

Jury Is Still Out on Obama Judges

By [John Stanton](#)
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Senate Republicans and conservative activists are warily watching President-elect Barack Obama's early executive branch nominations, aiming to glean a sense of how the new president will approach the minefield of judicial nominations after he takes office in January, activists and aides said.

Although the first round of nominations to the federal bench are not expected until the spring at the earliest, conservative activists and Republicans in the Senate are already gearing up for a sustained battle with the new president over nominations.

Late last month, Senate GOP leaders vowed to block any nominations that they feel hew too far to the left.

In a speech to the Federalist Society late last month, Senate Minority Leader Mitch McConnell (R-Ky.) seized on Obama's statements that judicial picks should demonstrate the ability to "empathize" with certain groups as proof that his picks will not fit the "strict constructionist" model that Republicans have favored.

"In my opinion, we should reject the permanent establishment of an entirely subjective, extra-constitutional test for judicial nominees. We cannot countenance a process where nominees will be selected based upon whether they promise, or are presumed to favor, certain 'sides' in litigation," McConnell said. "This is antithetical to what 'judging' is. And it calls into serious question whether nominees who are chosen on these grounds will even be capable of living up to their solemn oath of administering justice without respect to persons."

Senate Minority Whip Jon Kyl (R-Ariz) was more blunt, telling the conservative legal organization, "I will lead a filibuster if the nominee is the kind of radical leftist who decides cases based on empathy rather than the Constitution or the law. And if that's what he intends to do, then I'll try to get my colleagues to join in that as well."

Curt Levey, executive director of the Committee for Justice, said outside activists have begun discussing how they will take on Obama on the nomination issue. "We're already talking strategy. ... I think we need to be prepared for the worst," Levey said.

But Levey and others acknowledge that in recent weeks, Obama's decision making on his economic advisers and first round of planned Cabinet nominations have given some conservatives pause.

Noting that many of Obama's picks have indicated he might take a moderate approach, Levey said activists are willing to give the new administration a chance, even as they prepare for the worst.

"We don't know which Obama we'll see," Levey said. "I want us to be ready in case we're wrong ... but we're giving him the benefit of the doubt for now."

A senior GOP Senate aide who works for a member of the Judiciary Committee agreed, saying much of the nuts and bolts planning for nominations battles is on hold until Republicans get a better sense of the type of candidates Obama will choose.

"He seems to be smarter and more pragmatic than we thought. Now, it remains to be seen whether that will translate to judges because he'll be under enormous pressure from his base," the aide said.

Glenn Sugameli, senior legislative counsel for Earthjustice, said it remains unclear what types of nominees Obama will select. Sugameli noted that Vice President-elect Joseph Biden was chairman of the Judiciary Committee for a time and that Obama aid Melody Barnes, who will become director of the Domestic Policy Council, worked for liberal Sen. Edward Kennedy (D-Mass) on judicial nominee issues.

While Obama's nominees will certainly come from the progressive side of the political spectrum, Sugameli said the amount of experience in the process — and difficulties — of moving judicial nominees that his team has should mean they will tap viable candidates. "You've got plenty of exposure there," Sugameli said.

Sugameli predicted that aside from the Supreme Court, which is always a major fight, skirmishes can be expected when Obama begins nominating judges to the Fourth Circuit, which has traditionally been a conservative circuit, and D.C. Circuit, which deals with cases challenging federal regulations.

"Flash points will clearly be the D.C. Circuit ... and the Fourth Circuit because it is a circuit in flux," Sugameli said.