



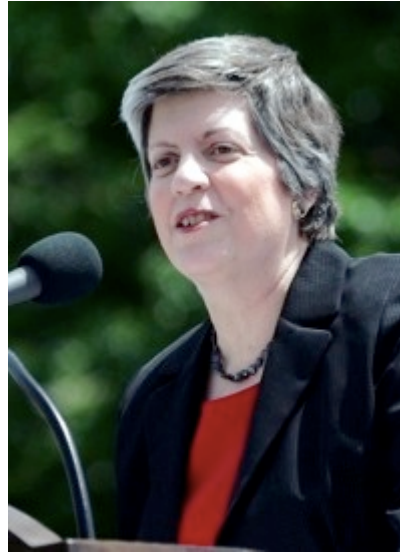
Written by [Bob Adelman](#) on December 28, 2009

## Will Obama Nominate Napolitano for the Supreme Court?

Evidence is mounting that Obama will have another opportunity to appoint a justice to the Supreme Court when Justice Stevens retires next summer.

Justice John Paul Stevens, age 89, [raised some eyebrows](#) when he hired just one law clerk to his staff for the current term. Full-time Justices can hire as many as six clerks, and retired Justices usually hire two.

Speculation as to who might be nominated to replace Stevens was fueled by NBC's Chuck Todd's [suggestion](#) (to Laura Ingraham on her radio show) that Janet Napolitano would soon resign her post as Secretary of Homeland Security in order to be available for the nomination:



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Personally, [Obama] likes her probably more than any other cabinet secretary outside of [Robert] Gates on a personal comfort zone. I think he's determined to put somebody who's actually run for elective office on the Supreme Court. You know, we're in the first Supreme Court, I think in a hundred years, that hasn't had somebody with elective office experience at any point in time. He's talked about wanting that as a criteria.... He's a big fan of hers.

President Obama has made himself abundantly clear about his position on appointing justices to the Supreme Court. As a Senator, Obama expounded on his "empathy" standard to explain why he voted against Justice John Roberts as Chief Justice:

While adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases — what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.... In those difficult cases, the critical ingredient is supplied by what is in the judge's heart.

Instead of looking to original intent (see this author's article on [this](#)), Obama wants his justices instead to be "somebody who's got the heart — the empathy — to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor or African-American or gay or disabled or old — and that's the criteria by which I'll be selecting my judges."

In a recent *New York Times* article, Neil Lewis pointed out that Obama "would be able to — and fellow Democrats certainly expect him to — reverse or even undo the current conservative dominance of the



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courts.” This position flies in the face of what Americans want from the Supreme Court. A recent [Rasmussen Report](#) indicates that 36 percent of likely voters consider the Supreme Court to be “too liberal”, while only 20 percent consider it to be “too conservative.” And 70 percent of those polled think that the Supreme Court should “make decisions based on what’s written in the Constitution and legal precedents,” versus 25 percent who think that it should “be guided mostly by a sense of fairness and justice.”

How well would Janet Napolitano measure up to Obama’s “empathy” standard?

Putting aside her [immediate difficulties](#) as Secretary of Homeland Security, she was busy as Governor of Arizona voting against restrictions on eminent domain (see this author’s articles [here](#) and [here](#)) that would have kept local governments from taking private property from some owners and giving it to others, as well as [voting against the Second Amendment](#) in two important bills that had already passed the state legislature.

She also [voted against several pro-life measures](#), including bans on partial-birth abortion and taxpayer funding of abortion.

If Justice Stevens retires, and if Napolitano is appointed to replace him, will that tip the scales of justice? According to UPI, [probably not](#).

Named to the High Court by President Gerald Ford in 1975 and expected to be a conservative, Justice Stevens became more liberal over time, and now is considered to be “the liberal lion of the Supreme Court.” If Napolitano did replace Stevens, little if anything would “change.”

*Photo of Janet Napolitano: AP Images*



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