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Interesting piece . . .

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News

Speculation builds over chief justice successor
Jan Crawford Greenburg, Washington Bureau

When Supreme Court Justice Anthony Kennedy walked into a District of Columbia magnet school last month to talk to students about concepts of freedom, he said he was hoping they would gain a greater understanding of democracy.

But his key role in unveiling the "Dialogue on Freedom" initiative, with help from the American Bar Association and First Lady Laura Bush, prompted some court watchers to suggest he also may have something else on his mind.

"I'm sure he wants to be chief justice," one court observer said.

Chief Justice William Rehnquist has not announced his retirement, but most agree he is likely to do so this summer or next. With such a closely divided court, the magnitude of that prospect already has public interest groups, lawyers and law professors quick to speculate on even the sincerest intentions of possible nominees and anxious over what all predict will be a colossal confirmation battle.

"This is going to be one of the most dramatic moments in American history," Ralph Neas, president of People for the American Way, said of the confirmation hearings for the next Supreme Court justice.

Indeed, the bitter battle that Neas' group has spearheaded over Charles Pickering, one of President Bush's federal appeals court nominees, is only a hint of what's to come when the administration seeks to fill a vacancy on the high court, observers say. The current court generally is divided 5-4 on contentious issues such as race, religion and the role of government, and Bush is poised to nominate up to three justices, including the chief justice, as aging ones retire.

Rehnquist, 77, is a likely candidate for retirement this year or next, as is Justice Sandra Day O'Connor, although she said recently she would not step down this year. Justice John Paul Stevens, the court's most liberal member and, at 81, its most senior, also could retire this term--particularly because Democrats control the Senate and, Neas vows, would not confirm an ardent conservative to replace him.

But the chief's spot has grabbed the interest of many. To be sure, the chief justice has just one vote, but he also assigns opinions when he is in the majority. That can help shape how broadly or narrowly a decision is written. What's more, the chief is the administrator of a branch of government.

As such, filling that post could present the biggest problem for Bush, particularly if Rehnquist is the only justice to step down. The Senate historically has placed greater emphasis on confirming the chief justice than associate justices, and Democratic leaders already have indicated they will not make it easy for Bush to fill a vacancy.

Conservative groups, aware of the looming battle, are becoming increasingly critical of the administration's approach. They say the administration is not doing enough to get ready for the fight and are particularly upset at Bush's refusal, despite requests, to mention the issue of judicial appointments in his State of the Union address.

Further complicating matters is that there is no obvious choice to take Rehnquist's place. Opponents on the left and the right have raised flags about several of those believed to be contenders, including Kennedy and the current White House counsel, Alberto Gonzales. Groups such as Neas' say they would love to take on two other possible nominees, conservative federal appeals court Judges J. Harvie Wilkinson III and J. Michael Luttig.

Some have said Kennedy's statesmanlike behavior in recent weeks has the cast of a potential chief justice candidate.

That's not to question his sincerity in the "Dialogue on Freedom" initiative. Kennedy, 65, has had a long-standing interest in promoting the virtues of the legal system to young people.

"I would think if an opening occurs, he certainly is one of the people who would be considered seriously," said Jesse Choper, a law professor at the University of California at Berkeley. Of the Democratic-controlled Senate, Choper said: "They'd be hard-pressed to beat him."

Elevating a current justice could siphon attention from the nominee who would take his place as associate justice. That's what happened in 1986, when President Ronald Reagan sought to elevate Rehnquist as chief and nominated Antonin Scalia as associate justice. The Senate spent all its time on the chief's nomination, while Scalia--one of the court's most ardent conservatives--skated through unanimously.

That said, "Chief Justice Kennedy" is an extremely unlikely

scenario. His nomination would infuriate the far right, which was outraged by his refusal in 1992 to overturn *Roe vs. Wade*, as well as other decisions it perceives as liberal, such as one that blocked clergy from praying at school graduation ceremonies.

"A lot of the president's conservative base would strongly oppose elevating Kennedy," said Tom Jipping, director of the Center for Law and Democracy at the Free Congress Foundation.

Moreover, elevating Kennedy to chief would give the left ample fodder as well. He joined the court's three most conservative members two years ago, for example, in dissenting from a decision that struck down state efforts to ban certain late-term abortions.

Bush vs. Gore role damaging

But his role in *Bush vs. Gore* could be the most damaging for his prospects. Any confirmation hearing for Kennedy (or O'Connor, if she were tapped for the chief's post) would resurrect the 2000 presidential election. Kennedy and O'Connor are considered the architects of the 5-4 opinion that stopped the vote recounts in Florida and handed the election to Bush over Al Gore.

O'Connor, who will be 72 next month, would have those problems as well as her age working against her, said David Yalof, a political science professor at the University of Connecticut. Bush probably would prefer a younger nominee who would serve for more than a few years, he said.

The other two conservatives on the court, Scalia and Clarence Thomas, are considered simply too conservative--both would overturn *Roe vs. Wade*, for example--to be confirmed by a Democratic-controlled Senate, Neas, Yalof, Choper and others said.

As such, most observers predict Bush will have little choice but to look outside the court for its next chief, just as President Dwight Eisenhower did in 1953 with Earl Warren, then governor of California, and President Richard Nixon did in 1969 with Warren Burger, then on the U.S. Court of Appeals for the District of Columbia Circuit.

"We're looking at a moment where the current president's best prospects for chief justice lie outside the court," Yalof said.

Yalof and other court watchers, such as Choper, say they believe Bush would like to name the first Hispanic to the court. Most say White House Counsel Gonzales is the front-runner, certainly for

associate justice, because he has the confidence of Bush and may not have the damaging paper trails of other potential nominees.

The latter likely would do in the other leading Hispanic candidate, Emilio Garza, a judge on the U.S. Court of Appeals for the 5th Circuit. Garza has openly suggested his opposition to Roe vs. Wade, a decision he said is "inimical to the Constitution."

Gonzales could raise brows

Gonzales could be a controversial choice, however, particularly for chief. He served on the Texas Supreme Court just 23 months before assuming his current position, and he could be viewed as too political, Neas and others said. Moreover, the far right views him suspiciously, noting that while on the Texas Supreme Court he joined a majority decision allowing some minors to get abortions without parental notification.

But Yalof said he thought Gonzales "had a lot to offer for chief" because it is an administrative post.

"He's currently in the administration and is someone the president would feel comfortable with, not simply rendering decisions but running a branch of government," Yalof said.

Bush may believe he could get a more predictable conservative as chief, because the appointment would not move the court to the right. Rehnquist, one of the court's most conservative members, would overturn Roe and has led the court in scaling back congressional power and handing it to the states.

If so, Bush could turn to the U.S. Court of Appeals for the 4th Circuit, where Wilkinson and Luttig have established solid conservative reputations. Wilkinson, who turns 58 this year, is a former law professor at the University of Virginia and the chief judge of the circuit.

Luttig is a former Scalia clerk who worked to help get Thomas confirmed while working in the Justice Department. Philosophically, he is closer to Scalia and Thomas--the justices Bush said during the campaign he most admired--than Wilkinson. He wrote the high-profile opinion, which the Supreme Court upheld, striking down a section of the Violence Against Women Act as beyond Congress' power.

Recently, however, the two have parted ways dramatically in several high-profile cases, with Luttig, 47, all but accusing Wilkinson of being a faux conservative.

"Many people think Luttig has blessed Wilkinson by making him seem like a moderate statesman," one court observer said.

Ruled with liberal colleagues

In a recent high-profile school desegregation case, Wilkinson joined with more liberal judges in refusing to hold a North Carolina school system liable for running a race-conscious magnet school. Wilkinson said the school district could not be held liable because it had been under a court order to end segregation. But Luttig, in dissent, said Wilkinson "variously ignored and misunderstood" the law.

They also split ways in a high-profile case over the breadth of Congress' power to protect endangered species. Wilkinson wrote for the majority that the federal government had power to limit the taking of red wolves on private lands, a decision Luttig harshly criticized in dissent.

"Wilkinson is more in the mold of the gentle conservative, whereas Luttig is more in-your-face," said one lawyer who frequently practices in the 4th Circuit. "I think Wilkinson tries to be more scholarly, whereas Luttig has much more of a rubber-hits-the-road kind of approach."

That's not to say Wilkinson is not conservative. He wrote a majority opinion upholding the Clinton administration's "don't ask, don't tell" policy that excluded acknowledged homosexuals from the military.

"I would guess if either Luttig or Wilkinson is on the Supreme Court, their voting patterns would not be that different," said A.E. Dick Howard, a law professor at the University of Virginia.

Conservative groups acknowledge that either could be difficult to confirm, which could prompt Bush to name a stealth candidate, such as Judge Samuel Alito Jr. of the U.S. Court of Appeals for the 3rd Circuit. They put the blame partly on Bush and suggest the administration has ceded control of the debate on the issue to the Democrats.

"I believe the president, before any Supreme Court vacancy, needs to provide sustained public leadership on judicial appointments, generally," said Jipping of the Center for Law and Democracy. "If the administration is going to wait until there's a Supreme Court vacancy, they're going to lose. Or they're going to feel compelled to

nominate someone who won't be worth it."

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PHOTOS 3; Caption: PHOTO: Supreme Court Justice Anthony Kennedy unveils the "Dialogue on Freedom" initiative last month before students in Washington. Some observers say he is angling to become chief justice. AP photo by Kenneth Lambert. PHOTO: White House Counsel Alberto Gonzales would be the first Hispanic to serve on the court. AP photo by J. Scott Applewhite. PHOTO: Chief Justice William Rehnquist is expected to announce his retirement this summer or next. AP file photo by Marcy Nighswander.

---- INDEX REFERENCES ----

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