

Obama presidency could reshape courts

By **FRED BARBASH** | 11/1/08 1:54 PM EST

www.politico.com

While the differences between John McCain and Barack Obama blur on some issues, there is no mistaking the gap between them on the subject of the Federal courts.

McCain has stressed his preference for judges and justices who defer to the elected branches of the government. Obama has stressed just the opposite, a preference for appointees who check "majoritarian impulses."

McCain, in his most extensive speech about the Supreme Court, challenged a ruling he felt abridged Americans' property rights. Obama, by contrast, has chosen in his campaign to attack a ruling that made it harder for women to sue for equal pay.

Obama's ideal appointee recognizes "who the weak are, and who the strong are in our society." McCain stresses judges who show "self-restraint."

Beyond their differences over *Roe v. Wade*, the 1973 Supreme Court ruling legalizing abortion, the gap between McCain and Obama reprises the struggle for the court between liberals and conservatives underway since the 1970s.

Either man through his appointments could have a profound impact on the judiciary for decades to come, with McCain continuing the conservative ascendance brought about by the Reagan and Bush years and Obama striving to reverse it.

At the Supreme Court level, a single new justice joining the reliably conservative bloc—which includes Chief Justice John Roberts and Justices Antonin Scalia, Samuel Alito and Clarence Thomas—could indeed threaten *Roe*, while a new justice opposed to capital punishment, for example, could build momentum for blocking the death penalty once again.

In fact, Obama stands a greater chance than any Democratic President since Lyndon Johnson of making an impact on the both the appeals courts and the Supreme Court, especially if the Democrats get 60 seats in the Senate, which must confirm appointments.

Among the reasons, say court observers, is the unique knowledge he and his running mate would bring to the process.

Obama, a Harvard Law School graduate, was a lecturer at the University of Chicago for 12 years, from 1992 to 2004, when he was elected to the U.S. Senate.

Biden, who earned his law degree at Syracuse, chaired the Senate Judiciary Committee from 1987 through 1995, presiding over the stormy confirmation hearings for Justice Clarence Thomas and Robert Bork, and opposing both nominations.

"The first thing to know about Obama, which hasn't gotten sufficient attention, is that he is himself appointable to the Supreme Court," said Harvard Law School's Cass Sunstein, an Obama friend, advisor and former faculty colleague at the University of Chicago Law School.

"He is a constitutional specialist who has taught for many years, said Sunstein. "There's a guarantee that we'd get someone of the first intellectual rank. No Harriet Miers." Plus, he said, Obama "is obviously alert to the fact that there's been a rightward drift on the court....I wouldn't say he'd be interested in anything like 'leftwing' judges," said Sunstein, who stressed that he was

speaking for himself only, and not the campaign. But “he does want people of certain perspectives and values when the legal materials are unclear.”

A McCain judiciary “would be pretty similar to the Bush judiciary,” said George Washington University law professor Orin Kerr. “I think most Republican administrations have actually looked pretty similar in terms of the kind of people they look for,” he said. Kerr, who serves on a McCain campaign legal advisory committee, stressed that he was speaking only for himself.

“The tough thing to predict,” especially in a McCain administration, “is where the Senate goes in terms of how much deference the president gets” in making appointments, said Kerr. “The key change was with Roberts and Alito, where you saw a lot of senators opposing the nominee for general ideological reasons,” as opposed to the confirmations of Scalia, nominated by President Reagan and Ruth Bader Ginsburg, nominated by President Clinton.

“A President McCain will likely face a Senate with 55 or more Democrats,” Doug Kendall, head of the Constitutional Accountability Center, said in a recent Brookings panel discussion. “And with liberal justices retiring, and the possibility of a sharp ideological shift in the makeup of the Supreme Court, a Democratic controlled Senate will almost certainly demand a consensus nominee. The skirmishes we saw over John Roberts and Sam Alito will look like child’s play in comparison to the battles likely to accompany McCain’s Supreme Court nominees.”

All talk of the Supreme Court’s future makeup is inherently speculative. The next president could have no appointments or many. The oldest Supreme Court justices—John Paul Stevens, 89, and Ruth Bader Ginsburg, 79—are commonly perceived as the most likely to depart. On the other hand, no one expected Sandra Day O’Connor to retire in 2006, or the death of Chief Justice William H. Rehnquist in 2005.

Presidents have a much greater chance of leaving their mark on the U.S. Courts of Appeal, which are the end of the line for the vast majority of legal issues in the Federal courts and the primary source of Supreme Court justices—including Roberts and Alito—in recent years.

Russell Wheeler, a Brookings expert on the courts, calculates that the new president will immediately have 15 appellate vacancies to fill, and would likely get another 14 in the probable event that Congress expands the courts soon to accommodate rising caseloads. Retirements from among the 164 appeals court justices now sitting.

“A reasonable estimate,” Wheeler wrote in a recent study, “is that a President McCain would increase the total proportion of Republican appointees from 56% to 74% and reduce the proportion of Democratic appointees from 36% to 26%.

“That would make for the second most lopsided appellate judiciary in modern history, after 1953, following 20 years of Roosevelt and Truman appointees,” Wheeler said in his study. “A President Obama, by contrast, would reduce the proportion of Republican appointees [from 56%] to 42% and increase the proportion of Democratic appointees from 36 to 58%,” he wrote.

Appointees to the Federal bench often go their own way once confirmed for life—“whenever you put a man on the Supreme Court he ceases to be your friend” Harry Truman once quipped.

Nevertheless, ideology and party does matter. “When I got to the United States Senate and went on the Judiciary Committee as a young lawyer,” Biden said during his debate with Sarah Palin, “I was of the view and had been trained in the view that the only thing that mattered was whether or not a nominee appointed, suggested by the president had a judicial temperament, had not committed a crime of moral turpitude, and was -- had been a good student.

“....It took about five years for me to realize that the ideology of that judge makes a big difference.”

