

# Worries arise over judicial nominees

Patricia Zapor/CNS

WASHINGTON — There isn't a vacancy on the Supreme Court yet, but battle lines over who might be named to fill an opening are already being defined over the chairmanship of the Senate Judiciary Committee, which will vet any nominees.

Chief Justice William Rehnquist, 80, is thought to be the most likely justice to step down soon.

Rehnquist announced in October that he is undergoing treatment for thyroid cancer. Though he continues to work from home, doctors who are not treating Rehnquist have said the treatment he has received suggests an aggressive type of cancer that can quickly prove fatal.

Other members of the court also may retire during the second Bush administration. Justice John Paul Stevens, the longest-serving member of the current court, is 84. Justices Sandra Day O'Connor, 74, and Ruth Bader Ginsberg, 71, have both been treated for cancer.

There has been speculation about who might be named to the court un-

der President George W. Bush since he took office nearly four years ago. The last member seated on the court, Justice Stephen Breyer, was named in 1994 by President Bill Clinton.

In the decade since, court watchers have paid close attention for rumors about whether anyone planned to announce retirement at the end of the court's term in June, a traditional point for justices to step down that allows a replacement to be confirmed during the summer recess.

Abortion opponents, however, are already working to shape who runs the Senate Judiciary Committee that gets first crack at confirming nominees to all federal judgeships. Specifically, they're trying to block Sen. Arlen Specter, R-Pa., from taking over as chairman of the committee.

Operation Rescue, the Christian Defense Coalition and other organizations were collaborating in mid-November on what they were calling a "Stop Specter Pro-Life Pray-in" that will assemble outside the Supreme Court and process to the office of Senate Majority Leader Bill



Reuters/CNS

Members of the U.S. Supreme Court are, back row from left: Ruth Bader Ginsburg, David H. Souter, Clarence Thomas and Stephen Breyer. Front row from left: Antonin Scalia, John Paul Stevens, Chief Justice William H. Rehnquist, Sandra Day O'Connor and Anthony M. Kennedy.

Frist, R-Tenn. There they hoped to prevail on him to block Specter from chairing the committee.

The organizers were opposing Specter on the basis of comments attributed to him in the *Philadelphia Inquirer*, in which he said he would block any nominee who would overturn *Roe v. Wade*, the 1973 Supreme Court ruling legalizing abortion.

Specter, who supports keeping abortion legal, later said he was not describing how he would run the committee, so much as explaining the reality of a Senate where the Republicans do not have enough votes to fight back a filibuster against a nominee who is known to favor reversing *Roe*.

Bernard Dobransky, dean and president of Ave Maria Law School, said it is perfectly reasonable for people who are worried about judicial nominees to start with who chairs the Senate Judiciary Committee, even if it means an intraparty fight for the Republicans over denying a chairmanship to someone who is in line for it.

"Among Catholic conservatives there is deep distrust of Arlen Specter," he said. "They don't think he keeps his word."

Mark Tushnet, a Georgetown University law professor who once clerked for the late Supreme Court Justice Thurgood Marshall, predicted Specter would be named chairman of the committee.

Those who are worried about Specter stacking the deck against a nominee who was expected to reverse *Roe* are making their point by raising the issue now. That attention should put Specter on notice that "people are watching," and that he will be held accountable if he seems to oppose White House nominees, Tushnet said.

Dobransky and Tushnet cited some of the same people commonly named as likely nominees.

Current White House counsel Alberto Gonzales, a former Texas Supreme Court justice and longtime Bush friend, was thought to be on the president's list of potential nominees. But when Gonzales was nominated for attorney general Nov. 10, many legal scholars either took his name off the "maybe" list or moved it down for a potential second or third vacancy during the Bush administration.

Tushnet said he agrees with those who put two judges from the 4th U.S. Circuit Court of Appeals at the top of the list of possible nominees: Judges J. Michael Luttig and J. Harvie Wilkinson III, both on the Richmond, Va.-based court.

He said anyone Bush nominates will have to be perceived as "reliably" pro-life when it comes to abortion while not being so clearly in favor of reversing *Roe* that opposition kills a nomination.

Dobransky named as possible nominees Miguel Estrada, a former Justice Department attorney whose nomination to the District of Columbia Court of Appeals was blocked; Emilio Miller Garza, a member of the 5th U.S. Circuit Court of Appeals; and Janice Rogers Brown of the California Supreme Court.

He said the test a nominee will have to pass with the White House will be less about promising to overturn *Roe* than his or her belief in judicial restraint, which in turn might translate to reversing *Roe*.

No matter whose name is on an eventual announcement from the White House, Dobransky said, the confirmation fight "will surpass the nastiness of that for Robert Bork and (Justice) Clarence Thomas."

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