

Received(Date): 28 DEC 2002 02:04:25

From: Jamil Jaffer [REDACTED] P6/b(6)

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Bcc: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

Subject: : FW: NYTimes.com Article: Aides Weigh Supreme Court Picks

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR:Jamil Jaffer [REDACTED] P6/b(6) [UNKNOWN])

CREATION DATE/TIME:28-DEC-2002 02:04:25.00

SUBJECT:: FW: NYTimes.com Article: Aides Weigh Supreme Court Picks

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BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
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I'm sure most of you have seen this already, but just in case you were enjoying the winter vacation and taking a break from the usual run of politics and the law, I thought you might find this article of interest....

Best,

JJ
Jamil Jaffer

P6/b(6)

-----Original Message-----

From: articles-email@ms1.lga2.nytimes.com
[mailto:articles-email@ms1.lga2.nytimes.com] On Behalf Of

P6/b(6)

Sent: Saturday, December 28, 2002 12:48 AM

To: P6/b(6)

Subject: NYTimes.com Article: Aides Weigh Supreme Court Picks

This article from NYTimes.com

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Aides Weigh Supreme Court Picks

December 27, 2002

By NEIL A. LEWIS

WASHINGTON, Dec. 26 - White House officials are so convinced that there will be at least one Supreme Court vacancy by the end of the current term in early summer that President Bush's senior aides have been quietly conducting serious internal discussions about possible nominees.

These conversations have begun with a discussion of whether Chief Justice William H. Rehnquist will decide to end his 31-year career on the court at the end of this term and whether Mr. Bush will have to fill one or two vacancies.

In almost all of the possibilities, officials said, Alberto R. Gonzales, the White House counsel and a longtime legal adviser to Mr. Bush from Texas, would be a candidate. Mr. Gonzales would be the first Hispanic member of the Supreme Court. Mr. Bush's top aides, notably Karl Rove, the president's chief political adviser, are described as keenly

aware that this would provide a political bonus for both him and the Republican Party, which has been aggressively courting Hispanic voters.

"I don't think there's any question the president would turn to him," said a senior administration official who knew details of the informal but high-level discussions.

The political considerations, and delicate ethnic balancing, are so central to the deliberations that administration officials said the chances of one possible candidate, Judge Samuel A. Alito Jr., a federal appeals court judge in Newark, may have lessened after one senior official noted that there was already an Italian-American on the Supreme Court, Justice Antonin Scalia.

Besides Mr. Gonzales, the other figure who has emerged as a strong candidate is Judge J. Harvie Wilkinson III, the chief judge of the appeals court based in Richmond, Va.

President Bush has been briefed on the internal conversations, which have taken on a new urgency because of the age of several justices and, if for no other reason, because Republicans have been waiting so long to make new appointments. The court began its ninth term this year without a turnover, the longest such period since the early 19th century.

The three oldest justices are Republicans, and White House officials believe that two of them, Chief Justice Rehnquist and Justice Sandra Day O'Connor, would be most likely to retire, given the knowledge that a Republican president would pick their replacements.

The incoming chairman of the Senate Judiciary Committee, Orrin G. Hatch, said one or more retirements were so inevitable that he was calling on any justices who plan to leave at the end of the term this spring to end the suspense and announce their intentions now.

"I believe we'll have at least one before June" when the court's current term ends, Mr. Hatch said in a recent interview.

Speculation about court retirements have been a regular feature in recent years given the ages of the three oldest justices, John Paul Stevens, who is 82, Chief Justice Rehnquist, 78, and Justice O'Connor, 72.

Another factor has changed the nature of the discussion from the inevitable speculation to a growing assumption that one or more of the justices may soon retire: The administration's let's-be-prepared deliberations were set in motion by the November election and the impending shift to Republican control of the Senate, which must vote on confirming any Supreme Court nominees.

When Mr. Rehnquist told the television interviewer Charlie Rose last year that "traditionally, Republican appointees have tended to retire during Republican administrations," he meant that it would be far easier for a justice to leave when his or her successor would bring a similar ideology. That reasoning becomes

even stronger with an aggressive Republican Senate taking over in January. If all the Republicans supported a nominee, the Democrats could not block confirmation unless they engaged in a filibuster, a difficult political task.

Administration officials do not expect that Justice Stevens intends to retire soon or has much interest in leaving and giving them the opportunity to replace him.

If the chief justice retires, Mr. Bush will have to decide whether to elevate one of the current justices to the chief's position and nominate a new associate justice or simply name a new candidate for chief justice from outside the court.

That calculation will change, of course, if a second justice, also chose to leave the court, creating a different situation.

Administration officials say the short list of candidates for Supreme Court seats besides Mr. Gonzales includes Judge Wilkinson, Judge J. Michael Luttig who also sits on the United States Court of Appeals for the Fourth Circuit and Justice Janice Rogers Brown of the California Supreme Court. Justice Brown, a black woman, wrote the majority opinion in 2000 interpreting the state's referendum against affirmative action in a way that delighted conservatives.

Other possibilities, officials say, include Judge Alito, who was a clerk for Justice Scalia and is nicknamed Scalito by some lawyers but who is seen as a far less confrontational figure.

Another candidate is Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit in New Orleans who is noted for sharp conservative opinions. Judge Jones was poised to be named by President Bush's father in 1990 when he decided instead to choose David H. Souter. Also mentioned has been Larry D. Thompson, the deputy attorney general, who would give the court two black members.

If Mr. Bush decides to elevate a current justice to the chief's position, the most likely candidates, officials said, would be Justice Scalia or Justice O'Connor because the other Republican-appointed members of the court have assorted liabilities. The two possibilities come with different political dimensions. Justice O'Connor would add to her historical legacy as the court's first woman by becoming the first woman chief justice. But Republicans have, for years, favored younger people as judicial choices so they can remain longer and have greater impact on the bench.

Elevating Justice Scalia would almost certainly entail a confirmation battle, but one in which the White House might be willing to engage.

If Mr. Bush needs to name someone from outside to become chief justice, a leading candidate, officials said, would be Judge Wilkinson, who sits in Charlottesville and is 58.

Judge Wilkinson, they said, would provide the stature needed to be chief justice because of his courtly manner and his years leading the circuit court, the nation's boldest conservative appeals court. Moreover, they said, he would stand in relief to his more aggressively conservative benchmate, Judge Luttig and might thus be more palatable to Democrats.

Some conservatives are wary of Mr. Gonzales, unsure if he is sufficiently faithful to their views. They have been deeply disappointed by the performance of Justice Souter on the court after they had been assured he would be to their liking. "No more Souters" became a rallying cry, meaning no support for anyone whose views were uncertain.

These conservatives have suggested to administration officials that they would prefer that Mr. Bush abstain from putting Mr. Gonzales on the court now and wait for a later vacancy, which he could fill with Miguel Estrada who would by then have some judicial experience. Mr. Estrada, a Washington lawyer and reliable conservative, is expected to soon be confirmed to a seat on the federal appeals court in Washington.

In his most publicized ruling as a justice on the Texas Supreme Court, Mr. Gonzales charged that some conservative colleagues were engaging in "judicial activism" when they wanted to enforce a more rigid reading of a statute requiring minor girls to inform their parents before receiving an abortion. But in the same opinion, Justice Gonzalez suggested that while he was obligated to read the statute as he believed the legislature intended, his personal views were strongly opposed to abortion.

Officials believe that, in any event, his personal story in becoming the first Hispanic justice would become the dominant issue in any public debate. He was raised in humble circumstances by parents who never got past elementary school and he eventually graduated from Harvard Law School.

One official said that Mr. Gonzales had cultivated a notion that he was reluctant to be named to the court but that was untrue. The official noted that he still likes to be addressed as "Judge Gonzalez."

Judge Wilkinson may have a clearer judicial record on the abortion issue, upholding state restrictions in some cases.

One senior official said that while the prospect of filling a seat or two on the Supreme Court was exciting, it was also daunting. It is, the official said, "as much a burden as an opportunity."

In a web-exclusive column, Linda Greenhouse answers readers' questions on Supreme Court rules and procedure. E-mail Ms. Greenhouse a question at scotuswb@nytimes.com. Please include your name, address and daytime telephone number; upon request names may be withheld.

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