

# Legal Times

LAW AND LOBBYING IN THE NATION'S CAPITAL

JUNE 9, 2003

PAGE 1

## Left and Right, Activists Gird For Court Fight

Specter of a Retirement Stirs  
Plans by Bush Foes, Defenders

BY JONATHAN GRONER  
AND TONY MAURO

As the clock ticks down to a possible retirement on the Supreme Court, partisans on all sides are gearing up for what promises to be the bloodiest confirmation battle in a dozen years.

Republicans have already met in the conference room of a D.C. law firm to brainstorm a campaign on behalf of any nominee. Senate Judiciary Committee staffers are at the ready. And leaders of liberal groups are canceling vacations and charting plans for the opposition fight.

"We've been preparing for this moment, really, since the day Bush was elected, or chosen," says Kate Michelman, president of NARAL Pro-Choice America and a veteran of battles over Robert Bork in 1987 and Clarence Thomas in 1991.

When the Court term ends later this month, it is still highly possible that neither Chief Justice William Rehnquist nor Justice Sandra Day O'Connor—the subjects of most retirement rumors—will step down. But that has not stopped the speculation, nor has it slowed the preparation throughout Washington in the event that President George W. Bush gets to fill the first Supreme Court vacancy in nine years.

"We have a fully staffed nominations unit and are preparing for a potential retirement in addition to working on filling the empty spaces on the federal bench," says Margarita Tapia, spokesperson for Judiciary Committee Chairman Orrin Hatch (R-Utah). Other senators say they have not beefed up their staffs

yet, but some vacancies have been filled with veterans of past nomination wars—such as Sen. Edward Kennedy's (D-Mass.) new committee counsel Jim Flug, who first worked with Kennedy in the 1960s.

Outside government, the first tangible sign that war councils are convening came on May 22, when about two dozen highly placed Republicans gathered at the offices of Jones Day overlooking the Capitol.

The three-hour session brought together in one room GOP executive-branch veterans of earlier nomination wars over Bork and Thomas, as well as key point people who hold the same positions today. Several Republican Senate staffers were also present.

"It was a collective sharing of memories about what happened then," says attendee C. Boyden Gray, a partner at Wilmer, Cutler & Pickering who was White House counsel when the first President Bush nominated Thomas.

Gray heads the Committee for Justice, a group that presses for confirmation of Bush judicial nominees. "The purpose was to inform the current people so they don't have to reinvent the wheel," he says.

According to several people who were present, Gray was joined at the meeting by Charles Cooper, former assistant attorney general for legal counsel; Michael Carvin, former deputy assistant attorney general for legal counsel; and Lee Liberman Otis, former assistant White House counsel and a founder of the Federalist Society who was a key player in Thomas' confirmation fight in 1991.

Cooper is now a partner at Cooper & Kirk, Carvin is a partner at Jones Day, and Otis is general counsel of the Department of Energy.

"This was a meeting of a group of conservatives engaged in nomination fights in the past or the present who are concerned that we don't have another Borking," says a GOP Senate aide who was not present but heard about the meeting in detail.

Gray says ideological issues and the makeup of the Supreme Court didn't come up at the session, which was totally devoted to practical nitty-gritty issues.

"We told them, 'Here's what to do if there is a vacancy,'" Gray says. "Where to have the war room, things like that."

Says another lawyer who was present but requested anonymity: "No specific decisions were made at the meeting. It was simply about what to expect and how to prepare yourselves for it. An older generation of experienced hands were passing on their insights to the current generation in the executive branch and on the Hill."

Among the topics that participants say were discussed were the importance of developing a press strategy and the need to respond quickly to themes and issues raised by Democrats regarding a nominee.

Several sources confirm that Associate White House Counsel Brett Kavanaugh, who has been working on judicial nominations since the start of the administration, was one of the current officials at the meeting. Kavanaugh declines comment, as do Cooper and Carvin. Otis was traveling and unavailable for comment.

One lawyer who was at the May meeting says a follow-up session has not been scheduled, but the GOP Senate aide says he wouldn't be surprised if one is held later this month.

John Nowacki, a conservative strategist who declines to say whether he attended the meeting, says Bush supporters are anticipating all-out war. "No matter who is nominated, what we've seen so far with the lower court nominees will pale in comparison," says Nowacki, director of legal policy at the Free Congress Foundation, whose predecessors were also active during the Bork and Thomas battles.

Nowacki says his group will defend Bush nominees and also hopes to win public support in the ongoing debate over the role of filibusters in blocking judicial nominations. That issue, currently the subject of Senate maneuvering, could come to the fore if Democrats threaten to filibuster a high court nominee.

"Americans have a sense of fairness, and they will want to know why the Democrats don't want an up or down vote," says Nowacki.

## ITCHING FOR A FIGHT

For their part, liberal groups that are likely to oppose a Bush nominee have yet to convene a mass meeting on Supreme Court nomination strategy, but work is underway researching the backgrounds of potential nominees.

Nan Aron, longtime president of the umbrella group Alliance for Justice, still holds out hope that no vacancy will occur.

"Does the administration really want a big fight a year before the election?" asks Aron, whose group is the lead liberal umbrella group on judicial nominations. "It certainly didn't help the first President Bush that Clarence Thomas was fought over the year before his re-election campaign."

Aron also says that if there is a vacancy, liberal opposition to a Bush nominee is not automatic. "I'm very serious about that," she says.

But when asked about White House Counsel Alberto Gonzales—usually viewed as the most politically palatable possibility for Democrats—Aron answers without hesitation.

"We would mount a fight on Gonzales," Aron says. The target would not be Gonzales' record on the Texas Supreme Court, but rather his work as White House counsel and his advocacy of administration policies on civil liberties, judicial nominations, and other issues. "We can and will prevail" against Gonzales or any other nominee that is opposed by a broad coalition, Aron says.

A grass-roots campaign on a Bush nominee will look substantially different from the ones mounted against Bork and Thomas, says NARAL's Michelman.

Through its e-mail network, Michelman says, her organization can quickly contact 750,000 people. "This capacity to mobilize, to educate, to inform, and to activate, is enormously powerful," she notes.

Michelman says she has already laid the groundwork with senators who favor the right to choose.

"We have made it clear we expect pro-choice senators to filibuster any nominee who does not view the right to choose as a fundamental constitutional right," says Michelman. "Merely stating that *Roe v. Wade* is settled law is not good enough."

Ralph Neas, president of People for the American Way, also says the filibuster option is part of the arsenal that opponents will use if necessary. Since 60 votes are needed to end a filibuster, opponents would need only 41 senators to block a nominee.

"But we have a good shot at 51 votes too," says Neas, who was a key player in prior battles as head of the Leadership Conference on Civil Rights. Neas says he

and his family took a vacation in January in anticipation of the time demands a nomination battle will create for him this summer. Grass-roots mobilization will be crucial to win, Neas says, and his 600,000 members are ready to form the core of a "progressive army" of millions.

## NEW FACES ON THE LEFT

Not all the leaders of the likely opposition are veterans of the Bork and Thomas battles. Aron expects that labor and disabilities rights groups will be more visible. Most of all, Aron predicts that environmental groups—minor players in the confirmation battles over Bork and Thomas—will be important new combatants.

"There's a level of awareness in the environmental community about the threat involved in judicial nominations that was not there even two years ago," says Douglas Kendall, executive director of the Community Rights Counsel, an environmental and land use group that has focused on judicial nominees for years.

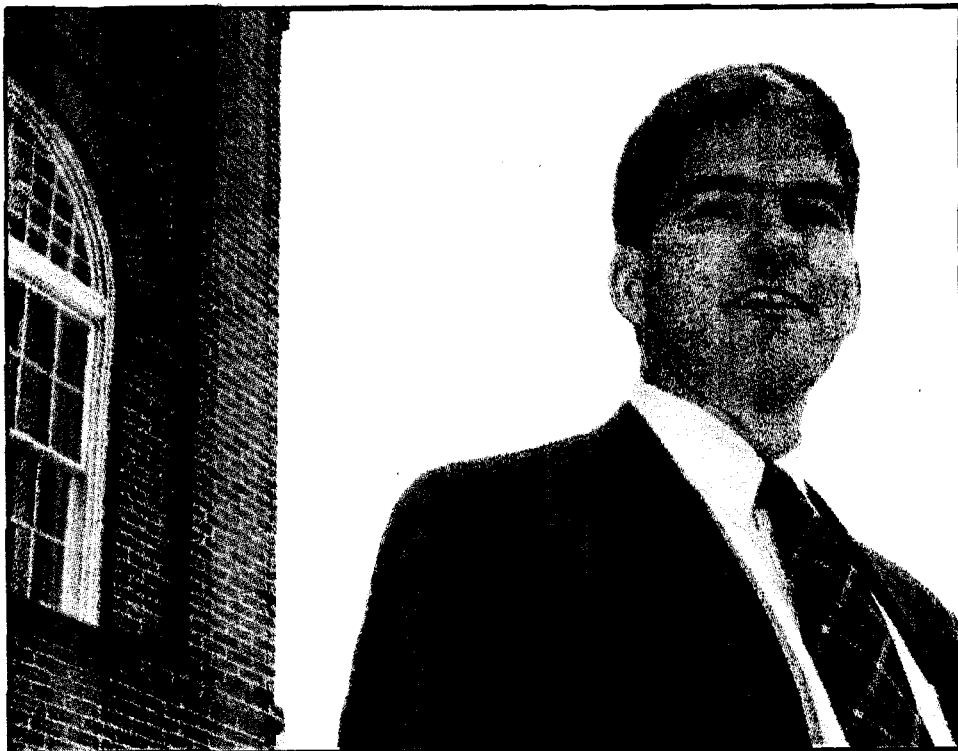
Environmental issues are the subject of only a few Supreme Court cases per term, and the Court's track record is mixed. But the potency of environmental laws can rise or fall on a wide range of Supreme Court rulings on issues of standing, the commerce clause, takings, the 11th Amendment, and the separation of powers, Kendall notes.

Kendall's group and Earthjustice—formerly the Sierra Club Legal Defense Fund—have formed an alliance to beef up environmental groups' research and advocacy in anticipation of a Supreme Court vacancy.

They, like others, are building files on the most-mentioned potential nominees, and they have been active on lower court nominees. A substantial number of senators opposing Miguel Estrada for the U.S. Court of Appeals for the D.C. Circuit have cited environmental concerns among others. Estrada's nomination, approved by the Senate Judiciary Committee, has been shut down by a months-long filibuster.

"We generated tens of thousands of messages into senators" on Estrada and other nominees, says Glenn Sugameli, senior legislative counsel with Earthjustice. For a Supreme Court nominee, he says, "We're talking about research, media, education, lobbying, outreach, networking, all of it. It will be a very high-profile issue for the national environmental community."

At least one other familiar face from past nomination battles has not gotten energized yet. Harvard Law School professor Laurence Tribe, who advised Senate Democrats on constitutional issues before the Bork and Thomas hearings, said in an e-mail last week, "I'm thinking as little about this as I can manage and am resisting requests to become involved. When the time comes, I suspect the force will become irresistible and I will get drawn in. But not without protest. For some reason, I'm feeling fatalistic about things this time around." ■



**ON WATCH:** Douglas Kendall of the environmental and land use organization Community Rights Counsel says there is a growing "awareness in the environmental community about the threat involved in judicial nominations."