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If I Were Obama, My Supreme Court Pick Would Be ...

Law360, New York (April 06, 2010) -- Law360 asked leaders of appellate groups at top firms who they would nominate to the U.S. Supreme Court if they were in President Barack Obama's shoes and Justice John Paul Stevens announced his retirement.

Peder Batalden, Jeremy Rosen, Felix Shafir and John Querio

Horvitz & Levy LLP, the nation's largest civil appellate firm

President Obama would want to choose a nominee who possesses a rich background of diverse and interesting experiences, who is bright and scholarly without being pretentious, who is young enough to embrace technological developments in the courts, who would balance the court by adding the perspective of a Westerner, and who is perceived to be a centrist and thus could be confirmed easily. Three excellent Ninth Circuit judges fit that bill: Judge Margaret McKeown, Judge Susan Graber and Judge Barry Silverman.

John Dragseth

Fish & Richardson LLP, co-leader of the appellate group

I would select Solicitor General Elena Kagan or Senator Amy Klobuchar. They are the youngest candidates on the short list and should both be confirmable. More important, with only two women now on the court, and a raft of quality female candidates, it is certainly time for another female justice.

As for Kagan, she is eminently qualified, with an unmatched academic resume. She seems confirmable, and her lack of courtroom experience should not be a problem because the Supreme Court is more about thinking deeply than it is about litigation. She deserves to be the front-runner.

Klobuchar is a real dark horse, but she is a relative moderate who is respected in the Senate, and also has a stellar academic resume. She is also a self-effacing Midwesterner, and any court would be much improved by the addition of some Midwestern practicality. I wouldn't want to be a senator trying to block either of them.

Kevin M. Fong

Pillsbury Winthrop Shaw Pittman LLP, co-leader of national appellate practice

Justice Carlos R. Moreno of the California Supreme Court, who would bring to the Court a unique perspective as a state supreme court justice. All of the current U.S. Supreme Court justices have come from the federal Circuit

Courts of Appeals; a state supreme court justice would bring to the Court different insights on many issues, including issues of criminal law and land use issues, for example.

James J. Foster

Wolf Greenfield & Sacks PC, appellate attorney and member of the Supreme Court bar and the bar of six circuit courts

Of the names currently being bruited about, Obama would be wise to nominate Elena Kagan, the solicitor general. She has been through the confirmation process recently, has impressive academic credentials as Harvard Law School dean, and, most importantly, as she will be turning 50 this month, she is eight-to-nine years younger than other candidates (Garland, Wood) under discussion and thus will presumably sit on the court that much longer.

Because of increasing contentiousness in justice selection, holding a seat for a longer tenure has considerable appeal."

Lynne Liberato

Haynes and Boone LLP, co-chair of the appellate practice

Judge Diane Pamela Wood, 7th U.S. Circuit Court of Appeals.

Judge Wood is a thoughtful and careful judge with a national reputation. She demonstrates an understanding that the justices are not only the masters but the servants of the law and of the parties who appear before them.

Gene Schaerr

Winston & Strawn LLP, litigation partner in the Washington office and chair of the firm's nationwide appellate and critical motions practice

Although I'm a staunch Republican, if I were President Obama, I would feel a desire to choose someone with some Democratic connection. And of the candidates in that group, I would choose Judge David Tatel of the D.C. Circuit. He's a delightful person, an excellent legal craftsman, and a judge who, in my experience, takes seriously his obligation to adhere to and apply the laws written by Congress rather than twisting them to his personal preferences. An added bonus is that he's blind — and for that reason would provide inspiration to millions of Americans challenged by physical disabilities.

David B. Goroff

Foley & Lardner LLP partner and national chair of the firm's appellate practice

I would choose Kathleen Sullivan, one of the nation's foremost appellate advocates and constitutional theorists, and a respected professor and dean at Stanford Law School, who could provide a strong, young progressive counterpoint to the conservative majority on the Roberts court.

Doug Hallward-Driemeier

Ropes & Gray LLP, head of the appellate and Supreme Court practice

If a vacancy occurs, the president will be in the fortunate position of choosing between a number of superb candidates, each of whom would be a wonderful Supreme Court justice. I had the pleasure of working closely with one of those candidates, Elena Kagan, when I was an assistant to the solicitor general. Without a question, Elena would be a wonderful justice.

Although the SG's office deals a wide variety of issues — as broad as the court's own docket — Elena quickly grasps the subtleties in any case. She also appreciates the real-world consequences of the court's decisions, which the president has identified as an important qualification for his nominee. Finally, it is clear that those in the White House and elsewhere in the Justice Department value Elena's judgment. She would make a terrific addition to the court.

Kirk C. Jenkins

Sedgwick Detert Moran & Arnold LLP, partner in the appellate group

In nominating a successor to Justice John Paul Stevens, President Obama should seek not only a brilliant lawyer, but someone who would bring a breadth of real-world experience to a court which today consists of nine former judges from the federal circuits. Through most of the 20th century, Supreme Court nominees were frequently drawn from outside the federal appellate courts, including Congress, the Cabinet and the private bar. President Obama should revive that tradition by nominating United States Senator Sheldon Whitehouse of Rhode Island.

Over the next decade, the Supreme Court will likely face a range of important issues in criminal law, including federal sentencing, the death penalty, habeas corpus and issues arising from the government's anti-terrorism efforts.

Senator Whitehouse would bring an important perspective to these issues, having served as both a United States Attorney and as his state's attorney general before his election to the Senate, as well as serving on the Judiciary Committee and the Select Committee on Intelligence in the Senate.

In addition, the court will certainly be asked over the next several years to define the parameters of its recent landmark cases impacting both the legislative and political process, such as *Heller v. District of Columbia* and *Citizens United v. FEC*. Having served in both the state and federal government, Senator Whitehouse would bring a deep understanding of those worlds, far removed from the judiciary, to the court's debates.

In his four years in the Senate, Senator Whitehouse has demonstrated not only that he has a keen legal mind, but has shown himself to be an incisive, aggressive investigator in Senate committee rooms. Two of the finest 20th-century justices — Hugo Black and Earl Warren — held political office before joining the court. President Obama should elevate another: Senator Sheldon Whitehouse.

Stephen Kinnaird

Paul Hastings Janofsky & Walker LLP, co-chair of the appellate group

If I were in President Obama's shoes, I would choose Solicitor General Elena Kagan. She has already distinguished herself in her first year in the solicitor general's post. She is an accomplished legal scholar with a powerful intellect, constitutional expertise, a measured approach and practical experience in the executive branch. Having deftly led two very different institutions, the Solicitor General's Office and Harvard Law School, General Kagan appears to have the personality and personal skills to be effective at the court. She should also be acceptable to moderate Republicans, and she has the poise to handle the confirmation proceedings.

Richard E. Lerner

Wilson Elser Moskowitz Edelman & Dicker LLP, partner and chair of the firm's national appellate practice team

The likeliest pick will be U.S. Solicitor General Elena Kagan, who is eminently qualified, and has a reputation for being a consensus builder. Being of the relatively youthful age of 49, she may well serve for decades. And while the president has already appointed one New Yorker to the court — Justice Sonya Sotomayor — Kagan (who grew up in New York City) has lived outside New York since she graduated high school. So geography won't be a hurdle, at least not a big one. Of course, it doesn't hurt that she was a professor of law at the University of Chicago Law School and dean of Harvard Law School.

Lee Marshall

Bryan Cave LLP, leader of the appellate client service group

I would recommend Seventh Circuit Judge Diane Wood. She is smart. She writes well. And she has a great demeanor on the bench and a reputation as a consensus builder. Judge Wood would have some very big shoes to fill, but it would be great to see another Chicagoan and Seventh Circuit judge get the opportunity.

Kurt Melchior

Nossaman LLP, partner and general counsel

It goes without saying that the nominee must be a distinguished lawyer. There is no room for mediocrity on the Supreme Court.

However, it is probably a good idea to go outside the list of appellate judges for the nomination. Throughout our history, there have always been people from other parts of the profession on the Supreme Court, and the court has been the better for this broadening of experience.

But the president should not fear political opposition to his appointment. As a learned attorney and constitutional law professor himself, President Obama is in a superior position to judge the abilities and perspectives of potential nominees. The president has an established record as a mainstream person who is sensitive to the needs and views of our era. He should thus appoint someone who meets his own personal standards both in intelligence and insight, and in the perspectives of our time about our society and the world.

It is necessary that the appointment be of someone who will be a strong voice for justice to all segments of our diverse and multiplex society. That matters more than the gender or color of the person chosen, though those matters are of course also important in symbolics and in reality.

Specifically I would strongly consider Senator Whitehouse (R.I.) who has prosecutorial experience in addition to a good college and law school education, or Kathleen Sullivan, now in private practice but formerly a very well-known Stanford law professor.

Michael Newman

Dinsmore & Shohl LLP, partner and chair of the labor & employment appellate practice group

Justice Stevens has not yet made the final determination to retire on a specific date, but there is speculation as to whom the president will choose to replace him when he does. Right now, I understand the president is looking at

the following three individuals: 1) Elena Kagan: U.S. Solicitor General 2) Hon. Diane Wood: 7th Circ. 3) Hon. Merrick Garland: D.C. Circ. All three would bring strengths to this most important and prestigious position on the high court.

Stephen Orlofsky

Blank Rome LLP, head of appellate practice and former U.S. district judge for the District of New Jersey

I come at this with the following background. I have been practicing law for 35 years, mostly as a trial lawyer or trial judge. Of late, I have become an appellate lawyer as well. I spent four years as a United States magistrate judge, and almost eight years as a district judge. In May 2000, I was nominated by President Clinton to the Third Circuit, but because it was too close to the 2000 presidential election, I never received a confirmation hearing.

Every current sitting justice of the Supreme Court was nominated while a circuit court judge. Justice Sotomayor had also been a district judge. Before she went on the bench, she had some experience in private practice, as did Chief Justice Roberts, who was an appellate advocate. Justice Stevens had been an antitrust litigator before he went on the court of appeals.

Obviously, President Obama already has a short list of candidates which was developed when Justice Sotomayor was nominated and confirmed. In my view, the president should appoint a distinguished lawyer from private practice with trial experience.

The last time such a person was nominated was Justice Lewis Powell. Trial lawyers bring a different perspective to the bench. They understand the problems of clients, trial lawyers and trial judges. Justice Thurgood Marshall, who was a great trial lawyer, is an example of what I am talking about. Having tried civil rights cases before hostile judges and juries in the South, he brought a unique perspective to the bench. I think it is time we had another Supreme Court Justice with that perspective.

Kelly Woodruff

Farella Braun & Martel LLP partner

I would nominate Kathleen Sullivan, the former dean and current professor of law at Stanford Law School, because she has impeccable credentials, litigation and academic expertise in constitutional law, and a proven track record of leadership and consensus building, which I believe the court needs.

Eric L. Yaffe

Gray Plant Mooty, litigation practice group co-chair

Richard Cordray would be an excellent choice as the next Supreme Court justice should Justice Stevens retire. Mr. Cordray is currently the attorney general for the state of Ohio and is running for re-election this November. He was previously the state treasurer for Ohio. Mr. Cordray graduated from the University of Chicago Law School, where he was editor-in-chief of the school's Law Review.

Immediately upon graduation, he clerked for Supreme Court Justice Byron White, and then for Justice Anthony Kennedy. Following his clerkships, he was in private practice at Kirkland & Ellis and elsewhere. Eventually, he entered public service, serving as a state representative, solicitor general for Ohio and as treasurer for Franklin County, before holding the statewide offices noted above.

Mr. Cordray has argued seven cases before the United States Supreme Court. For 13 years, he also taught constitutional law at Ohio State University's law school.

The justices of the Supreme Court were all appellate judges prior to their appointments. Mr. Cordray, as a former private practitioner, constitutional scholar, and statewide politician, would bring a fresh perspective to the court's deliberations.

At the same time, as a former Supreme Court clerk and as a Supreme Court practitioner, Mr. Cordray is familiar with the court and its procedures and would be prepared from day one to tackle the multitude of issues facing the court.

Finally, Mr. Cordray possesses a respectful and civil demeanor, and is a thoughtful lawyer who, rather than being an ideologue, would render his decisions based solely on a fair and thorough review of the facts and the law. He would make an outstanding Supreme Court justice.