

Watch Your Step

President Barack Obama will surely make mistakes. But with advice from these Washington observers, maybe he can avoid some of the traps out there.

Don't Delay Over Judges

BY DOUG KENDALL

No presidential administration in history has been better positioned to get top-flight judges onto the federal bench. With a president and vice president who are both experts in constitutional law, an already distinguished team of legal advisers, and a highly favorable environment on Capitol Hill, this should be, in the immortal words of George Tenet, a “slam dunk” for the Obama administration.

But potential pitfalls still abound on an issue as highly charged as the future of the Supreme Court and the federal judiciary, suggesting this list of do's and don'ts.

- *Don't wait until August 2009 to make your first appeals court nomination.* There are many good reasons why President Bill Clinton waited 10 months after his election to announce his first appeals court nominee—two failed attorney general nominations, a Supreme Court vacancy—but such a delay should not be repeated. The result was predictable: There were almost as many appellate vacancies (16) in January 1995 as there were when Clinton took office (17), a painful result given that this was the only two-year period in which Clinton had a Senate inclined to confirm his nominees.

Obama should move quickly in the transition period to identify a number of ideal candidates for open seats and provide the Senate Judiciary Committee with a steady stream of nominees to process. You never know when the political winds will change.

- *Don't put a political target on your nominees' backs.* President George W. Bush announced his first batch of appeals court nominations at a highly publicized East Room ceremony, effectively daring the Senate to object. Here's a cardinal rule: If you don't want the Senate to politicize the confirmation process, you shouldn't politicize the nominations process. Announce nominees one at a time with no fanfare. Do your job, and go public only when and if the Senate fails to do its job of moving nominees to an up-or-down vote in a reasonable time frame.

- *Do find the next generation of brilliant legal minds.* Both on the bench and in the confirmation process, legal credentials are the one form of currency that has bipartisan chops. It's harder for senators to block a nominee who's finished first in her law school class and clerked for the Supreme Court. And once on the bench, brilliant and accomplished judges can sway colleagues. Obama should be skeptical of candidates with political connections and fat campaign contributions. He should listen carefully to home-state senators, but not accept proposed nominees who fail to meet an objective standard of excellence.

- *Do look outside the judicial academy.* Over the past several decades, equal opportunity has fully taken hold in the legal profession, giving Obama a rich pool of highly qualified women and minority candidates. Obama won't have to look long and hard to get a bench that is both top-flight and diverse, but he should look not just inside the judicial academy but outside as well, to distinguished practitioners from the public interest and government ranks as well as the private bar, and also to law school faculties, where many professors have the vision, judgment, and litigation experience to thrive as appellate judges.

- *Do support a pay raise for federal judges.* Judicial pay is a problem, particularly for the exact people who

Obama should be looking to put on the bench. Judicial pay will never and should not compete with the money lawyers can receive in private practice, but a law professor shouldn't have to take a 30 percent pay cut to serve on the bench.

- *Do stop talking about empathy and start talking about faithful enforcement of the Constitution and the law.* By referencing "empathy" as a free-standing criterion for selecting judges, candidate Obama left himself open to predictable charges that his judges will be guided more by an emotional tenderness for the little guy than by the laws and the Constitution that already enshrine principles of access to the courts and equal justice.

The current reality is that an overwhelmingly conservative federal judiciary has been bending the law to favor

corporate interests and to undermine individual rights. Moreover, the Supreme Court has never fully lived up to the Constitution's inspiring text and history, especially the Reconstruction amendments that wrote liberty and equality into our founding document.

If President Obama appoints highly qualified judges from diverse backgrounds, who will faithfully interpret the Constitution and laws and respect their progressive and egalitarian goals, these judges will be easily confirmed by the Senate and will serve as his most enduring legacy.

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