

# David Souter Retirement

By Logan Scisco

Last Friday, Supreme Court justice David Souter announced his retirement, pending the confirmation of a successor. Souter has been a liberal vote on the court, progressively moving in that direction since arriving to the Court in 1990. He was a former New Hampshire Attorney General, New Hampshire Supreme Court justice, and First Circuit Court of Appeals justice before serving on the highest court in the United States.

As most extempers are aware, mostly from their U.S. history classes in high school, the Supreme Court is one of the more powerful branches of government. It derives its power from judicial review, the power to declare acts of Congress unconstitutional. This was a power that was not expressly given to the Court in the Constitution, but was created in the 1803 Supreme Court decision of *Marbury v. Madison*.

With Souter's retirement, President Barack Obama will have his first opportunity to appoint a Supreme Court justice, enjoying this power earlier in his presidency than his predecessor George W. Bush, who had to wait until his second term to receive his first Supreme Court appointment (and he selected John Roberts).

This brief will explain Souter's arrival to the Court and his legacy, discuss possible successor options, and the political minefield that this decision creates for President Obama.

## Souter's Arrival & Impact on the Court

David Souter was selected for the Supreme Court after only serving two months on the First U.S. Circuit Court of Appeals by President George H.W. Bush in 1990 to fill the vacant seat once occupied by William Brennan. Conservatives had hoped that Souter would be a reliable vote on the Court and would eventually hope to overturn *Roe v. Wade*. Many of these hopes were based on a guess, though, because the Bush administration had decided to go with a so-called "stealth" pick to ease Souter's confirmation through the Senate.

Souter's confirmation came just three years after the Supreme Court voted down Ronald Reagan's nomination of conservative judge Robert Bork, a vote that largely heralded in the politicized judicial selection process we see today. In fact, today the process of politically going after a nominee with the purpose of defeating them is known as "borking." Conservatives hoped that they could avoid the same mistake Reagan made by selecting a candidate who did not have many scholarly writings that outlined controversial political positions. This would decrease the ammunition given to Senate opponents.

Strategically speaking, the "stealth" nomination worked and Souter joined the Court in October 1990. However, by 1992 it became obvious that Souter was not the conservative justice many had hoped for. In the 1992 Supreme Court case of *Planned Parenthood v. Casey*, Souter created a compromise with fellow justices Sandra Day O'Connor and Anthony Kennedy that upheld the right to an abortion as part of the Due Process Clause of the Fourteenth Amendment, a right that originated in the 1973 Supreme Court case of *Roe v. Wade*. It is this decision that is often referred to by court watchers as Souter's legacy. Following the *Planned Parenthood v. Casey* decision, conservatives were outraged and became ever moreso in coming years as Souter started to join liberal colleagues on other social issues such as affirmative action and the death penalty.

Souter also voted in favor of Al Gore in the infamous *Bush v. Gore* decision that decided the 2000 presidential election for George W. Bush.

## **Replacements**

Souter's decision to leave the Court comes at a personal and politically good time. Souter had always argued that he did not want to be on the Court into his 70's and since he is approaching 70, now is the time for him to leave Washington D.C. Also, Souter's retirement comes where there is a Democrat in the White House and with Arlen Specter's switch from the Republican Party and, assuming Al Franken holds onto the Minnesota Senate seat, the Democrats enjoy a filibuster-proof majority in the Senate. This allows a liberal justice to replace him and retain the 5-4 balance that exists on the Court between conservatives and liberals.

Legal scholars are already considering judges who can replace Souter on the Court, with most guesses centering on female candidates since there is only one woman on the Supreme Court, Ruth Bader Ginsburg, after Sandra Day O'Connor left several years ago (and was replaced by Samuel Alito). There has been a hankering for another female justice to replace O'Connor after Bush failed to appoint one and this will be one of the pressures the Obama administration faces when choosing a nominee.

The leading candidate is said to be the current U.S. Solicitor General Elena Kagan. She is the first woman to occupy the Solicitor General position and despite not having served as a judge, she appears to be well liked by both sides of the aisle, having been confirmed early this year by a 61-31 vote. It might also be a welcome change for a Supreme Court justice to be selected from outside of the traditional judicial system in order to add more diversity to the Court.

*The Christian Science Monitor* last week also laid out a few other possible nominees. Pamela Karlan and Kathleen Sullivan, who teach at Stanford University, are considered to be good picks if Obama wants a nominee with strong liberal credentials. Karlan is seen as an especially good choice if Obama would like to have the liberal equivalent of an Antonin Scalia on the Supreme Court. Another possibility is Sonia Sotomayor, a Hispanic judge on the Second U.S. Circuit Court of Appeals. She is also a strong liberal justice and would help Obama woo the Hispanic community, who voted for him in large numbers in the presidential election.

## **Political Minefield**

While this nomination allows Obama his first chance to modify the Court to his liking, it also presents a variety of challenges. Obama indicated during the third presidential debate with John McCain that he wants his judges to have empathy for the different groups in the United States such as racial minorities, the elderly, and the disabled and not to base their decisions solely on past legal decisions that lack emotion. The problem here is that justice is supposed to be about facts and Supreme Court decisions tend to rely on precedents. Conservative judicial groups are already warning that Obama's criteria for selecting judges will lead to an activist Supreme Court that ignores the intent of laws and tries to become a lawmaking body, a power that is specifically designed for legislators.

Obama also needs to evaluate his political capital when making this decision. The 2010 midterm elections could either enhance or reduce the Democratic filibuster-proof majority in the Senate, which has to play into Obama's calculation. Court watchers suggest that if Obama wants to appoint a strongly liberal justice now is the time to do it because he will most likely not enjoy this

scope of power for the remainder of his presidency when another appointment, coming from the possible retirements of John Paul Stevens or Ruth Bader Ginsburg, will come up.

However, pursuing this liberal strategy could cause immense political problems for the administration. Conservative legal groups have already mobilized and are prepared to oppose any nominee with pro-choice credentials. Also, appointing a strong liberal nominee could center the confirmation hearing on social issues such as affirmative action, abortion, and gay marriage, which are still divisive issues for the American public. As such, a divisive confirmation battle could inflame the culture wars that Obama is trying to move his administration beyond and could complicate other items on Obama's agenda such as a cap and trade system and healthcare reform. This is not an unlikely scenario when looking at how past Obama measures such as next year's budget and the stimulus package failed to get conservative backing.