

Supreme Court justice choice: President Obama should avoid moderation now

By Frank Askin

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By Frank Askin/ Star-Ledger Guest Columnist

President Obama is not lacking for advice on the kind of person he should nominate to succeed retiring Justice **John Paul Stevens**. Even some liberal Democrats are advising the president to choose a centrist who can avoid a Republican filibuster (as well as a 2010 election issue) and merely hold the current 5-4 conservative court balance in place.

But if the president allows the pundits of moderation to dictate the choice, he will have squandered a unique opportunity to begin charting the course of constitutional interpretation for the 21st century.

I would urge Obama to reject the voices of moderation and instead emulate the bold stroke of Richard Nixon, who appointed the late William Rehnquist to the court in 1971 not for marginal gain but for the purpose of challenging the "activist" Warren Court and espousing an alternative vision of our constitutional system.

What the court needs now is not even another Stevens, a most-moderate Republican who, as he himself has confirmed, was a conservator of early Nixon-era values against the authoritarianism of Rehnquist and the radical right. It needs a justice who can articulate a judicial and constitutional vision that is both faithful to our democratic heritage yet creative enough to meet the requirements of a changing society in our nation's third century.

We need a justice who can apply the essential principles of the Constitution to the new realities of the decades ahead. His or her constitutional compass must be calibrated to promote equality in an increasingly racially and ethnically polarized society; defend freedom of expression and communication in an age of media monopoly; support the pursuit of happiness amidst the despair spread by diminishing economic opportunity; defend liberty and individual autonomy against popular demands for conformity and discipline in the age of terrorism, and protect individual privacy against increasingly intrusive technology.

And of course remain, as Justice Stevens so eloquently was, a champion of free and fair elections in opposition to those who would allow monied interests (including multinational corporations) to drown out the voices of the rest of us.

If any member of the current court is equipped by intellect, ideology or temperament to frame let alone articulate solutions to the fundamental constitutional issues of the tricentennial, it might be Sonia Sotomayor, but as the youngest justice she would need an ally and is unlikely to strike out on her own.

Again with the possible exception of Sotomayor, no one on the current court can be expected to advocate educational equity for the children of the poor and the powerless. When this issue was before the court in a Texas case in 1971, there were four justices prepared to say that state

governments could not allow public education to be dispensed according to the respective wealth of its municipalities. Those four dissenters were ready to find that such school financing schemes constituted a denial of equal protection of the laws for the residents of impoverished communities with narrow tax bases. Since then, a few states, including New Jersey, have reached that conclusion under their own state constitutions.

In another failed opportunity to break with hoary tradition, the court refused in a 1973 case out of Oregon to recognize a fundamental right to a habitable dwelling. In dissent, Justice William O. Douglas wrote: "In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are." Since the retirements of Justices William Brennan Jr, and Thurgood Marshall, there is no one left to argue that the Constitution requires that federal courts closely examine the impact on the rights of poor people to the necessities of life such as education and housing.

The academic journals are filled with debate on these and other issues of economic rights under a Constitution designed to promote the general welfare. However, those ideas will receive no hearing in the high court unless a president sends jurists prepared to explore new frontiers of constitutionalism.

As others have said, it is time for Obama to think outside the box as he searches for a jurist who can do likewise.

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