notably, Souter was one of the four justices to side with Democrat Al Gore in the Supreme Court decision over the Florida recount in the 2000 presidential election.

Three names have already floated to the top as potential replacements for Souter: two federal judges, Diane P. Wood of Illinois and Sonia Sotomayor of New York, and Obama administration Solicitor General Elena Kagan. But about a half-dozen other names have also been floated as potential replacements, among them Stanford University law professor Kathleen Sullivan and Democratic Michigan Gov. Jennifer Granholm.

Obama is widely expected to pick a woman to replace Souter, as Ginsburg is the lone female justice on the court.

Meanwhile, right-wing groups have already started to circulate documents that criticize some of the names that are reportedly at the top of the White House list.

"The current Supreme Court is a liberal, judicial activist court," Wendy Long of the conservative-leaning Judicial Confirmation Network said in a statement. "Obama could make it even more of a far-left judicial activist court, for a long time to come, if he appoints radicals like Diane Wood, Sonia Sotomayor, and Elena Kagan. A new Justice in this mold would just entrench a bad majority for a long time."

Souter's retirement from the court comes at a politically difficult time for the Republican Party, and it remains to be seen just how much conservatives can do to block a nomination.

By the time Souter's replacement is ready to come before the Senate, Democrats are likely to have 60 votes in the chamber with Sen. Arlen Specter's defection to the majority as well as the expected seating of Minnesota's Al Franken sometime this summer.

Specter's departure from the GOP is particularly notable because he served as the top Republican on the Senate Judiciary Committee and helped usher through the last two Supreme Court nominees -- Chief Justice John Roberts and Justice Samuel Alito. At this point, Republicans have yet to settle on who will take over for Specter, though Sen. Jeff Sessions of Alabama appears to be the front-runner.

At the same time, a Supreme Court fight could unify a Republican Party that is struggling to find a political message and has hit its lowest point in decades in terms of political power. Supreme Court battles have become increasingly partisan in recent years as the issues have become a higher priority for interest groups on both sides of the aisle.

The appointment is also not without pitfalls for Obama, despite the overwhelming majority that his party holds in the Senate. A number of Supreme Court nominees have failed in no small part because of opposition from within the president's party -- most recently former Bush White House counsel Harriet Myers, whose nomination was withdrawn after strong opposition from conservatives.

Reprinted with permission from E&E Publishing. www.eedaily.com 202.628.6500. Copyright [2007]. All rights reserved.