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SHORT LIST FOR THE HIGH COURT

Hispanic Activists Offer Judicial Candidates for Nomination

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David G. Savage

For a decade, both Republican and Democratic presidents have considered Hispanic candidates for vacancies on the Supreme Court. So far, however, the results have been frustrating for Hispanic activists. Although one in nine Americans is of Latino heritage, no Hispanic has ever been nominated to the highest court.

"It is time, really past time, for a Latino on the Supreme Court," says Chicago lawyer Martin R. Castro, who chaired a Hispanic National Bar Association committee that has lobbied for such a nomination.

As the Supreme Court wraps up its term in July, the activists are poised to begin their campaign anew, if need be. The approach of the summer recess often sets off speculation about possible retirements and likely nominees for a successor.

For a president, nomination of the first Hispanic justice would set a marker for history, and offer a political bonus as well. In the nation's four largest states – California, Florida, New York and Texas – Hispanics make up a powerful voting bloc that can swing elections.

Two Names Surface

If President Clinton were to consider a Hispanic for the High Court this year, his advisers would be pushing two U.S. Court of Appeals judges.

One is Fortunato "Pete" Benavides of the 5th Circuit in Austin, Texas, who has a reputation as an evenhanded judge who is

nonetheless a frequent dissenter to the court's conservative rulings. The other is Jose A. Cabranes of the 2nd Circuit in New Haven, Conn., a scholarly moderate.

Administration officials, who do not want to be quoted, say the high-pressure lobbying from Hispanic activists has had an impact.

During Clinton's first term, the field of potential Hispanic nominees lacked a "true star," says one official. But those lobbying for a Hispanic nominee have been "persistent, very persistent," says another, and their message has been heard.

When President Bush had vacancies to fill in 1990 and 1991, several Hispanic judges made the short list, including Cabranes. But they also were viewed as relatively young and not quite ready for elevation to the Supreme Court.

Antonia Hernandez, executive director of the Mexican American Legal Defense and Educational Fund in Los Angeles, discounts the talk of Hispanic candidates appearing on a short list in either administration. "I don't believe a Latino has yet been under serious consideration" for a seat on the Supreme Court, she says. Former White House counsel C. Boyden Gray says Bush "would have been delighted to make such an appointment, but it's a complicated process and a lot of subtle factors come into play."

One factor was abortion. Conservatives wanted a judge who opposed *Roe v. Wade*. At the same time, the Democrats who controlled the Senate threatened to block an avowed opponent of abortion. In nominating David H. Souter and Clarence Thomas, Bush found candidates who had avoided public pronouncements on the subject.

Afterward Bush's chief of staff, John Sununu, met with Hispanic lawyers and said he doubted the Hispanic community was in agreement on who should be nominated to the Supreme Court.

"We took that as a challenge," says Carlos G. Ortiz, a New Jersey corporate lawyer and a leader of the Hispanic National Bar Association.

Determined to be prepared the next time, the association set up a committee in 1992 to screen potential nominees and to compile a candidate list. "We wanted to identify and evaluate the best candidates. And we wanted to prove we could unite behind these nominees. We didn't want anyone to have that as an excuse ever again," Ortiz says.

The list, presented to Clinton in 1993, includes Benavides and Cabranes; New Mexico Supreme Court Justice Joseph Baca; Gilbert Casellas, the former chairman of the Equal Employment Opportunity Commission; Los Angeles attorney Vilma Martinez; and former California Supreme Court Justice Cruz Reynoso.

Last summer, activists' hopes for a Hispanic nominee were briefly fanned when rumors spread that 78-year-old Justice John Paul Stevens was about to retire. The Hispanic lawyers sent their candidate list again. But the rumormongers had not consulted with Stevens, who announced he had no plans to step down.

A Chance to Make History

A Hispanic appointment would be the fourth to add diversity to the Court. President Wilson appointed Louis D. Brandeis, the first Jewish member of the Court, in 1916. More than a half-century later, the Court had its first black justice when President Johnson selected Thurgood Marshall in 1967. And in 1981, President Reagan ended the exclusive reign of the brethren when he chose Sandra Day O'Connor.

Who will be the first Hispanic on the Court? One contender favored by Clinton advisers, Benavides, 52, has won high marks as a solid judge "with no axes to grind, no proclivity for partisanship," according to one bar report.

He graduated from the University of Houston Law School in 1972 and spent five years in private practice before he began his upward ascent on the state bench. In 1991, Gov. Ann Richards made him the first Hispanic on the state's Court of Criminal Appeals, and Clinton named him to the 5th Circuit in 1994.

There, Benavides has been a frequent dissenter in high-profile conservative rulings. When a three-judge panel called a halt to affirmative action at the University of Texas in *Hopwood v. Texas*, 78 F.3d 932 (1996), Benavides voted to rehear en banc.

He also cast a dissenting vote when the 5th Circuit held that interest accrued from law firm trust accounts was the property of the clients. The decision "poses an un-warranted threat to a primary source of funding for public interest legal organizations," he wrote in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 106 F.3d 640 (1997).

Another contender, Cabranes, has the scholarly credentials for a nomination to the Court, as well as the centrist views that would pave the way for his confirmation in a Republican-controlled Senate.

Born in Puerto Rico in 1940, Cabranes moved to New York City with his family as a boy. He earned degrees from Columbia University, Yale Law School and Cambridge University, where he earned a master's in international law.

In 1972, he was a founder of the Puerto Rican Legal Defense Fund. He was general counsel to Yale University when President Carter named him to the federal bench in 1979.

But his moderate record on the bench has not won him the enthusiastic backing of liberals.

"I'm rooting for Sonia Botomayor," says Nan Aron, executive director of the Alliance for Justice, a coalition of civil rights and consumer groups that tracks judicial nominations.

Sotomayor, 45, grew up in a housing project in the South Bronx and went on to excel at Yale Law School. She was named to the federal bench in 1992 and won a contentious Senate confirmation to the 2nd Circuit in November. Some Republicans said she was a liberal activist

and were wary of putting her in line for a possible High Court nomination.

Time Running Out

For President Clinton, the window of opportunity for filling a third Supreme Court seat is likely to close soon. Six months from now an election year begins, a time when no justice wants to step aside. And by that time, a Republican Senate is unlikely to confirm a nomination made by an outgoing Democratic president.

If Vice President Al Gore succeeds Clinton, a recharged Democratic administration would likely favor many of the same Hispanic judges under consideration now, such as Benavides and Sotomayor.

If the Bush era resumes with the election of Texas Gov. George W. Bush, "You could expect he would look first at some of the Hispanic judges from Texas," says Elliot Minberg, legal director for People for the American Way.

Either way, Hispanic activists remain optimistic. "We are extremely confident we will get the nod next time," says Ortiz. "If Clinton doesn't get another chance, his successor – Republican or Democrat – will seize this opportunity."

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THE VACANCY GUESSING GAME

Filling High Court Openings is Creeping into Presidential Election Politics

Texas Lawyer

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Tony Mauro

If it's summer, the U.S. Supreme Court vacancy machine must be gearing up again. The television networks are scouting around for file footage of Justice John Paul Stevens, in case he chooses to retire. Never mind that Stevens, at 79, looks to be at the top of his game - twinkly-eyed, bow-tied and churning out feisty opinions especially in the last month. Speculation about other departures bounces down the seniority tree, to Chief Justice William H. Rehnquist, Justices Sandra Day O'Connor and Antonin Scalia, and even junior Justice Stephen Breyer, who's looking wan and weary of late.

Next year's presidential election adds an extra fillip to the vacancy guessing game. As the theory goes, anyone thinking of leaving soon should go now or face having to stay put for two years. After this summer, it will be the spring of 2001 before a president will be in a decent position to name a replacement.

The question of vacancies is already creeping into presidential election politics. At his maiden press conference in New Hampshire, George W. Bush is asked about Supreme Court nominations and says, "There will be no litmus tests" on abortion or anything else.

That brings a charge of waffling and wimpiness from Gary Bauer and Pat Buchanan and adds juice to a rumor circulating in conservative circles (which *George* magazine printed this month).

As the rumor goes, Justice Scalia is so upset with the court's drift to the left that he's ready to quit. The rumor is preposterous, but its subtext is clear: Elect a conservative who will appoint simpatico justices to keep Saint Antonin company, or else the court's last angry purist will leave.

Meanwhile, the prospect that a Republican might beat Vice President Al Gore is accelerating talk that Rehnquist, who some say postponed his retirement because President Bill Clinton was re-elected in 1996, will leave in 2001.

And that, in turn, has spawned a range of "elevate from within" scenarios that would give the next president a "twofer" a chance to appoint a chief justice and an associate justice at the same time, as President Ronald Reagan did in 1986 when he elevated Rehnquist and named Scalia to replace Rehnquist.

Two potential chiefs come to mind among Republicans if a Republican is elected and Rehnquist leaves: Sandra Day O'Connor, who would become the first woman chief justice, or David Souter, who wouldn't be a first, but has other kinds of appeal. Souter was one of Daddy Bush's proudest appointments, so George W. could honor his father by elevating Souter to chief. Alternatively, if John McCain is elected, then Souter's original sponsor, Warren Rudman, one of McCain's three campaign co-chairmen, might try to get his New Hampshire friend Souter a promotion. Another

bonus: the unassuming Souter is popular inside the building, a favorite of many current justices.

If Gore is elected and Rehnquist steps down anyway, some suggest Souter could be on Gore's list for promotion to chief as well. Souter would be an easy confirmation prospect with a still-Republican Senate, and it would show Gore's bipartisanship.

Gore had some involvement in Clinton's appointments to the high court - he led a memorable press briefing on Stephen Breyer's appointment in 1994 so either Ruth Bader Ginsburg or Breyer could also get the nod as chief in a Gore first term.

Gore's judge-picker would probably be his current chief of staff, Ron Klain, a former Byron White law clerk. While in the White House counsel's office in 1993, Klain was the one who got the call and carried White's retirement letter to President Clinton.

So there are at least four potential chief justices sitting on the court - Souter, O'Connor, Ginsburg and Breyer.

But what about associate justices? Well, like the Maytag repairman, Carlos Ortiz of the Hispanic National Bar Association waits by the phone. He is the keeper of the association's list of potential Hispanic appointees to the Supreme Court.

Much to the association's regret, it is a list that was passed over by Clinton in his two appointments, and the association's members don't want to be ignored again.

"We are long past the point where we would just like to be considered," says Ortiz. "We've come to expect that the next vacancy will be filled by a Latino. It would be mind-boggling if it wasn't."

And that expectation stands no matter who is elected president. George W. Bush

speaks Spanish and has broad appeal among Hispanics in Texas.

"He has tried to be as inclusive as possible with the Hispanic community in Texas, and I would think that would continue in his presidency as well," says Steptoe & Johnson's Richard Willard, who is helping the Bush campaign, but says he is not speaking for the campaign. While in the Reagan Justice Department, Willard helped in the effort to get his former boss, Anthony Kennedy, confirmed for the Supreme Court.

For his part, Gore will need the Hispanic vote to get elected, and almost certainly will give early consideration to Hispanic nominees if he becomes president.

On the HNBA list, which Ortiz stresses is nonpartisan, are: federal appeals judges Jose Cabranes (2nd Circuit) and Fortunato Benavides (5th Circuit), as well as New Mexico Supreme Court Justice Joseph Baca, former Equal Employment Opportunity Commission Chairman Gilbert Casellas, litigator and former president of the Mexican American Legal Defense and Education Fund Vilma Martinez, and former California Supreme Court Justice Cruz Reynoso.

Cabranes, like Souter, turns up in speculation no matter which party takes the White House next year. Benavides is from Texas, but one recently notorious ruling may make him unattractive to Bush; he was on the 5th Circuit panel that struck down federally funded school equipment loans to parochial schools in *Helms v. Picard*, which the Supreme Court just agreed to hear.

Other than Hispanics, Republican wish lists tend to include appeals judges Michael Luttig (4th Circuit), Diarmuid O'Scannlain (9th Circuit) and Edith Jones (5th Circuit), while the star on any Democratic list is David Tatel (D.C.)

Circuit), who would be the court's first blind justice going in.

Why They Quit

All of this end-of-term and pre-election speculation is based, of course, on a vacancy coming along, and there simply isn't any real evidence that one is coming soon.

A fascinating book on the subject of Supreme Court vacancies has just been published, called "Leaving the Bench" (University Press of Kansas, 1999) by David Atkinson, a University of Missouri-Kansas City political science and law professor.

A sort of counterpart to Henry Abraham's "Justices and Presidents," which charts why justices are appointed, "Leaving the Bench" looks at why they quit. Atkinson has tracked the final years of all the justices - providing new insights into Charles Whittaker's mental illness and Lewis Powell Jr.'s nearly fatal surgery in 1983, among others.

The conclusion he reaches, by and large, is that justices rarely time their departures - or prolong their tenure - to bestow the job of replacing them on a president of a preferred party. If ideological reasons come into the equation at all, he says, it is more often to hold a majority of one stripe or other - a William Douglas or Thurgood Marshall determination to hang on because they feel their side needs their votes.

The vast majority of the time, however, "they leave for health reasons. They go when they have to go," says Atkinson. Lately, more justices have been able to stay on for a very long time, and they only begin to go downhill once they retire. Someone like Justice Stevens probably stays on as long as he does partly because he saw what happened to the likes of Brennan, Marshall and

Blackmun after they retired. Leaving the court took a certain spark from their lives and health problems began to crowd in.

Remarkably, Atkinson notes that no justice has died in office since Robert Jackson in 1954. He died of a second heart attack a few months after he left his sickbed to join in *Brown v. Board of Education*.

Atkinson points out that the institution copes very well with aging justices who may not be as active as they once were. High-powered law clerks can carry the work of the office indefinitely, and form "an effective cordon" around their justice in the later years. He recounts how Marshall and even Brennan became less involved in their opinion writing in their final years on the bench. "Their chambers kept clicking along," says Atkinson.

On the current court, while all the justices seem to be active and in good health, there are said to be several who don't burn the midnight oil as they used to. Yet their offices churn out the requisite number of opinions, dissents and concurrences - and then some. Most other aspects of their jobs, except for the pay, are hard to beat anywhere else in the legal profession.

The perks, the adoration from the bar and academe, are unparalleled. So, in trying to figure out why no justice has left in the last five years, and no one might this summer or next, the simple answer might be a simple question: Why should they?

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