The Fire Next Time

Another Supreme Court vacancy would spark a bruising fight, with activists in both parties eager for a confrontation.

By Kirk Victor

ews that Justice John Paul Stevens, the oldest member of the Supreme Court, had taken on only one law clerk for the Court's 2010-11 term sparked speculation that the 89-year-old jurist may retire after this term ends in June. After all, Stevens's usual practice would be to hire four clerks by now.

Even as that development was making waves, Justice Ruth Bader Ginsburg was hospitalized on September 24 as a precautionary measure after feeling faint following treatment for an iron deficiency. Ginsburg, 76, returned to work the next afternoon. She was successfully treated earlier this year for pancreatic cancer that was detected at an early stage.

Coming so soon after Sonia Sotomayor's confirmation in August, the reports about the Court's two most liberal justices have prompted activists to begin thinking about the next Supreme Court vacancy.

Regardless of whose seat is being filled, advocates on both ends of the ideological spectrum predict a bruising fight if a vacancy occurs next year. "It will be a big battle for a number of reasons," said Curt Levey, executive director of the conservative Committee for Justice. "One is just the very fact that it is an election year. Two is that when the president was at the height of his popularity, Republicans were only willing to fight so hard on Sotomayor. But there was sort of an understanding that they would fight harder next time. Of course, if the president were to nominate somebody very middle-of-the-road, there wouldn't be a fight. But I think the chances of that are pretty small." 

Nan Aron, president of the liberal Alliance for Justice, contends that no matter whose seat is vacated or whom President Obama nominates, Republicans are spoiling for a fight. "Judging from the way in which Republicans are treating the president's nominees so far, they will mount an all-out battle to defeat whomever is sent to the Senate by the president."

Aron maintains that GOP treatment of Sotomayor was telling, as only nine of 40 Republicans backed her confirmation. She ticked off the reasons why the depth of Republican opposition surprised her: The former Appellate Court judge is the first Hispanic nominated for a Supreme Court seat; she is "moderate-to-conservative on some issues"; and "her views were unknown on some hot-button issues such as abortion and prayer in school."

If the gloves will be off irrespective of who the next nominee is, Aron hopes that Obama will choose "a progressive who is boldly committed to core constitutional values." In other words, a liberal, although she did not use that word, which has been jettisoned from the lexicon of the Left as politically toxic.

"A lot of Republican antics around these nominations have to do with firing up their base and firing up their fundraising," Sen. Sheldon Whitehouse, D-R.I., a Judiciary Committee member, said in an interview. "Judicial nominations are a tried-and-true way of making those audiences respond."

Sen. Lindsey Graham, R-S.C., the only Republican on the Judiciary Committee to support Sotomayor, disagrees that a raucous tussle over the next nominee is inevitable. "I can't think a Supreme Court [nomination] won't be without controversy, but if [Obama] picks a qualified person like Sotomayor, I think he will be in good shape," Graham said in an interview.

Levey said that Republicans got "a lot of traction, a lot of concessions" in the Sotomayor hearings. "That will only embolden them the next time," he said. For example, conservatives were heartened when Sotomayor parted company with Obama's musings about "empathy." The "job of a judge is to apply the law," she said. "So it's not the heart that compels conclusions in cases. It's the law."

Levey said, "Give us more ammo and good organization next time and the nominee will be defeated—not necessarily because there will be a filibuster or because there will be 50 votes. Instead, the nominee will be withdrawn, he predicted, after "a number of red-state Democrats go to the president and say, 'Especially in an election year, we cannot support this nominee.'"

So, Levey's message to liberals? "Is it a big fight the Left wants to win narrowly or a big fight they want to lose narrowly, because they will lose if they go too far to the left."

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