

CAN WE EXPECT CHANGES AT THE SUPREME COURT?

Appellate Law Practice Group

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Law360, New York (March 03, 2010) -- As the United States Supreme Court hears argument and issues opinions during this term, speculation continues about whether Justice John Paul Stevens or Justice Ruth Bader Ginsberg will retire.

Conjecture is fueled by the fact that these two liberal members of the court — Justice Stevens, at 90, and Justice Ginsberg, given her recent health problems — may wish to leave early enough in President Obama's term to ensure that a liberal replacement is nominated and confirmed by the Senate.

Statistics show that justices tend to retire relatively early in a presidential term, presumably to assure that the political impact of their departure and the difficulties of the confirmation process during an election are minimized.

Political scientists from Santa Clara University recently issued a study about the timing of departures from the court. Marcia Coyle, *The National Law Journal* (Feb. 2, 2009) quoting Terri Peretti and Alan Rozzi in their study, "Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power." They studied the departures of justices from 1954 to 2006 to evaluate the timing in light of various factors.

Peretti and Rozzi concluded that regardless of the justices' possible desire to time their departure to allow for a replacement with the same philosophy, other factors have often intervened to prevent that outcome.

A justice might delay retirement due to his continuing desire to exercise power. Or a justice waiting for a compatible president to take office might face an unexpected illness or death. All of these factors suggest that the process and timing of a justice's departure is difficult to reliably predict.

With that caveat, it nevertheless seems likely that at least one of the older justices currently serving on the court will retire after this term.

Justice Stevens, who remains healthy at 90, is nevertheless the oldest justice now serving on the court. If he does intend to leave during President Obama's term of office, he will likely need to retire soon. The closer to the election it gets, the more likely the confirmation process will be stalled by opponents of a replacement.

Predictions of an imminent departure for Justice Stevens were fueled by his decision not to hire a full complement of law clerks last fall. On the other hand, if he remains in office until February 2011, he will surpass Justice Oliver Wendell Holmes as the oldest sitting justice. This fact

prompted court watcher Tom Goldstein to suggest that he will delay his retirement until some time after that date.

Blog chatter and press speculation also center on Justice Ginsberg, whose recent health issues and advanced age, 76, prompt some to predict her retirement. Justice Ginsberg underwent surgery for colorectal cancer in September 1999. That treatment was successful. But she was diagnosed with early stage pancreatic cancer shortly after President Obama's inauguration.

She has continued to serve after undergoing surgery for it, and some former law clerks have reported to the press that she has no intention of retiring. But given her advanced age and the rather bleak statistics for survival of pancreatic cancer, discussion about her potential departure from the court continues.

The chatter may amount to nothing more than the proverbial "tempest in a teapot" since no dramatic change is likely if either Justice Stevens or Ginsberg leave the court. President Obama has promised to nominate a relatively liberal replacement.

Despite the heightened political rhetoric and divisive confirmation process that has become the norm, a moderately liberal nominee with strong credentials would likely be confirmed. President Obama's comments during the election campaign shed some light on the kind of person he may nominate.

He said, "[W]hen you look at what makes a great Supreme Court justice, it's not just the particular issue and how they rule, but it's their conception of the Court. And part of the role of the Court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout." The Democratic Debate, The New York Times (Nov. 15, 2007).

President Obama also mentioned pragmatism as a desirable quality, saying, "I think that Justice Souter, who was a Republican appointee, Justice Breyer, a Democratic appointee, are very sensible judges. They take a look at the facts and they try to figure out: How does the Constitution apply to these facts? They believe in fidelity to the text of the Constitution, but they also think you have to look at what is going on around you and not just ignore real life." Obama: Fundamental change needed to help Michigan, nation, The Detroit Free Press (Oct. 3, 2008).

President Obama's short list for the replacement for Justice David Souter ultimately included four women, all of whom were interviewed by the White House. Sonia Sotomayer, who was eventually nominated and confirmed, headed the list, which also included three others, Judge Diane Pamela Wood of the Seventh Circuit Court of Appeals, Dean Elaine Kagan, now the Solicitor General, and Janet Napolitano, now serving as Secretary of the Department of Homeland Security.

Other frequently mentioned names at the time included Chief Justice Leah Ward Sears of the Georgia Supreme Court, Governor Jennifer Granholm of Michigan, Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit, and Judge Ruben Castillo of the District Court for the Northern District in Illinois.

One prominent academic frequently mentioned as a potential nominee, Professor Cass Sunstein, has been appointed by President Obama to director of the Office of Information and Regulatory Affairs (OIRA). His appointment was viewed favorably by many because of his pragmatic approach to costbenefit analysis and regulation that is thoughtful, pragmatic and fair, though he was also castigated by Glenn Beck as being outside of the mainstream on the basis of some of his writings.

A replacement of either Justice Stevens or Ginsburg with any of these potential nominees would not dramatically alter the court's jurisprudence. According to the statistics at SCOTUSblog (www.scotusblog.com), during the 2009 term, 32.9 percent of the decisions were unanimous. Another 17 decisions were either 8-1 or 7-2, which is approximately 22 percent of the decisions.

These statistics illustrate the large number of cases that are decided on non-ideological grounds, and as to which there is a broad agreement on the court. Only 29.1 percent of the decisions during the 2009 term were issued with a 5-4 split. It is on these battleground issues that a change in the makeup of the court might make a difference.

But since both Justice Stevens and Justice Ginsberg are liberal jurists, a replacement with a similarly liberal approach likely means a negligible change to the current voting blocks. The biggest change would result from the loss of Justice Stevens as the leader of the liberal wing of the court.

Under Supreme Court rules, Justice Stevens is charged with appointing the justice to write a majority opinion when Chief Justice John Roberts is in the minority. Justice Stevens, with his vast experience, is reputed to use this power effectively to fashion a majority.

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