

Copyright 2001 American Lawyer Media, L.P.
The Recorder

June 29, 2001, Friday

SECTION: NEWS; PG. 2

HEADLINE: JUSTICES: LIST OF BANNED; GUNS IS AG'S TO EXPAND

BODY:

By Sonia Giordani RECORDER STAFF WRITER Revisiting the state's 12-year-old assault weapons ban, the California Supreme Court ruled Thursday that trial **judges** have no authority to add a "copycat" rifle to the attorney general's list of banned guns. In a split 4-2 vote, **Justice Janice Rogers Brown** wrote for the majority that the AG retains exclusive authority to augment the list of banned guns. She said giving **judges** that power would result in guns getting banned in some counties and not in others. But Chief Justice Ronald George, in a dissent also signed by Justice Kathryn Mickle Werdegarr, said he interpreted the statute to say all AK series rifles are to be treated as assault weapons whether or not the AG specifically includes a gun in question on the list and said the majority creates a major loophole in the law. And in a thinly veiled reference to former AG Dan Lungren's attitude toward the law, George warned that "an attorney general who is hostile to the regulation of assault weapons would be able to thwart the effect" of the law. *Harrott v. Kings County*, 01 C.D.O.S. 5468, is the latest in a growing body of rulings aimed at hammering out the details of California's controversial Roberti-Roos Assault Weapons Control Act. When passed in 1989, it specifically banned more than two dozen guns and set out a process for tacking on "copycat" weapons to the list through an add-on procedure. In 1999, it was amended to define assault weapons by characteristics rather than by name. Litigation over the law continued for years until 2000, when **Brown** led a 6-1 court to uphold its constitutionality in *Kasler v. Lockyer*, 23 Cal.4th 472. The justices found that it doesn't violate the equal protection clause of the state constitution even though it bans certain weapons and not others that are virtually identical. In her opinion Thursday, **Brown** cited a point raised in the National Rifle Association's amicus curiae brief. **Brown** wrote that giving judges such discretion "could lead to the same weapon being treated differently from county to county and even within the same county." Justices Joyce Kennard, Marvin Baxter and Ming Chin concurred. Chuck Michel, a partner with Trutanich & Michel in San Pedro who represented the NRA, said the decision finally clarifies a recurring question in California gun law. "Unfortunately, it took 11 years to get here," he said. "Dozens of people became accidental felons because they possessed a firearm that prosecutors, police, judges and the Department of Justice couldn't agree on whether it was banned or not." Dennis Henigan, an attorney with the Washington, D.C.-based Center to Prevent Handgun Violence, said he was disappointed with the majority's conclusion. But he said it will likely affect only those cases prosecuted prior to the 1999 amendments to the law that expanded the statute's reach by imposing a generic definition on the term "assault weapon." "We hope the amendments serve to encompass most AK-series and AR-series weapons," he said.

Harrott stemmed from attorney J.W. Harrott's agreement with a client to be paid for legal services in the form of the client's gun collection. The guns had been confiscated by Kings County Sheriff's officers. When Harrott attempted to collect the guns, he was told one of the guns could not be released to him because it was an AK-47-type assault weapon.

Two experts testified that the gun wasn't technically an AK-47, but Kings County Judge Peter Schultz

ruled it fell under the gun ban anyway. The Fifth District Court of Appeal reversed, saying the AG's office had the exclusive authority to add copycat weapons to the list. On Thursday, the state high court agreed. Donald Kilmer Jr., a San Jose solo who represents gun show promoters and gun dealers in Northern California, praised **Brown's** opinion. "Regardless of your position on gun control, the issue is that gun owners and citizens are entitled to a uniform interpretation of the law throughout the state."

But in his dissent, George suggested that uniformity is a ridiculous expectation in a law's interpretation. "Whenever the terms of a statute are to be applied in the context of particular cases, there is always the possibility that different triers of fact may arrive at different conclusions. "

George took some comfort in the fact that the 1999 amendment expanded the reach of the law but said the majority's ruling "nonetheless represents a clear and unwarranted frustration of legislative intent."

LOAD-DATE: July 2, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

June 28, 2001, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 834 words

HEADLINE: Supreme Court decision cripples assault weapons ban< dkfohojp1

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Judges cannot declare firearms illegal under the state's assault-weapons ban law, the California Supreme Court ruled Thursday in a decision the dissenting chief justice said created a "loophole" in the 1989 act.

In a 4-2 vote that featured a blistering dissent by Chief **Justice** Ronald M. George, the high court ruled that a semiautomatic rifle is legal if it is not explicitly designated illegal under 1991 amendments to the act.

Justice Janice Rogers Brown, agreeing with arguments made in the case by the National Rifle Association, wrote that the 1991 provisions - enacted to ban the proliferation of generic versions of outlawed weapons - was too vague for gun owners to know which of the so-called copycat weapons of the Russian-made "AK series" were illegal.

Without explicitly listing each weapon, **Brown** wrote, "Ordinary law-abiding citizens could suddenly find themselves ... subject to prosecution." The immediate fallout of Thursday's decision is that an untold number of copycat weapons to the AK series are now legal in California.

George wrote that the "Legislature recognized the impossibility of compiling a comprehensive list" of all AK series rifles and therefore chose not to when it wrote the 1991 amendments.

"By refusing to heed the clear statutory language classifying all AK series rifles as assault weapons, whether specifically identified by name or model or not, the majority creates a loophole in California's assault weapons control legislation that the Legislature plainly intended to eliminate," George wrote.

Thousands of people in California have been convicted wrongly for possessing, transporting or using AK series weapons, said Chuck Michel, a lawyer for the National Rifle Association.

"It took years to clarify this mess and in the meantime hundreds or perhaps thousands of accidental felons were created by a law that was pushed through without a full consideration of the

consequences," Michel said.

The state attorney general's office was reviewing the decision Thursday and would not comment on Michel's assertions, spokesman Nathan Barankin said.

Thursday's decision was based on a 1994 confiscation of an AK series rifle from a Delano attorney who was given the gun instead of payment from a client.

Authorities seized the weapon on grounds it was banned under the 1991 amendments. Kings County Superior Court Judge Peter M. Schultz ruled that the weapon was illegal, a decision the high court reversed Thursday.

Still, George wrote that the court's decision may be minimized by amendments the Legislature enacted to the assault-weapons act in 1999.

That year, lawmakers adopted a provision that bans assault-weapons based on a host of features instead of makes and models - a move that makes illegal hundreds of so-called copycat weapons not clearly defined in the law.

That provision has not been tested in California's courts. Gun proponents said the Supreme Court decision gives them fodder to challenge it.

The NRA's Michel said Thursday's decision bolsters arguments that the 1999 amendments are illegal because outlawed guns are not clearly identified.

"A lawsuit will be filed challenging this," he said.

The decision means that some copycat weapons to the AK series will now be legal.

That is because some of the weapons do not have the features that would make them illegal under the 1999 provisions. Those features include semiautomatic rifles having a detachable magazine for bullets, and one of the following: a pistol grip, a stock with a hole for a thumb, a grenade launcher and, among other features, a flair launcher.

"It's conceivable that you have an assault weapon that fell under the 1991 category and isn't covered by the new legislation," said John S. Dulcich, the attorney who won Thursday's case on behalf of Delano lawyer J.W. Harrott.

Under the high court's closely watched decision last year upholding the original assault-weapons law, a majority of justices noted that the state attorney general's office has the discretion to add weapons to the list of the hundreds of weapons already banned.

Gun-control advocates said Thursday that Attorney General Bill Lockyer has greatly expanded the number of illegal weapons, but worried Thursday's decision gives the state's top law enforcement officer too much leeway.

"What if the next attorney general is not as aggressive as Lockyer?" asked Dennis Henigan, an attorney for the Center to Prevent Handgun Violence.

The Roberti-Roos Assault Weapons Control Act of 1989 originally outlawed 75 weapons that are

high-powered and have rapid-fire capabilities. The Legislature passed the nation's first law banning such weapons after a gunman, Patrick Purdy, fired a semiautomatic weapon into a Stockton school yard, killing five children and injuring 30.

Following California's lead, several states and the federal government passed similar or even stricter bans.

The case decided Thursday is J.W. Harrott v. Kings County, S055064.

LOAD-DATE: June 29, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

June 27, 2001, Wednesday

SECTION: NEWS; PG. 1

HEADLINE: 'THE PASSING OF AN ERA'

BODY:

By Sonia Giordani RECORDER STAFF WRITER @Normal:Justice Stanley Mosk left word that when he died he would prefer not to have a religious service at all.

But in a letter addressed to family and read aloud by his son Richard at a memorial service in Los Angeles Tuesday, Mosk went on to say that "if for valid reasons or on a whim you choose to do otherwise, I promise not to return to haunt you."

More than 300 relatives and friends remembered Mosk as a man with robust senses of both humor and compassion. The group met at the Wilshire Boulevard Temple to pay their respects to the California Supreme Court's longest-serving justice who died June 19 at the age of 88. Reminiscences painted a picture of a man who was not only a dedicated legal scholar, but who loved the camaraderie of the legal community and also of a good tennis game. As state attorney general, Mosk fought to expand civil rights and protect consumers; as a judge he issued nearly 1,700 opinions in 37 years.

Chief Justice Ronald George said he was an institution on the court, working with 31 different justices and bridging the terms of six chief justices. His tenure as a justice was only one year short of spanning a quarter of the court's entire history in California. "It is not hyperbole to say his passing connotes the passing of an era," George said.

George's personal relationship with Mosk spanned the entirety of George's career in law. George said he was among the ranks of young lawyers hired on by Mosk in the attorney general's office; he later went on to argue before the court as a deputy attorney general when Mosk was elevated to the court and later he served beside him on the bench.

He recalled one night, when Malcolm Lucas was chief justice, that a pending matter kept the justices at the courthouse well into the early morning hours. It was 3 a.m., and Lucas noticed that Mosk, already in his 80s, would look over at the clock occasionally. Lucas told Mosk he could go home if he wasn't up for the long night still ahead.

George recalled that Mosk promptly explained that his concern with the hour stemmed from the fact that "he'd scheduled a 7 a.m. tennis game, and it had become too late to cancel." George went on to note that Mosk left at 6:15 a.m., played the game and was one of only three **justices** to return and spend the rest of the day at work.

Among those in attendance Tuesday were his colleagues, California Supreme Court **Justices** Joyce Kennard, Marvin Baxter, Kathryn Mickle Werdegar and **Janice Rogers Brown**, as well as Mosk's research attorneys at the court and other court staff. Former Secretary of State Warren Christopher attended, as did Gov. Gray Davis, his judicial appointments secretary Burt Pines and Attorney

General Bill Lockyer. Vaino Spencer and J. Anthony Kline were among the court of appeal justices in attendance.

Santa Clara law professor Gerald Uelmen said Mosk was the most prolific justice the court has ever seen. His opinions are studied by law students around the country in virtually every class -- from criminal to torts.

"We celebrate many judges for being masters in one field or another," said Uelmen. "But Stanley Mosk was a master of every field."

"He was the first Jewish person to be elected to state constitutional office, even though his opponent attempted to make an issue out of his religion," said Edward Sanders, a partner at Crosby, Heafey, Roach & May and former president of the Jewish Federation Council of Greater Los Angeles. Sanders praised Mosk for trailblazing the way for Jewish people and other minorities. Gov. Davis echoed that sentiment: "He stood up for those who had no voice." Spencer, presiding justice of the Second District Court of Appeal and the first African-American appointed to the appellate court, remembered reading newspaper accounts about Mosk in 1947. As a trial judge that year Mosk was the first to strike down racial covenants that prohibited African-Americans in Los Angeles from purchasing property in certain neighborhoods.

"Those of you who have never been affected by that type of prejudice and discrimination cannot begin to know the pain and humiliation, the stress," said Spencer, who went on to work with Mosk when as attorney general he created the first civil rights division in that office. The mood lightened from political and staid to more lighthearted when Richard Mosk got up to speak, painting a picture of a down-to-earth man who wasn't above having himself paged at airports and bus stations during campaign seasons just so people would hear his name. He was a man with a sense of humor and an edge, his son recalled -- a man "fatalistic and content" who considered Woody Allen to be "a contemporary philosopher."

When his son told him he should have been a state senator, Mosk responded that he surely would have been defeated in the next election. When he said he should have been chief justice, his father simply said he wouldn't have liked all that administrative work anyway. He said, "My father never had any regrets."

LOAD-DATE: June 27, 2001

Copyright 2001 Chicago Tribune Company
Chicago Tribune

June 27, 2001 Wednesday, NORTH SPORTS FINAL EDITION

SECTION: Commentary; Pg. 19; ZONE: N

LENGTH: 567 words

HEADLINE: The non-existence of black conservatives

BYLINE: By Michael Finch and Thomas Krannawitter. Michael Finch is director of development at Claremont Institute. Thomas Krannawitter is its director of academic programs.

BODY:

Remember the 1970s sitcom "Good Times?" Set in the housing projects of Chicago, it starred the young, black comedian Jimmy Walker as "JJ," who made "dy-no-mite" a catchphrase for a generation. In some ways, though, the more interesting character was JJ's kid brother, Michael. Studious and conservative in dress and manner, Michael cared about ideas and politics. His dream was to follow in the footsteps of U.S. Supreme Court Justice Thurgood Marshall.

Imagine that "Good Times" had been reality. Imagine Michael went to law school and after years of hard work now stands among the nine Supreme Court justices--a lifetime appointment to the highest judicial body of the most powerful country on Earth. You might think that black organizations would honor such a man as an example of what others might accomplish. Then again, if you worked at Ebony magazine, you might not.

The May edition of Ebony lists the 100 most influential black Americans in 2001. To be sure, some worthy names made the list: Secretary of State Colin Powell, National Security Adviser Condoleezza Rice, NAACP President Kweisi Mfume, U.S. Rep. Charles Rangel (D-N.Y.), Michael Jordan and Oprah Winfrey are among the 100. Whatever one thinks of these individuals, there can be no question that they all wield great influence.

Then there is U.S. Supreme Court Justice Clarence Thomas. Ebony thinks Thomas is not among the most influential African-Americans. He is not even mentioned in the article preceding the list of 100. It's as if he does not exist. Which, of course, is exactly the point.

For the liberal editors at Ebony, Clarence Thomas simply is not "black." Neither is Eloise Anderson (former director of social services for California and Wisconsin), William Allen (former chairman of the U.S. Commission on Civil Rights), **Janice Brown** (California Supreme Court **justice**), Ward Connerly (University of California regent), Roy Innis (national chairman of the Congress for Racial Equality), Alan Keyes (candidate for the Republican nomination for president), Thomas Sowell (economist and best-selling author), Shelby Steele (professor of English and winner of the National Book Critics Circle Award) or Armstrong Williams (nationally syndicated talk-radio host). All of these people have had an influence that has touched millions, black and non-black alike. But what unites them, and what disqualifies them from Ebony's list, is that they are conservative.

Their conspicuous omission points to how liberals have transformed American political language.

Today the term "black" has little to do with skin color. Rather it is a code word for acceptance used by the political left. For the folks at Ebony, any black American who adheres to the principles of color-blindness and human equality--the principles championed by Abraham Lincoln, Martin Luther King Jr. and Clarence Thomas--are not black.

Rejecting those principles and their most prominent defenders of all colors, the editors at Ebony are left in the shameful and ridiculous position of saying that Edward Darnell (the imperial potentate of the Nobles Mystic Shrine, for those who don't know) is more influential than a sitting justice of the Supreme Court. The message Ebony is sending to young "Michaels" in America is clear: If you wish to be judged by the content of your character and not the color of your skin, don't bother. You don't exist.

GRAPHIC: GRAPHICGRAPHIC: Illustration by Jon Krause.

LOAD-DATE: June 27, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

June 22, 2001, Friday, BC cycle

SECTION: State and Regional

LENGTH: 329 words

HEADLINE: Widow must share husband's property with unknown relatives

DATELINE: SAN FRANCISCO

BODY:

A Santa Barbara widow must split her husband's property with two half siblings her late husband never knew he had, the California Supreme Court has ruled.

Because the late Denis H. Griswold did not have a will when he died, the court ruled Thursday that widow Norma B. Doner-Griswold must give the Ohio relatives half of Griswold's \$300,000 estate.

The justices said the law clearly reads that relatives of the biological parent of a child can collect an inheritance from that child if the parent acknowledged or contributed to the child's support. Griswold had no contact with his biological father, John Edward Draves, before dying in 1996 and didn't even learn about the man who paid child support for 18 years until seeing his birth certificate as an adult.

The half siblings didn't know of Griswold either until professional "heir hunter" Francis V. See called to tell them about their connection to the inheritance.

See will collect a share of the estate as a fee for his work, said attorney Herb Fox, who represented See in the appeal.

"This is a case where somebody calls you up and says, 'You had a long-lost uncle or brother who has left you some money,'" Fox said. "It's the kind of phone call everyone hopes to receive."

The heir hunter could receive as much as one-third of the property, said See's trial lawyer, David C. Turpin.

Justice Janice Rogers Brown said this law needs to be re-examined by the Legislature to avoid similar future cases.

"I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a father who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support," **Brown** wrote in a separate opinion.

Doner-Griswold's attorney, Lawrence T. Sorensen, said he was "very disappointed" by the court's decision. He said his client is medically disabled and her husband wanted her to receive his full

inheritance.

LOAD-DATE: June 23, 2001

Copyright 2001 Contra Costa Times
All Rights Reserved

CONTRA COSTA TIMES

Found on BayArea.com

Contra Costa Times

June 22, 2001 Friday FINAL EDITION

SECTION: NEWS; Pg. A12

LENGTH: 425 words

HEADLINE: WIDOW MUST SHARE ESTATE WITH "STRANGERS"

BYLINE: MAURA DOLAN

DATELINE: SAN FRANCISCO

BODY:

SAN FRANCISCO A widow whose husband died without a will must share his property with his half siblings, even though he never knew of their existence, the California Supreme Court reluctantly decided Thursday.

The court ruled in the case of the late Denis H. Griswold, a Santa Barbara resident who had been born out of wedlock and whose biological father had paid child support for 18 years. The father and son never had any contact before they died, and Griswold only learned of him when he came across a birth certificate as an adult. Griswold died without knowing that he also had two half siblings in Ohio.

They in turn did not know about him until a professional heir hunter researching probate and birth records called and told them they could inherit some money.

Never mind the circumstances, the court said in a unanimous decision in the case (Griswold vs. See, S087881). The law "provides in unmistakable language" that the half siblings are entitled to half of Griswold's estate, estimated at \$300,000, **Justice** Marvin R. Baxter wrote for the court.

Baxter questioned whether the Legislature intended such results in fashioning the probate code and noted that elected officials may want to change it.

Justice Janice Rogers Brown, in a separate opinion, implored the Legislature to act.

"I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a father' who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support," **Brown** wrote.

"I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring."

Herb Fox, who represented Francis V. See, the heir hunter, in the appeal, said See will collect a percentage of the half siblings' share of the estate as a fee for his work.

See's lawyer said the heir hunter would receive as much as one-third of the inheritance.

"This is a case where somebody calls you up and says, You had a long-lost uncle or brother who has left you some money," Fox said.

Under the current law, relatives of a biological parent of a child can inherit from that child if the parent had acknowledged the child and contributed to his or her support.

The fact that Griswold's biological father had admitted his paternity in court and paid child support was enough to meet the requirements, the court said.

"By blood at least, they are certainly close relatives," Fox said. "By society, they were actual strangers."

GRAPHIC: Los Angeles Times

LOAD-DATE: November 6, 2001

Copyright 2001 / Los Angeles Times
Los Angeles Times

June 22, 2001 Friday Home Edition

SECTION: California; Part 2; Page 1; Metro Desk

LENGTH: 778 words

HEADLINE:

'Strangers' to Get Half of Estate

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

A widow whose husband died without a will must share his property with his half siblings, even though he never knew of their existence, the California Supreme Court reluctantly decided Thursday.

The court ruled in the case of the late Denis H. Griswold, a Santa Barbara resident who was born out of wedlock and whose biological father paid child support for 18 years. The father and son never had any contact before they died, and Griswold only learned of him when he came across a birth certificate as an adult.

Griswold died without knowing that he also had two half siblings in Ohio. They, in turn, did not know about him until a professional "heir hunter" researching probate and birth records called them up and told them they could inherit some money. Never mind the circumstances, the court said in a unanimous decision in *Griswold vs. See*, S087881. The law "provides in unmistakable language" that the half siblings are entitled to half of Griswold's estate, estimated at \$300,000, **Justice** Marvin R. Baxter wrote for the court.

Baxter questioned whether the Legislature intended such results in fashioning the probate code and noted that elected officials may want to change it.

Justice Janice Rogers Brown, in a separate opinion, implored the Legislature to act.

"I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a 'father' who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support," **Brown** wrote.

"I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring."

"Finally," she added, "I have no doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a 'forensic genealogist,' " as heir hunters call themselves.

Attorney Herb Fox, who represented heir hunter Francis V. See in the appeal, said See will collect a percentage of the half siblings' share of the estate as a fee for his work. See's trial lawyer, David C. Turpin, said the heir hunter could receive as much as one-third of the inheritance.

"This is a case where somebody calls you up and says, 'You had a long-lost uncle or brother who has left you some money,' " Fox said. "It's the kind of phone call everyone hopes to receive."

Under the current law, relatives of a biological parent of a child can inherit from that child if the parent had acknowledged the child and contributed to his or her support.

The fact that Griswold's biological father had admitted his paternity in court and paid child support was enough to meet the requirements, the court said.

"By blood at least, they are certainly close relatives," Fox said. "By society, they were actual strangers."

If Griswold had died with a will leaving his estate to his wife, the half siblings would not have been entitled to any inheritance, lawyers in the case said.

Lawrence T. Sorensen, who represented Griswold's widow, Norma B. Doner-Griswold, said he was "very disappointed" by the court's decision because Griswold clearly wanted his widow to receive his full inheritance. He said his client, who lives in Santa Barbara, is medically disabled.

Denis Griswold, who died in 1996, had for most of his life believed his father was Fred Griswold, whom his mother married in 1942. Sorensen said Griswold learned the truth only after his mother's death in 1983, when he was going through her papers.

He saw the name of "somebody he had never heard of before" and didn't want to think about it or investigate it, Sorensen said. At that time, the biological father, John Edward Draves, was dead.

Griswold's widow would have inherited his entire estate if the couple had treated their assets as community property. The pair had lived together for many years and married several years before Griswold's death.

They did not mingle their bank accounts or real estate because they felt the separation would protect each of them if the other suffered catastrophic health problems, Sorensen said.

Turpin said See is one of about a dozen heir hunters in California. He researches records and finds money for others in exchange for a cut for himself.

"It is a legitimate occupation," Turpin said.

If someone dies without a will and has no wife or children, the nearest relatives inherit the property, he said. The first in line to collect are the parents, followed by siblings and nieces and nephews "until you get to fifth-cousins twice-removed," Turpin said.

The lesson of the case? "It is always the better practice to make a will," Fox said.

LOAD-DATE: June 22, 2001

Copyright 2001 Andrews Publications, Inc.
Health Law Litigation Reporter

June 2001

SECTION: Vol. 8; No. 11; Pg. 13

LENGTH: 601 words

CASE: Medicare HMOs: McCall v. PacifiCare of Cal.

HEADLINE: California Gives Seniors Right to Sue HMOs

BODY:

In a major victory for seniors' patient rights, the California Supreme Court has ruled that Medicare beneficiaries may sue health maintenance organizations for damages when they are denied adequate care. By a 5--2 vote, the court rejected an HMO's claim that elderly and disabled patients and their survivors are limited to administrative relief and cannot turn to the courts. *McCall et al. v. PacifiCare of California Inc. et al.*, No. S082236 (Cal., May 3, 2001). The decision allows the family of a Huntington Beach man who suffered from degenerative lung disease to sue PacifiCare Health Systems for allegedly refusing to refer him to a specialist or transplant program.

Writing for the court majority, Justice Kathryn Mickle Werdegard said Congress, in passing the Medicare Act, did not intend to prevent beneficiaries from suing. "Congress left open a wide field of operation for state law pertaining to standards for the practice of medicine and the manner in which medical services are delivered to Medicare beneficiaries," she said.

Justice Werdegard added that the Medicare administrative review process covers only "a limited class of claims" primarily relating to reimbursement disputes. The law does not cover claims relating to the quality of care, she said.

But the dissent insisted that the decision undermines Medicare's review process. While the system may not afford the range of relief available under state law, **Justice** Marvin R. Baxter said, "it is designed to provide that coverage decisions are reviewed in a thorough and expeditious manner" by the federal government and review boards.

Justice Janice Rogers Brown joined in the dissent.

George McCall, who suffered from lung disease, had brought the case against PacifiCare in 1997 for repeatedly refusing to refer him to a specialist, put him on a lung transplant list or provide other needed care. McCall was eventually forced to end his membership in the HMO and ultimately received a lung transplant paid for by Medicare. He died several hours after receiving the transplant at the age of 58.

McCall's wife, Barbara, kept the suit alive against PacifiCare, charging the HMO with negligence, willful misconduct, fraud, negligent and intentional infliction of emotional distress, and unfair business practices. McCall's physician provider group, Greater Newport Physicians Inc., is also named as a defendant.

Ruling that Medicare law barred such a complaint in state court, an Orange County Superior Court judge threw out McCall's suit. Less than a month after McCall's death in July 1999, however, the state appellate court reinstated the case and decided that the suit could go to trial. The California Supreme Court majority upheld this decision.

"It is not the prerogative of this court to second-guess the measured trade-offs enacted by Congress," Justice Baxter countered in his dissenting opinion. "Today's decision all but assures that the Medicare administrative review process will cease to function as a meaningful limit on judicial review. I cannot, and will not, join in its undoing."

In a prepared statement, PacifiCare praised the dissent. "Like the dissenting justices," the HMO said, "we are concerned that the efficiency and integrity of the program's administrative review process will be compromised."

Carol S. Jimenez of Los Alamitos, Calif., argued for McCall.

Jon N. Manzanares, Keith A. Weaver and Jeffrey D. Olster of Konowiecki & Rank represented PacifiCare.

(Call 877-595-0449 for the 19-page opinion and 20-page dissent.)

LOAD-DATE: July 17, 2001

Copyright 2001 Washington Legal Foundation
Legal Opinion Letter

June 1, 2001

SECTION: Vol. 11, No. 6

LENGTH: 1113 words

HEADLINE: STATE HIGH COURT JUSTICE INJECTS REASON INTO PUNITIVE DAMAGES DEBATE

BYLINE: Ellis J. Horvitz and Stephanie Rae Williams; Ellis J. Horvitz is the founder of and senior partner with the Encino, California appellate law firm of Horvitz & Levy llp. Stephanie Rae Williams is an associate at Horvitz & Levy llp. The firm specializes in the civil appellate defense of corporations and others who frequently face large punitive damage awards.

BODY:

Last year, in a highly significant concurring opinion largely overlooked outside of California, California Supreme Court **Justice Janice Rogers Brown** proposed some guidelines designed to prevent arbitrary and excessive awards of punitive damages. *Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405, 427 (2000)(**Brown**, J., concurring). Her thoughtful and well-reasoned opinion merits consideration by judges and legislatures across the country. Her recommendations correctly bring a measure of rationality and predictability, heretofore missing, to this important area of law.

In Justice **Brown's** opinion, "without clear guidance, judicial oversight of punitive damage awards will not be uniform, and the resulting gross variability in awards will ultimately implicate the rights of defendants to due process and the equal protection of the laws." *Id.* at 422. She stresses that "[w]ithout a beginning point of reference, punitive damage awards tend to vary widely, depending as much on the vicissitudes of jury decisionmaking as on the facts of the case." *Id.* In fact, "jury determinations of punitive damages are likely to contain an element of arbitrariness as long as the awards remain uncalibrated. To assure basic fairness, courts must consider ways of calibrating punitive damage awards." *Id.*(citing Sunstein et al., *Assessing Punitive Damages* (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2110 (1998)). Justice **Brown** explains that one way to assess fairness and calibrate damages is to determine if the compensatory award, alone, is sufficiently punitive. In her opinion, "large compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed." *Id.* at 424 (citing *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985), *Maiorino v. Schering-Plough Corp.* 302 N.J.Super. 323, 695 A.2d 353 (1997).) In other words, according to Justice **Brown**, where there is a large compensatory award, that award alone may be enough punishment and deterrence, rendering punitive damages unnecessary. *Id.* at 424. This is particularly true where there is a large compensatory award for noneconomic damage. *Id.* Accordingly, "[t]he trial court should instruct the jury that . . . [o]nly if the jury finds the compensatory damage award insufficient to punish or deter should an additional punitive award be imposed. And if imposed, the punitive award must be limited to an amount needed to deter and punish when added to the sum already imposed as compensatory damages." *Id.* at 425.

While Justice **Brown** does not advocate eliminating jurors' discretion to set damages, she explains that "discretion must be distinguished from whim and serendipity." *Id.* at 423. To that end, if needed, "punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record." *Id.* This three to one ratio is "an uppermost limit, and most punitive damage awards should fall well below that limit." *Id.* (citing *Eiseno p& Wells, Punitive Awards after BMW, a New Capping System, and the Reported Opinion Bias*, *Wis. L. Rev.* 387, 420, 422(1998).)

Recognizing past criticism of a strict correlation between compensatory and punitive damages, Justice **Brown** answers that "fundamental notions of justice require some correlation between punishment and harm." *Id.* at 424 (citing Aristotle, *Nicomachean Ethics* (Hackett Pub. Co. 1985), at 135.) Thus, the use of compensatory damages as a calibrating factor, "even if imperfect, is not wholly arbitrary because the degree of harm to the plaintiff bears a substantial relationship to the appropriate punishment." The fact that legislatures frequently provide for double or treble damages as a punishment for wrongful acts shows the propriety of basing punitive awards on compensatory damages and limiting them to no more than three times compensatory damages. *Id.* at 425. Moreover, Justice **Brown** notes that several states, including Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma, and Texas, limit punitive damages to two or three times compensatory damages. *Id.* at 426.

Finally, Justice **Brown** explains that a defendant's wealth "cannot provide an adequate upper limit [on punitives because m]any of the wealthiest defendants are corporations, and the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty." *Id.* at 427. "In order to remain competitive, large corporations count small as well as big costs, particularly if those small costs may be recurrent. Therefore, even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct." *Id.* Moreover, "above a certain level, the precise amount of a defendant's wealth becomes less relevant, compared to other factors." *Id.*

Justice **Brown** closes her opinion with the observation that "the law of punitive damages does not punish a large corporation simply for being large; it takes wealth into consideration so as to ensure the award creates an adequate deterrent, even though the award may still be small in relation to the corporation's net worth." *Id.* Therefore, "trial courts should not permit attorneys to argue . . . that punitive damages should be a fixed percentage of the defendant's total net worth." *Id.*

A closer examination of Justice **Brown's** opinion is particularly timely in light of the United States Supreme Court's recent decision in *Cooper Industries, Inc v. Leatherman Tool Group, Inc.*, __ U.S. __ (2001). Expressing serious concerns about the often excessive and capricious nature of punitive awards, the Cooper Industries Court held that, in order to establish acceptable constitutional guidelines, courts must provide *de novo* review of punitive awards at the appellate level. Justice **Brown's** opinion should be a valuable source to appellate justices in performing that assignment.

For more information contact: Washington Legal Foundation, 2009 Massachusetts Ave.
Washington, D.C., 20036; (202) 588-0302.

LOAD-DATE: June 13, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

June 1, 2001, Friday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES AIR PAIR OF FEHA DISPUTES

BODY:

By Sonia Giordani RECORDER STAFF WRITER Lachi Richards says she held off suing her employer for discrimination until she saw no other choice. Now the California Supreme Court may rule she sat on her rights and can't recover for many of the alleged acts. During arguments in a pair of FEHA cases Thursday, some of the justices worried about the policy implications of allowing the so-called "continuing violations" doctrine to toll the statute of limitations for Richards' claims. "It appears the Legislature was trying to achieve a balance between the rights of employees and the rights of employers and part of the attempt to balance those rights was to have a statute of limitations," said **Justice Janice Brown**. "Why should we simply ignore what the Legislature has done?" In the second case, the **justices** will decide if statutory attorneys fees belong to a plaintiff, or to her lawyers. The plaintiff in Richards v. CH2M Hill, S087484, was an engineer at CH2M Hill when she was diagnosed with multiple sclerosis and confined to a wheelchair. Richards says she endured less than reasonable accommodations for her disability while trying to work out solutions with her bosses. By the time she threw up her hands and filed suit under the Fair Employment and Housing Act, five years had passed. Her attorney, Ellen Lake of Oakland, argued that the numerous discriminatory acts against her client -- failure to provide an accessible fire escape route; obstructing access to offices and hallways; moving her office to a storage room without furniture -- were not isolated incidents but rather a course of conduct that constituted a continuing violation. And Lake said Richards shouldn't be punished for trying to work out the problems before jumping into litigation. Justice Kathryn Mickle Werdegar said plaintiffs could then sit back and accumulate examples of discrimination they could "dredge up" years later. "What protection does the defendant have against this?" But Justice Joyce Kennard countered that "all the employer has to do is stop the pattern of discriminatory acts." Theodore Olsen, a partner with Sherman & Howard in Denver who represented CH2M Hill, encouraged the court to look to federal precedents that say the clock starts ticking when a plaintiff knows or reasonably should know that a violation occurred. Timely complaints, he added, allow a company's managers to learn of problems and get to work resolving them expeditiously. "Here we don't even have a case of 'reasonably-should-have-known.' We have a case of known violations," said Olsen. He noted Richards kept a log of aggravating on-the-job incidents and took photos illustrating her managers' lack of cooperation to make reasonable accommodations. But several justices also seemed sympathetic to plaintiffs like Richards who don't necessarily want to appear obstreperous and drag their employers to court -- especially when they're still hopeful a solution will be reached without resort to a lawsuit. "I see a real tension between your point that there should be prompt attention to the issue and expeditious resolutions," Werdegar told Olsen, "and the employee's point to want to work with employers." In the second case, Flannery v. Prentice, S080150, the court seemed eager to send a message to lawyers to put their fee arrangements on paper. "Attorneys <#201> are supposed to have written fee agreements. Why should we allow those who fail to do so to get these fees?" asked Werdegar. But other justices seemed to think the statutory fee award stemming from Leslie Flannery's successful sexual harassment suit belongs to her attorneys, and not to her. Justice Ming Chin noted that the legislative intent in creating statutory attorney fees was partly to encourage

lawyers to take public interest cases even when the potential sum to be collected is small compared to the cost of the legal work. **Brown**, meanwhile, pointed to the language of the Business and Professions Code, which she said permits recovery of "a reasonable fee" even without an agreement. The dispute arose after an Alameda County jury awarded Flannery \$250,000. Now-retired Alameda County Judge Demetrios Agretelis awarded her lawyers, John Prentice and John Scott, more than \$1 million in attorney fees. Flannery said they'd agreed orally to split any recovery, and told her lawyers she'd agree to split "everything" 60-40. San Francisco solo Richard Pearl, representing the lawyers, said attorneys fees should be for attorneys. And with or without a written agreement, he argued, statutory fees are supposed to compensate counsel for taking tough cases. But Lawrence Hensley, an associate with Sacramento's Nageley, Meredith & Miller who represents Flannery, said the impasse could have been avoided had the attorneys explained the fee situation beforehand. Otherwise, he said, "Clients are left scratching their heads as to how legal math works." _Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com._

LOAD-DATE: June 1, 2001

Copyright 2001 The Chronicle Publishing Co.
The San Francisco Chronicle

JUNE 1, 2001, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A3

LENGTH: 810 words

HEADLINE: Suing landlord made harder;

Not responsible for crime on premises

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:

The California Supreme Court yesterday made it difficult for crime victims to sue landlords and property owners for failing to provide adequate security -- even if there is a history of similar assaults.

By a 4-to-3 vote, the justices ruled that a Federal Express delivery woman who was brutally attacked at a Southern California apartment complex could not sue property owners who had been warned about their lack of security.

The decision reflects the court's unwillingness to hold property owners responsible for crimes committed by others at parking lots, college campuses, garages and other areas.

The Federal Express employee, Marianne Saelzler, had evidence of numerous assaults, robberies, and gunshots at the apartment complex as well as frequent trespassing incidents via broken gates. Police officers had advised the apartment manager to provide daytime security patrols, but the only guards present were those hired to escort the apartment manager to her car. In yesterday's opinion, the court said that Saelzler had not come up with enough proof to go to trial. Even though the apartment owners may have violated a duty of care for Saelzler, the justices said she had not produced clear evidence that the lack of security was a "substantial factor" causing her injuries.

EVIDENCE 'SPECULATIVE'

Her evidence "merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault," wrote Justice Ming Chin in the majority opinion.

He added that holding landlords liable for criminal acts would increase their costs, which would be passed on to tenants of low-cost housing units. Chief **Justice** Ronald George and **Justices** Marvin Baxter and **Janice** Rogers **Brown** joined in Chin's decision.

In a strongly worded dissenting opinion, **Justice** Joyce Kennard blasted the court for imposing "a

virtually insurmountable" barrier in the path of any victim suing a property owner for failing to provide security to guard against foreseeable crimes.

Justice Kathryn Mickle Werdegard issued her own dissent, expressing outrage that the majority was dismissing Saelzler's case because her assailants were never caught -- leaving police unable to determine if they lived there or were trespassing.

"That she should be barred from the courthouse for this very reason is both cruelly ironic and legally unjustified," Werdegard wrote. Justice Stanley Mosk joined in the dissent.

COURT FOCUSED ON MONEY

"I'm very angry," said Saelzler after learning of the court's decision. She said the majority didn't seem to focus on the issues, but on the financial implications. She said that after the attack, which left her with broken ribs and torn ligaments in her shoulder, police eventually gave up on finding the criminals.

"I don't know how much more I can take," she said when asked about whether she will pursue an appeal. "It's very emotional."

Andrew Wolfberg, one of the lawyers for Saelzler, said that a plaintiff will now have to convince the criminals to testify that they wouldn't have been able to commit the crime if there had been better security. But in most cases, he said, it won't be in the best interest of the criminal to admit to anything.

"It puts an unbelievable burden on the plaintiff," Wolfberg said.

Barbara Ravitz, a lawyer who filed a brief on behalf of the Building Owners and Managers Association of Greater Los Angeles, said that the court is protecting property owners from being held responsible if their security measures fail.

"They're very concerned about landlords and clients like mine not having such exorbitant costs for security that it's going to raise the rents and it's going to fall on tenants especially in low-income areas," she said.

BRUTAL 1996 ATTACK

Saelzler was attacked in March 1996 when she tried to deliver a package to a resident at Sherwood Apartments, a vast complex in Bellflower with 300 units.

As she entered the premises she saw two men loitering outside a security gate that had been propped open and another man already on the premises. She tried to deliver the package but no one was home.

When she returned down a path inside the complex the three men confronted her, beat her and tried to rape her. They were never caught.

She sued the apartment owners, saying they knew that dangerous people loitered on the premises and failed to provide adequate security.

The trial judge found "overwhelming evidence" of criminal activity on the property, including a gang that was headquartered in one of the apartments. But the court concluded that Saelzler had failed to show enough of a connection between the property owner's inaction and her injuries.

But a state appeals court reversed that decision, allowing Saelzler to go to trial. E-mail Harriet Chiang at hchiang@sfgchronicle.com.

LOAD-DATE: June 1, 2001

Copyright 2001 Associated Press
AP Online

May 31, 2001; Thursday

SECTION: Domestic, non-Washington, general news item

LENGTH: 431 words

HEADLINE: Calif Court Hears Life Support Case

BYLINE: DAVID KRAVETS

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court has begun hearing the case of a woman who wants permission to pull her husband off life support because she says that is what he would have wanted after an auto accident left him in a near-vegetative state.

The case has become the center of right-to-die issues in California and ignited debate over when loved ones can order removal of life support with no will or other written document verifying those wishes.

Rose Wendland directed doctors to pull husband Robert Wendland's feeding tubes in 1995, two years after he crashed his car while driving drunk in northern California. She said statements he made before the crash such as telling her he did not want to live like a "vegetable" are enough proof to allow the life support to end.

"It's a decision that he wanted," Rose Wendland said.

An appeals court agreed but Robert Wendland's mother, Florence, claims her son isn't a "vegetable" and should be allowed to live. She appealed to the Supreme Court.

Doctors say Wendland has some ability to think and sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

In a packed courtroom Wednesday, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice Rogers Brown** suggested that, even had Wendland documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

The case comes three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state.

It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That ruling followed a U.S. Supreme Court decision in a Missouri case that said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

LOAD-DATE: May 31, 2001

Copyright 2001 Associated Press
AP Worldstream

May 31, 2001; Thursday

SECTION: International news

DISTRIBUTION: Europe; Britian; Scandinavia; Middle East; Africa; India; Asia; England

LENGTH: 432 words

HEADLINE: AP Photos CAJOS501-502

BYLINE: DAVID KRAVETS

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court has begun hearing the case of a woman who wants permission to pull her husband off life support because she says that is what he would have wanted after an auto accident left him in a near-vegetative state.

The case has become the center of right-to-die issues in California and ignited debate over when loved ones can order removal of life support with no will or other written document verifying those wishes.

Rose Wendland directed doctors to pull husband Robert Wendland's feeding tubes in 1995, two years after he crashed his car while driving drunk in northern California. She said statements he made before the crash such as telling her he did not want to live like a "vegetable" are enough proof to allow the life support to end.

"It's a decision that he wanted," Rose Wendland said.

An appeals court agreed but Robert Wendland's mother, Florence, claims her son isn't a "vegetable" and should be allowed to live. She appealed to the Supreme Court.

Doctors say Wendland has some ability to think and sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

In a packed courtroom Wednesday, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice** Rogers **Brown** suggested that, even had Wendland documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

The case comes three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state.

It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That ruling followed a U.S. Supreme Court decision in a Missouri case that said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

LOAD-DATE: May 31, 2001

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

May 31, 2001, Thursday, BC cycle

SECTION: Domestic News

LENGTH: 430 words

HEADLINE: California Supreme Court grapples with pulling plug on accident victim

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court has begun hearing the case of a woman who wants permission to pull her husband off life support because she says that is what he would have wanted after an auto accident left him in a near-vegetative state.

The case has become the center of right-to-die issues in California and ignited debate over when loved ones can order removal of life support with no will or other written document verifying those wishes.

Rose Wendland directed doctors to pull husband Robert Wendland's feeding tubes in 1995, two years after he crashed his car while driving drunk in northern California. She said statements he made before the crash - such as telling her he did not want to live like a "vegetable" - are enough proof to allow the life support to end.

"It's a decision that he wanted," Rose Wendland said.

An appeals court agreed but Robert Wendland's mother, Florence, claims her son isn't a "vegetable" and should be allowed to live. She appealed to the Supreme Court.

Doctors say Wendland has some ability to think and sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

In a packed courtroom Wednesday, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do

not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice** Rogers **Brown** suggested that, even had Wendland documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

The case comes three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state.

It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That ruling followed a U.S. Supreme Court decision in a Missouri case that said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

GRAPHIC: AP Photos CAJOS501-02

LOAD-DATE: June 1, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

May 31, 2001, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 709 words

HEADLINE: State high court grapples with pulling plug on accident victim

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Rose Wendland thought she was carrying out her husband's wishes in 1995 when she directed doctors to pull his feeding tubes, two years after an auto accident left him in a near-vegetative state.

Instead, the plight of Robert Wendland has reignited national debate over when loved ones can make such directives when no will or other written document verifies those wishes. An estimated 15 percent of U.S. adults have drafted such wills or designated such powers to others.

The debate over Robert's future took center stage before the California Supreme Court on Wednesday, three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state. It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That case came three years after the U.S. Supreme Court, ruling in a Missouri case, said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

At issue in the Wendland case is whether statements Robert made to his wife before his near-fatal traffic accident in Lodi - such as saying he did not want to live like a vegetable - are enough proof to allow doctors to remove the tubes that keep the 49-year-old former auto parts dealer alive.

An appeals court said those statements, and doctors at a Lodi hospital agreeing with the decision, are all that is necessary to end the life of the father of three.

"It's a decision that he wanted," said his wife, who added that her husband made the statement about wanting to die before the accident and after the death of her father, who died when life support was turned off.

But Robert's mother, Florence Wendland, claims her son is not a vegetable and therefore should not die, because those were not his wishes. Doctors say Robert has some ability to think and to sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

It's a twilight state providing him no means to care for himself.

That's a situation that has prompted a host of disability rights groups to push for Robert's survival on grounds that he is not a vegetable, but instead is a disabled man.

"We don't think it's appropriate for people to have a license to kill people with disabilities," said Amy Hasbrouck, an attorney with the disability group, Not Dead Yet, which urged the California justices to spare Robert.

Inside a crowded courtroom here, the justices grappled over Robert's fate. From the outset, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some of the high court justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice Rogers Brown** suggested that, even had Robert documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

Justice Marvin R. Baxter wondered aloud whether keeping Robert alive would send a message to people that they should document their desires while they are competent to do so.

"Shouldn't people be encouraged to set forth their instructions in a very specific way?" he asked.

Attorney Jon Eisenberg, who represents a group of medical ethicists who want the court to carry out the wife's wishes, answered that, "People are not going to do it in droves."

Outside of court, Robert's daughter, Kerrie, said she knows her father would want to die. She knows that every time she visits him in a Lodi hospital.

"That's not my father," she said.

The case is Conservatorship of Robert Wendland, S087265. The court generally rules within 90 days.

GRAPHIC: AP Photos CAJOS501-502

LOAD-DATE: June 1, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

May 31, 2001, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 709 words

HEADLINE: California Supreme Court grapples with right-to-die case

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Rose Wendland thought she was carrying out her husband's wishes in 1995 when she directed doctors to pull his feeding tubes, two years after an auto accident left him in a near-vegetative state.

Instead, the plight of Robert Wendland has reignited national debate over when loved ones can make such directives when no will or other written document verifies those wishes. An estimated 15 percent of U.S. adults have drafted such wills or designated such powers to others.

The debate over Robert's future took center stage before the California Supreme Court on Wednesday, three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state. It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That case came three years after the U.S. Supreme Court, ruling in a Missouri case, said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

At issue in the Wendland case is whether statements Robert made to his wife before his near-fatal traffic accident in Lodi - such as saying he did not want to live like a vegetable - are enough proof to allow doctors to remove the tubes that keep the 49-year-old former auto parts dealer alive.

An appeals court said those statements, and doctors at a Lodi hospital agreeing with the decision, are all that is necessary to end the life of the father of three.

"It's a decision that he wanted," said his wife, who added that her husband made the statement about wanting to die before the accident and after the death of her father, who died when life support was turned off.

But Robert's mother, Florence Wendland, claims her son is not a vegetable and therefore should not die, because those were not his wishes. Doctors say Robert has some ability to think and to sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

It's a twilight state providing him no means to care for himself.

That's a situation that has prompted a host of disability rights groups to push for Robert's survival on grounds that he is not a vegetable, but instead is a disabled man.

"We don't think it's appropriate for people to have a license to kill people with disabilities," said Amy Hasbrouck, an attorney with the disability group, Not Dead Yet, which urged the California justices to spare Robert.

Inside a crowded courtroom here, the justices grappled over Robert's fate. From the outset, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some of the high court justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice** Rogers **Brown** suggested that, even had Robert documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

Justice Marvin R. Baxter wondered aloud whether keeping Robert alive would send a message to people that they should document their desires while they are competent to do so.

"Shouldn't people be encouraged to set forth their instructions in a very specific way?" he asked.

Attorney Jon Eisenberg, who represents a group of medical ethicists who want the court to carry out the wife's wishes, answered that, "People are not going to do it in droves."

Outside of court, Robert's daughter, Kerrie, said she knows her father would want to die. She knows that every time she visits him in a Lodi hospital.

"That's not my father," she said.

The case is Conservatorship of Robert Wendland, S087265. The court generally rules within 90 days.

GRAPHIC: AP Photos CAJOS501-502

LOAD-DATE: June 1, 2001

Copyright 2001 The Chronicle Publishing Co.
The San Francisco Chronicle

MAY 31, 2001, THURSDAY, FINAL EDITION

SECTION: NEWS; Pg. A3

LENGTH: 862 words

HEADLINE: Justices struggle with new right-to-die case;

State high court hearing on barely conscious man

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:

The California Supreme Court yesterday struggled with the prospect of allowing the wife of a severely brain-damaged Stockton man to remove the feeding tube that keeps him alive.

During an hourlong hearing, several of the justices appeared troubled by the facts of the case and suggested that they needed "clear and convincing" proof that Robert Wendland would have wanted to die under these circumstances.

"Given the gravity and irreversibility of the consequences," the law requires a higher standard of proof, said Justice Kathryn Mickle Werdegarr.

Wendland has been unable to walk or communicate since he was severely injured in a 1993 car accident. His wife and three children want to remove the feeding tube that keeps him alive. His mother and sister want to continue the treatment. This right-to-die case has drawn national attention because it involves a man who is not in a coma or a persistent vegetative state, but has suffered devastating brain damage. In prior cases, courts have allowed the family of patients in coma-like states to stop life support treatment.

While Robert Wendland sat in a Lodi hospital 100 miles away, the justices in a San Francisco courtroom seemed to have a difficult time with an unenviable task. The justices seemed to focus on the uncertainty of Robert Wendland's condition.

"Is he competent?" Justice Marvin Baxter asked Janie Hickok Siess, who represents Wendland's mother. She said he wasn't competent, but insisted he was conscious and aware.

Siess urged the court to "raise the bar" and require Rose Wendland to provide "clear and convincing evidence" of her husband's wishes.

"Is that a standard that can actually be met" unless there is a clear, written directive, asked **Justice Janice Rogers Brown**.

Siess said that people could talk to family members before becoming ill and express feelings about potential medical conditions.

James Braden, the patient's lawyer, said there was ample evidence that his client would have wanted to die rather than live in his current condition, which he said bordered on a persistent vegetative state.

Rose Wendland has testified that her husband told her shortly before the accident that he would not want to be kept alive if he was on life support. But a trial judge ruled against her, saying that she failed to provide "clear and convincing evidence" of his wishes.

A state appeals court overturned that decision, ruling that the law required only that Rose Wendland, as her husband's conservator, act in good faith.

But at yesterday's hearing, both Chief Justice Ronald George and Baxter suggested that people should put their wishes in writing in the event that they were unable to make their own decisions later. If the court allowed Robert Wendland's wife to withdraw the feeding tube based solely on remarks he made, George questioned whether that would discourage people from leaving written directives.

Jon Eisenberg, an Oakland lawyer representing several medical organizations and 43 bioethicists, said only 20 percent of patients prepared written instructions.

George said he was concerned that a patient "who can think and feel" might have his fate decided by a guardian with a financial interest.

Justice Joyce Kennard followed the same line of thinking, noting that at one point since the accident, Robert Wendland could respond to questions through the use of a board with "yes" and "no" buttons.

After the hearing, Eisenberg said he was "very concerned" that the judges didn't fully understand Robert Wendland's condition.

He said that a videotape showed that Robert Wendland responded to questions at random and was just as likely to answer "yes" to questions that he should say "no" to. "I wish mightily that this court looks very carefully at the record in this case to get a true understanding of this man's condition," he said.

Rose Wendland's attorney, Lawrence Nelson, told reporters that it was impossible for people to predict the exact medical conditions they might face some day. "If they require clear and convincing evidence of the patient's wishes, it would condemn millions of Americans to be attached to life support systems," Nelson said.

Siess, representing the patient's mother, was cautiously optimistic after the arguments. "I think they went really well," she said. She said that Florence Wendland, 78, felt that a trip to San Francisco was too much for her and preferred to spend the day with her son in his Lodi hospital room.

Several representatives of disability groups attended the hearing, saying that a decision in favor of Wendland's wife would allow people with disabilities to be killed.

But Rose Wendland and her three children said that they were not trying to impose their decision on anyone else. "I can't speak for other people who have disabilities," said Katie Wendland, 22, the

oldest of the patient's children. Her father, she said, "is not there, and he's not going to be. It's his decision we're honoring."

A decision is expected in 90 days.

Each side said that it would appeal its case to the U.S. Supreme Court if it lost. E-mail Harriet Chiang at hchiang@sfchronicle.com.

GRAPHIC: PHOTO. Rose Wendland and her children -- Katie (left), Robert and Kerrie (behind Rose) -- gathered outside the courtroom yesterday. / Craig Lee/The Chronicle

LOAD-DATE: May 31, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

May 30, 2001, Wednesday, BC cycle

SECTION: State and Regional

LENGTH: 709 words

HEADLINE: State high court grapples with pulling plug on accident victim

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Rose Wendland thought she was carrying out her husband's wishes in 1995 when she directed doctors to pull his feeding tubes, two years after an auto accident left him in a near-vegetative state.

Instead, the plight of Robert Wendland has reignited national debate over when loved ones can make such directives when no will or other written document verifies those wishes. An estimated 15 percent of U.S. adults have drafted such wills or designated such powers to others.

The debate over Robert's future took center stage before the California Supreme Court on Wednesday, three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state. It's not the first right-to-die case before California's justices. In 1993, the high court said mentally competent adults may refuse lifesaving medical treatment. That case came three years after the U.S. Supreme Court, ruling in a Missouri case, said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

At issue in the Wendland case is whether statements Robert made to his wife before his near-fatal traffic accident in Lodi - such as saying he did not want to live like a vegetable - are enough proof to allow doctors to remove the tubes that keep the 49-year-old former auto parts dealer alive.

An appeals court said those statements, and doctors at a Lodi hospital agreeing with the decision, are all that is necessary to end the life of the father of three.

"It's a decision that he wanted," said his wife, who added that her husband made the statement about wanting to die before the accident and after the death of her father, who died when life support was turned off.

But Robert's mother, Florence Wendland, claims her son is not a vegetable and therefore should not die, because those were not his wishes. Doctors say Robert has some ability to think and to sometimes move in his hospital bed, but has no ability to communicate whether he wants to live or die.

It's a twilight state providing him no means to care for himself.

That's a situation that has prompted a host of disability rights groups to push for Robert's survival on grounds that he is not a vegetable, but instead is a disabled man.

"We don't think it's appropriate for people to have a license to kill people with disabilities," said Amy Hasbrouck, an attorney with the disability group, Not Dead Yet, which urged the California justices to spare Robert.

Inside a crowded courtroom here, the justices grappled over Robert's fate. From the outset, the mother's attorney, Janie Hickok Siess, framed the importance of the justices' pending decision.

"The gravest issue is before you, that is a man's life," Siess said.

Some of the high court justices were unsure whether they should allow Robert to die, on grounds that it is unclear whether his medical condition is the one which he told his wife was unbearable.

"Don't those remarks express being in a totally vegetative state, which I think we would all agree do not describe his condition?" Chief **Justice** Ronald M. George asked.

But **Justice Janice Rogers Brown** suggested that, even had Robert documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked.

Justice Marvin R. Baxter wondered aloud whether keeping Robert alive would send a message to people that they should document their desires while they are competent to do so.

"Shouldn't people be encouraged to set forth their instructions in a very specific way?" he asked.

Attorney Jon Eisenberg, who represents a group of medical ethicists who want the court to carry out the wife's wishes, answered that, "People are not going to do it in droves."

Outside of court, Robert's daughter, Kerrie, said she knows her father would want to die. She knows that every time she visits him in a Lodi hospital.

"That's not my father," she said.

The case is Conservatorship of Robert Wendland, S087265. The court generally rules within 90 days.

GRAPHIC: AP Photos CAJOS501-502

LOAD-DATE: May 31, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

May 25, 2001, Friday

SECTION: NEWS; PG. 1

HEADLINE: COURT'S CONFLICT SCREEN HAS HOLES

BODY:

By Sonia Giordani RECORDER STAFF WRITER

Last year, Chief Justice Ronald George held stock in 47 publicly traded companies, stashing hundreds of thousands of dollars in high-flying tech stocks and blue-chips like Microsoft, America Online, Johnson & Johnson and Citigroup. Fellow California Supreme Court Justice Marvin Baxter held stocks like Motorola, Nokia, IBM, Intel, Bank of America and Wells Fargo, in addition to farmland near Fresno.

Justice Ming Chin was in Pacific Gas & Electric, Allstate Insurance, Home Depot and Sears, among others. And **Justice Janice Rogers Brown** owned stocks in a half dozen companies, including K-Mart, Disney and MCI. There are no rules restricting **judges** from investing in stocks and other assets, though ethics rules require them to recuse themselves from any case in which financial holdings in excess of \$1,500 create a conflict of interest. But the justices' vast and varied holdings create a wide array of potential conflicts of interest that the court is apparently ill-equipped to track. On Thursday, the Daily Journal reported 32 different instances in which one of four California Supreme Court justices voted on petitions despite owning stock in a party to the suit. George says the problem stems from a faulty automated system, introduced last July, that failed to flag potential conflicts. And he says the increasingly complex face of corporate America, with mergers and acquisitions constantly creating new subsidiary companies and sister entities, makes the task harder than ever before. But ethics professor Stephen Gillers says the fault can't all be laid at the feet of a computer program and urged the justices to consider the need to monitor and enforce compliance with existing ethical rules.

"If there are 32 instances of which we are aware, then the court system in California has a problem and that's not acceptable," said Gillers, a professor and vice dean of New York University School of Law. "It seems to me the Supreme Court has to re-establish public confidence in the judges and initiate an investigation to determine how widespread the ignorance of the rules is."

Gillers suggests the justices adopt the federal rule requiring corporate litigants to detail their subsidiary and parent company relationships in their briefs.

Santa Clara University School of Law's Gerald Uelmen, meanwhile, says lawyers should be more active in checking out and raising a justice's potential conflicts of interest -- and not just financial ones. He recently asked a justice to recuse himself from reviewing a decision written by the justice's brother-in-law.

Earlier this week, George said he ordered a review of the Full Court automated case management system. That followed the Daily Journal's report that two justices voted last week to deny review in

a toxic tort against IBM despite owning the company's stock.

George also rescinded the order denying, by a 4-2 vote, review in Leth v. Superior Court, S096437, and said he'd call in two pro tem justices to vote in place of IBM shareholders Baxter and Chin.

George said the case caption did not include a reference to IBM, the real party in interest, though the company was named in the conference memo prepared by staff. Baxter and Chin voted with George and **Brown** to deny review. Justices Joyce Kennard and Stanley Mosk voted to grant. Justice Kathryn Mickle Werdegard was not present and did not leave a vote.

Baxter and Chin didn't return several phone calls, but in a joint statement issued through court staff, said, "In this particular case involving IBM we inadvertently failed to recognize that IBM was involved in the case.

"The court's computer system unfortunately failed to highlight the conflict," the statement continued. "All justices will continue to take all necessary steps to identify conflicts of interests and to recuse themselves as appropriate."

Though George acknowledges that the problem could be widespread -- the Full Court program doesn't track real parties in interest or corporate subsidiaries -- he says Leth was the only case in which the votes of conflicted justices affected the outcome.

George also said that during the justices' weekly conference Wednesday, he urged his colleagues to rely less on computer notification. "It appears we were doing a much better job before we went to the automated system," George said.

Still, George said he is confident the justices' actions were not influenced by how their rulings would affect the value of their investments.

Most of the justices invest heavily in the stock market, opening them up to what George calls "a minefield" of potential conflicts.

But although the Daily Journal identified several instances in which Chin, Baxter, **Brown** and George voted despite conflicts, three other justices appeared to steer clear of the problem.

Justice Kathryn Mickle Werdegard last year held tens of thousands of dollars in real estate investments, as well as interests in three insurance companies, three water utilities, about a dozen technology and communications companies and two lumber companies.

Kennard lists ownership of stock in only one company, Resource Biometrics. Mosk has most of his money in tax-exempt bonds, an aircraft rental company and two public utilities.

While the vast array of a justice's financial holdings may require additional vigilance on the part of that justice -- and perhaps of the public -- there's nothing wrong with investing, says Gillers.

"You don't want to make the price of becoming a judge that his or her investments be limited to treasury bonds," he says. "On the other hand, as a judge's assets are disbursed among frequent litigants in the court, the judge will have to step aside in many cases. But there's really nothing you can do except rely on the judge's good judgment to avoid unnecessary conflicts."

Gillers says California courts could benefit by adopting a rule similar to Federal Rule of Appellate Procedure 26.1, which calls on any non-governmental party to file a statement identifying all companies, subsidiaries and affiliates -- and to place that statement in front of the table of contents for the judges to read.

Santa Clara's Uelmen concedes that the justices' potential conflicts of interest don't necessarily mean they're biased. But he counters that the appearance of bias can be just as damaging.

"Across the country courts have become more sensitive to avoiding even the appearance of impropriety," says Uelmen. "A century ago, judges routinely were sitting on cases argued by close relatives."

And he says financial conflicts are part of a bigger picture. In December, the court adopted a new set of canons for appellate justices detailing when they are expected to recuse themselves.

The rules say justices must recuse if they appeared or served as a lawyer or sat as a judge in an earlier stage of the case; have more than a 1 percent interest in a company or stock worth more than \$1,500; or if a lawyer in the case is a relative.

But there is no mechanism to force a justice off a case.

Earlier this month, Uelmen cited the new rules in a motion for disqualification that suggested Baxter recuse himself from *People v. Mower*, S094490, a medical marijuana case, because Baxter's brother-in-law, James Ardaiz, wrote the Fifth District ruling. Last week, Baxter sent a letter saying he'd recused himself from the matter.

But if a justice were to refuse, court watchers say, there's little that a litigant could do.

And with the justices' varied stockholdings, it's almost impossible for litigants or their attorneys to keep track of all potential conflicts a justice may have.

Gillers notes that a rule in the American Bar Association's Code of Judicial Ethics says that judges shall minimize the number of cases in which they will be disqualified. Still, he says, "I can't think of any judge who has ever been disciplined or criticized by an official body for violating that rule. We rely on a judge's good sense." _Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com._

LOAD-DATE: May 25, 2001

Copyright 2001 Tower Media, Inc.
The Daily News of Los Angeles

May 20, 2001 Sunday, Valley Edition

SECTION: VIEWPOINT; Pg. V1

LENGTH: 704 words

HEADLINE: GOVERNMENTS CLING TO POLICIES OF RACIAL BIAS

BYLINE: Harold Johnson

BODY:

TOO many public officials in California are still closing their eyes to their legal obligation to be colorblind.

Six months after the California Supreme Court ruled that public entities can no longer treat people differently because of race or sex, significant violations persist.

Hi-Voltage Wire Works vs. San Jose is the state Supreme Court decision that is being flouted. Brought by Pacific Legal Foundation, the case yielded a definitive judicial interpretation of Proposition 209, the 1996 initiative to ban race and sex preferences in public employment, contracting and schools. The court struck down San Jose's racially targeted "outreach" program that required bidders on city contracts to take steps to recruit minority and women subcontractors, but didn't require outreach to anyone else.

Writing for the majority, **Justice Janice Brown** (who happens to be African-American) gave Proposition 209 a broad and forceful reading. It bans not just explicit quotas, she declared, but any "race-conscious governmental decision-making." It represents voters' endorsement of "equal opportunity for all individuals," as opposed to "entitlement based on group representation."

To its credit, San Jose has gotten into line. Discriminatory flourishes have been edited out of official hiring and contracting policies. If the revised rules are followed, any new outreach efforts in San Jose will be inclusive, instead of being aimed only at certain pockets of the population based on color or chromosomes.

But San Jose's reversal didn't exactly start a stampede in the public sector to get on the right side of the law.

San Francisco, for instance, still reviews contracting bids by minority-owned firms as if they were as much as 10 percent below their real price. Instead of bringing this rigged policy into line with Proposition 209, the city has been busy devising procedural objections to slow a lawsuit against it.

The Sacramento Municipal Utility District also gives bonus points to business owners of the desired color or gender. The discrimination in this case comes with a twist: In the awarding of prime contracts, preferences go to blacks and Latinos, but not Asians, while in subcontracts, Asians and blacks, but not Latinos, receive official favoritism. Go figure.

At the Los Angeles County Hall of Administration, the racial preference tool of choice is a "goals and timetables" schedule for hiring nonwhites.

This might sound benign - less rigid than an outright quota - but it's a good bet the county's managers feel an incentive to honor the "goals" by letting race influence hiring and promotions.

Indeed, a "participation goal differs from a quota or a set-aside only in degree," wrote Justice **Brown** in the Hi-Voltage decision.

The Los Angeles Unified School District does its part to perpetuate racial pigeonholing by enforcing an arbitrary racial mix in teaching staffs at magnet schools.

Jim Friery, a Van Nuys High School physical education teacher, ran into this policy when he tried to apply for a job at a nearby magnet school a couple of years ago. Because he's white, hiring him wouldn't fit the racial formula, so he wasn't even allowed to put his name in.

He has responded with a lawsuit arguing that Proposition 209 prohibits the district from counting teachers by color.

Sociologist Fred Lynch of Claremont McKenna College, author of two books on affirmative action, isn't surprised that even a clearly worded state Supreme Court decision hasn't secured obedience to the principle of race-neutrality in government.

"Preference programs have a self-perpetuating life force," he says. "The affirmative-action machine's head may have been cut off, but the body lumbers on."

In order to identify as many violations as possible, Pacific Legal Foundation has launched a Proposition 209 enforcement project, Operation End Bias, with a toll-free number - (866) END BIAS (363-2427) - allowing whistle-blowers to report policies that play favorites by sex or skin color.

If more years of litigation battles are required, so be it.

There are few more motivating goals than ensuring equal opportunity - and forcing politicians and bureaucrats to obey the law.

EDITOR-NOTE:

Harold Johnson is an attorney with Pacific Legal Foundation, which has six lawsuits under way against violations of Proposition 209 in various parts of California. The Web address for PLF's enforcement project is www.endbias.org. Write to Johnson by e-mail at [hej\(at\)pacificlegal.org](mailto:hej(at)pacificlegal.org).

LOAD-DATE: May 21, 2001

Copyright 2001 National Review
National Review

May 18, 2001

SECTION: National Review Online; NR Comment

LENGTH: 821 words

HEADLINE: Society Girls

BYLINE: By Melissa Seckora; NR editorial associate. Miss Seckora is a former deputy director of The Federalist Society for Law & Public Policy Studies.

BODY:

If you thought conservative women were an endangered species, chances are you've given up all hope for conservative women lawyers. Do such women even exist? They do, thanks to the Federalist Society for Law & Public Policy Studies - the same influential outfit which the Washington Monthly called a "conservative cabal."

When the Federalist Society was established almost twenty years ago, the idea of limited government could barely get a shake in the legal community, not to mention in public discourse. At the same time, many on the Left were arguing that women weren't getting a fair shake, either. This wasn't so at the Federalist Society, where one of its co-founders was a woman by the name of Lee Lieberman Otis. Ms. Otis is now general counsel to the U.S. Department of Energy. Women are major players in the organization because it encourages its members to freely decide for themselves what to think, encouraging open and civil debate. Interior Secretary Gail Norton, UVA Law Professor Lillian BeVier, California Judge Lois Haight, former Deputy Attorney General Carol Dinkins, Hershey Corporation Senior Counsel Tammy McCutchen, and NFL counsel Jodi Balsam are just a handful of the many, highly talented women who mastered their legal chops at the Society.

"The Federalist Society represents true diversity of ideas," Jodi Balsam told NRO. Ms. Balsam helped co-found the Federalist Society's student chapter at NYU Law School in 1984 - a time when conservative and libertarian voices were even more quiescent on college campuses than they are today. "It just wasn't done. It was almost considered tactless or rude to speak out against the liberal orthodoxy," explained Ms. Balsam.

As a New York attorney, she was glad to learn there are more conservative women than she once thought working in corporate America. "Society girls" like Balsam see the value in limited government, reduced taxes, and a government that does not discriminate. "The fatal flaw of liberal policies is that it's only the government that gains power." Conservative women, she says, understand the sense of empowerment that comes from believing in the principles of limited government. They fear a nanny state that swoops into their private lives, telling them how to rear their children, how to practice their faith, and how to shape a home.

Lillian BeVier, who serves on the Federalist Society's Board of Visitors, first became involved in the organization in 1992, just before President Clinton took office. She had been waiting for a hearing before the Senate Judiciary Committee on her nomination to the Fourth Circuit Court of Appeals. She

never got her hearing, but she did become more interested in the debate on judges and whether they should be charged with making policy, or interpreting laws. She was attracted to the Federalist Society because it is a group that believes that all viewpoints be presented. She says she wouldn't be supportive of the Federalist Society if it didn't "genuinely support, believe in, and advocate open debate." As a faculty advisor to UVA's Federalist Society student chapter, she's noticed that her students are politically engaged and that they represent a wide range of conservative thought. "I value this about my conservative law students. I have no objection to liberal students, but they are much less engaged in their political debates. And, it is a terrible thing when students are precluded from ever being presented with the other sides of the debate."

Before becoming senior counsel at the Hershey Corporation, Tammy McCutchen served as a Federalist Society student chapter president at Northwestern Law School, and later served as president of the Chicago lawyers' chapter. In her experience with the Federalist Society, she's encountered nothing but a tremendous welcome and respect for ideas. Panel discussions have always been balanced, fostering "the smartest, most vigorous debates." "How do you know you are right if you don't know all the arguments on the other side?" she asks. Of course, with so many points of view to behold, she has encountered some extremists every once in a while, but this is par for the course. The Federalist Society, she says, has "never been exclusionary."

In San Francisco, the number of women participating in Federalist Society events has been steadily increasing, said Mary Neumayr, the president of the city's local chapter. Program guests have included distinguished **judges**, including Edith Jones of the Fifth Circuit Court of Appeals and California Supreme Court **Justice Janice Brown**. "The Federalist Society promotes programs that seek to have the most distinguished, capable advocates on both sides of fundamental legal issues present and participating." Unlike today's law schools, the Society places a premium on presenting all sides of an argument. No wonder Society girls are such fierce advocates for their clients.

LOAD-DATE: May 18, 2001

Copyright 2001 P.G. Publishing Co.
Pittsburgh Post-Gazette

May 18, 2001 Friday SOONER EDITION

SECTION: LOCAL, Pg.A-1

LENGTH: 1309 words

HEADLINE: A BITTER FEUD, 3 FAMILIES AND 2 DEATHS

BYLINE: CINDI LASH AND M. FERGUSON TINSLEY, POST-GAZETTE STAFF

BODY:

The shooting deaths of two Hill District women during a brawl at their apartment complex exploded from a feud that began more than a year ago and involved members of three families living in apartments on the same block in Bedford Dwellings.

The start of the trouble was a romantic triangle involving women from two of the warring families, police and neighbors said.

Repeated spats between children from those families drew in adults, who in turn quarreled, threatened, harassed and attacked each other before gunfire erupted Wednesday night.

Police and administrators of the Pittsburgh Housing Authority, which operates the Bedford Dwellings complex, said they took many steps aimed at persuading the Collins, Fuller and **Brown** families to leave each other alone. Nothing worked. "When I got the phone call about this situation [Wednesday] night, I thought right away, 'Oh, my God. It finally happened.' We tried everything we could think of to defuse this problem, but it still happened," said Keith Kinard, the Housing Authority's acting director.

Dead after Wednesday's shooting were Thomasina **Brown**, 44, and Carmen Collins, 37, who had clashed in front of **Brown's** home at 2167 Bedford Ave. A third woman, Lakeysh Collins, 27, a niece of Carmen Collins, was in critical condition last night at UPMC Presbyterian with a gunshot wound to the head.

Police shot **Brown** after she shot Carmen Collins. **Brown's** son, Michael Foreman, was charged with shooting Lakeysh Collins.

The feud initially involved members of the families of Janice Collins, 38, of 2171 Bedford Ave., who is Carmen Collins' sister and Lakeysh Collins' aunt, and Joyce Fuller, who lives at 2165 Bedford. It began as a competition for the affection of a neighborhood man who had relationships with women in both families.

Neighbors said the man had a child with Lawanda Wilks of Terrace Village, who is Fuller's daughter, but at the same time continued a relationship with a member of the Collins family. When Lawanda Wilks brought her son to visit Fuller, neighbors said, verbal sparring began between her family and the Collinses.

Neighbor Gail Felton, 49, said trouble usually began after Wilks' son and a child from the Collins' household argued and fought.

"This was a kid fight," Felton said. "If you attacked [Fuller's] kids, she's going to defend them. It's so amazing that this has continued."

As hard feelings grew between Fuller and Janice Collins, bickering gave way to threats, assaults and an incident July 26 in which Janice Collins was charged with stabbing Fuller. **Brown** witnessed the stabbing and was to testify at Collins' trial for aggravated assault next month.

Janice Collins, who was later freed on bail, would clash again with Fuller.

"There was a lot of he-said, she-said stuff going back and forth between them," said city police Cmdr. William Valenta of the Hill District station.

When appropriate, police filed charges. When complaints involved conflicting accounts that couldn't be verified, Valenta said, officers told the families to file private complaints with a magistrate. Police also offered to refer the families to a mediator, but neither family was interested.

"Police have been here almost seven days a week because of all the fighting going on," said Mary Woodson, 61, who lives between **Janice** Collins and **Brown**. "It's been like a war zone."

In August, Collins filed a harassment complaint with Uptown District **Justice** Oscar Petite Jr. , accusing Fuller and Wilks of cursing at her and her family, photographing her for no reason and filing false police reports about her. She also accused Fuller of pulling a gun on her and of provoking fights.

That case was postponed several times before it was dismissed Feb. 28 because Fuller failed to appear in court. Notations made by Petite's staff on the case file, calling it a "terrible case" and mentioning its ties to the earlier stabbing, attest to the tension and name-calling that took place when the parties did appear in court.

Brown, who moved into Bedford Dwellings about three years ago, also was drawn into the strife. Police arrested her and Janice Collins April 18 and charged both with simple assault and disorderly conduct after a fight outside their apartments.

Collins posted bond and **Brown** was released on her own recognizance. They were scheduled to appear for preliminary hearings yesterday in City Court.

Two weeks ago, Janice Collins' mother, Frances Collins of the North Side, called City Councilman Sala Udin about the feud. Udin had spoken with Valenta and directed his staff to gather information about the families.

"It's one of the worst tragedies I've seen in a very long time," he said. "We're still trying to sort out the history and its substance. I'm telling everybody to remain calm and wait until all the facts are gathered before drawing any conclusions."

Early this month, **Brown** told police that Janice Collins twice had threatened to kill her if she testified

in the stabbing case. Police obtained a warrant charging Collins with intimidation of a witness, simple assault and harassment.

Hours before the shootings Wednesday, Janice Collins turned herself in to face those charges as well as charges in a second case in which she is accused of striking **Brown's** sister, Shirley Hudson, with a hammer. She was in custody when yet another quarrel between her allies and adversary turned lethal.

In the days before her death, **Brown**, too, went to Petite's office to file a complaint against her neighbors. She did not provide enough evidence, however, to persuade an assistant district attorney to approve the complaint, Petite's staff said.

Brown also contacted District Attorney Stephen A. Zappala Jr.'s office to complain about Janice Collins. Following policy, the office contacted the county bail agency, which warned Janice Collins that her bail would be revoked if she bothered **Brown**, said Zappala spokesman Mike Manko.

On Monday, **Brown** called Kinard, the housing authority acting director, to complain about her neighbors and to ask why the authority hadn't done something. Kinard said he told her that the authority had begun formal proceedings in January to evict the Collins family and was waiting for final approval from Petite.

"We were aware of problems between the other two families, but Monday was the first time I ever heard of Mrs. **Brown**," Kinard said. "She spoke to me very calmly."

Kinard said authority officials learned of problems between the Fullers and Collinses from numerous police reports and complaints from other neighbors. He said the authority decided to evict the Collinses because of their behavior, but could not do so without giving them due process in court.

The final eviction notice, dated May 11, arrived at the authority office later in the week; the Collinses were packing when Wednesday night's violence broke out.

On May 2 -- the same day Janice Collins was charged with threatening **Brown** -- Fuller called Kinard and said she also was distressed about the feuding. Kinard said he offered twice to temporarily move her family to another apartment outside Bedford Dwellings.

Fuller declined, saying she didn't believe her family had started the trouble and thus shouldn't have to move.

Kinard said he also made that offer to **Brown**. She, too, balked, saying she didn't want to be forced out because of the behavior of others.

"I think we took all of the steps within reason that we could take," Kinard said. "What more can you do but have police make arrests and follow through with the eviction and offer people chances to move?"

"When that doesn't work and people don't behave as they should, logic goes out the window. This is such a very tragic situation that has everyone scratching their heads, thinking: What else could we have done?"

NOTES:

Staff writer Michael A. Fuoco contributed to this report.

GRAPHIC:

Photo: Franka Bruns/Post-Gazette photos: Neighbor Gail Felton "This was a kid fight. If you attacked [Fuller's] kids, she's going to defend them. It's so amazing that this has continued."

Photo: City Housing Authority workers clean up after Wednesday's shooting at Bedford Dwellings.

LOAD-DATE: May 19, 2001

Copyright 2001 Business Wire, Inc.
Business Wire

May 8, 2001, Tuesday

DISTRIBUTION: Business Editors

LENGTH: 571 words

HEADLINE: Pacific Legal Foundation Says East Bay Municipal Utility District Imposes Illegal Race and Sex Preferences, Violating Proposition 209

DATELINE: SACRAMENTO, Calif., May 8, 2001

BODY:

The East Bay Municipal Utility District (EBMUD), headquartered in Oakland, is violating Proposition 209 (Article I, section 31, of the California Constitution) by imposing race- and sex-based preferences in contracting, four months after the state Supreme Court declared such policies illegal, Pacific Legal Foundation alleged in a letter to the district today.

Proposition 209 is the 1996 ballot initiative that outlawed race- and sex-based preferences by state and local government. It says public entities in California may not "discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." EBMUD is flouting Proposition 209 in its "Contract Equity Program," Pacific Legal Foundation charged. According to EBMUD's official description of the program (found at www.ebmud.com), it establishes goals or "Contracting Objectives" "defined as the minimum percentage of the total value of a contract which should be represented by businesses" in specific racial and gender groups. The program description, on the EBMUD web site, offers the following example: "When subcontracting opportunities are available, a \$200,000 construction contract should have at least 25% (\$50,000) for white men owned businesses, 9% (\$18,000) for white women owned businesses, and 25% (\$50,000) for ethnic minority owned businesses."

"The agency's race- and sex-based 'objectives' or goals are illegal under Proposition 209, which requires that governments show no favoritism by race or sex in any outreach or contracting policies," says Pacific Legal Foundation Principal Attorney Sharon Browne. In a landmark decision last November, the California Supreme Court ruled that Proposition 209 bars not just race and sex quotas, but also race- and sex-targeted "goals." "A participation goal differs from a quota or set-aside only in degree," wrote **Justice Janice Rogers Brown** in the majority opinion in *Hi-Voltage Wire Works v. City of San Jose*. "By whatever label, it remains a 'line drawn on the basis of race and ethnic status' as well as sex."

"The people in adopting Proposition 209 have spoken," said PLF's Sharon Browne. "A race- or sex-targeted 'goal' can be as invidious as an outright quota, because it creates an incentive for officials to make contracting decisions based on race or sex. Today, Pacific Legal Foundation is sending the East Bay Municipal Utility District a letter putting it on notice that its race- and sex-based 'objectives' in contracting are illegal under Proposition 209, and urging the district to abandon this illegal policy."

Pacific Legal Foundation is the main defender of Proposition 209 in the courts. In November, 2000, PLF won the landmark Hi-Voltage Wire Works case in the California Supreme Court. This ruling declared that Proposition 209 bars "programs or policies that use racial or gender classifications." PLF has launched OPERATION END BIAS, a drive to identify jurisdictions that continue to violate Proposition 209 and to put them on notice. The toll-free whistleblower number for citizens who know of policies in violation is 1-877-ENDBIAS (363-2427) CONTACT: Pacific Legal Foundation Sharon L. Browne/Harold Johnson, 916/362-2833
www.pacificlegal.org URL: <http://www.businesswire.com>

LOAD-DATE: May 9, 2001

Copyright 2001 Business Wire, Inc.
Business Wire

May 8, 2001, Tuesday

DISTRIBUTION: News Desks/Legal Writers

LENGTH: 737 words

HEADLINE: Pacific Legal Foundation Charges That Los Angeles County Imposes Illegal Race and Sex Preferences, Violating Proposition 209

DATELINE: SACRAMENTO, Calif., May 8, 2001

BODY:

The County of Los Angeles is violating Proposition 209 (Article I, section 31, of the California Constitution) by imposing race- and sex-based preferences in contracting and employment, four months after the state Supreme Court declared such policies illegal, Pacific Legal Foundation alleged in a letter to the county today.

Proposition 209 is the 1996 ballot initiative that outlawed race- and sex-based preferences by state and local government. It says public entities in California may not "discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Los Angeles County is flouting Proposition 209 in two ways in public-works contracting, Pacific Legal Foundation charged. The first violation is recorded on the county's "Community Business Enterprise Program" web site-oaac.co.la.ca.us/cbewebpage.htm. It states that county officials have established a "participation goal" calling for 25% of construction, commodity and service-contract dollars to be awarded to businesses owned by, among others, targeted racial groups, and women.

The second violation is recorded on the county's Construction Contract Compliance web site-oaac.co.la.ca.us/construcontr.htm. It reports that, for county construction work, the county has established specific numerical or percentage "goals and timetables for minority and female participation" in a contractor's aggregate workforce in each trade on all construction work. Under this program, "Goals for Minority Participation for Each Trade-28.3%; goals for Female Participation for Each Trade-6.9 %."

"To be sure, there's no problem with the county's affirmative action program in contracting to the extent its goals include greater participation of 'disadvantaged and disabled veteran-owned businesses,'" said Pacific Legal Foundation Principal Attorney Sharon Browne. "Those are race-neutral criteria, and Proposition 209 is perfectly compatible with outreach that is race- and sex-neutral. It's only when the county adds race- and sex-targeted 'goals' that it runs afoul of the law."

In the area of employment, Los Angeles County violates Proposition 209, according to PLF, because it establishes "Goals and Timetables [consisting of] specific commitments to appoint a certain number of minorities and women to specified classifications within a designated period of time." (LA County Personnel Policy, Chapter 5.08.080).

"Los Angeles County's race- and sex-based goals are illegal under Proposition 209, which require governments to show no favoritism on the basis of race or sex in any outreach or employment policies," says Attorney Sharon Browne. In a landmark decision last November, the California Supreme Court ruled that Proposition 209 bars not just race and sex quotas, but also race- and sex-targeted "goals." "A participation goal differs from a quota or set-aside only in degree," wrote **Justice Janice Rogers Brown** in the majority opinion in *Hi-Voltage Wire Works v. City of San Jose*. "By whatever label, it remains a 'line drawn on the basis of race and ethnic status' as well as sex."

"The state Supreme Court has spoken," said PLF's Sharon Browne. "A race- or sex-targeted 'goal' can be as invidious as an outright quota, because it creates an incentive for officials to make hiring or contracting decisions based on race or sex. Today, Pacific Legal Foundation is sending the County of Los Angeles a letter putting it on notice that its race- and sex-based performance and hiring goals are illegal under Proposition 209, and urging the county to abandon this illegal policy."

Pacific Legal Foundation is the main defender of Proposition 209 in the courts. In November, 2000, PLF won the landmark *Hi-Voltage Wire Works* case in the California Supreme Court. This ruling declared that Proposition 209 bars "programs or policies that use racial or gender classifications." PLF has launched OPERATION END BIAS, a drive to identify jurisdictions that continue to violate Proposition 209 and to put them on notice. The toll-free whistle-blower number for citizens who know of policies in violation is 1-866-END BIAS (363-2427). CONTACT: Pacific Legal Foundation

Sharon L. Browne or Harold Johnson, 916/362-2833
www.pacificlegal.org URL: <http://www.businesswire.com>

LOAD-DATE: May 9, 2001

Copyright 2001 / Los Angeles Times
Los Angeles Times

May 4, 2001 Friday Home Edition

SECTION: Part A; Part 1; Page 1; Metro Desk

LENGTH: 1313 words

HEADLINE:

Medicare Patients Can Sue HMOs;
Health: State court rules in favor of consumers' right to seek redress if care is improperly denied.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

Medicare patients in California may sue health maintenance organizations for denying necessary but expensive medical treatment, the California Supreme Court decided Thursday.

The 5-2 ruling clears the way for elderly and disabled patients and their survivors to seek hefty compensation, including punitive damages, from HMOs that improperly deny care. About 1.5 million Medicare patients in California are enrolled in HMOs.

Many such suits in California previously had been dismissed on the grounds that federal law requires these complaints to be filed in an administrative proceeding established by the Medicare law. The federal process allows only limited claims and compensation. "The decision could not be better for Medicare beneficiaries," said Carol S. Jimenez, a Los Alamitos lawyer who represents the family of a now-deceased Orange County man in the case. "It means that their HMOs can't deny care and escape the consequences."

Lawyers for PacifiCare of California, the second-largest HMO in the state and a defendant in the case, are considering an appeal to the U.S. Supreme Court.

"The concern is: Do we want to have a situation where the Medicare process is bypassed and is replaced with what we believe is unnecessary litigation," said attorney Jon Z. Manzanares, who also denied that the Orange County man, George McCall, was treated improperly.

Justice Kathryn Mickle Werdegarr, writing for the court majority, said state and federal courts have disagreed over whether such lawsuits are permitted in state courts, and the U.S. Supreme Court has not addressed the question.

She said the federal Medicare law, while establishing an administrative system for patient complaints, did not specifically prohibit lawsuits in state court.

"We presume that in enacting laws, Congress does not intend to preempt state regulation of the same subject matter unless a contrary intent is made clear," wrote Werdegarr, a moderate on the court.

The two most conservative members of the state high court dissented. **Justice** Marvin R. Baxter, joined by **Justice Janice Rogers Brown**, contended that the federal Medicare Act presents a careful administrative program for handling complaints.

"While the system may not afford the range of relief available under state law, it is designed to provide that coverage decisions are reviewed in a thorough and expeditious manner" by the federal government and review boards, Baxter wrote.

McCall, who suffered from lung disease, had brought the case, charging that his HMO, PacifiCare, and his physician provider group, Greater Newport Physicians Inc., refused to refer him for a lung transplant.

The Costa Mesa businessman was receiving treatment under Medicare. He was extremely ill and in the hospital when a nurse asked his wife, Barbara, why he wasn't on a lung transplant list, Jimenez said.

When he asked about a transplant, his doctors told him he would be a candidate but they would not refer him until he quit the HMO and relied fully on Medicare, which covers the full cost of such transplants, the lawyer said.

The same doctors continued to treat him as a Medicare patient after he left the HMO, Jimenez said.

"The moment he disenrolled, they referred him for a transplant because then, from that moment on, they got paid every time they saw him and did not have to pay for any of the care for which he had been referred," Jimenez said.

McCall waited about two years for the transplant, surviving on a ventilator. He died several hours after receiving a transplant at the age of 58. He left three grown children, two of them in college.

'They Took the Love of My Life From Me'

Barbara McCall said Thursday that she hopes the ruling "means that HMOs will no longer be able to get away with things like they did to George."

"George spent the last few years of his life on a ventilator, thinking about what might have been if he had been allowed a lung transplant earlier," she said.

Before learning about the success of transplants from a nurse, she said, she and her husband had been told that they didn't work and were dangerous. She said her husband had an inherited form of emphysema, and lung transplants save lives if they are done before the disease has ravaged the patient.

"He should have had it some time ago, many years ago, and he would have survived," said his widow, a real estate broker. "They took the love of my life from me. They took my best friend."

Medicare patients can go to private doctors, but some opt for HMOs that contract with Medicare. HMOs typically offer benefits, like prescription drug coverage, that Medicare doesn't.

HMOs also are required to cover all benefits to patients that Medicare provides. Physician groups, however, are sometimes paid more by Medicare than by HMOs.

At the time McCall filed his lawsuit (McCall vs. PacifiCare, SO82236), at least two Courts of Appeal in California had previously ruled that the Medicare law barred such complaints in state court. Relying on those rulings, an Orange County Superior Court judge dismissed the suit.

Less than a month after McCall's death in July 1999, another state Court of Appeal overturned the earlier rulings and decided that McCall's suit could go to trial. The California Supreme Court's ruling upheld that decision and disavowed the earlier appellate rulings.

Justice Werdegard noted that Medicare regulations provide administrative review of a limited number of claims--not the kind made in McCall's lawsuit. For instance, a patient who is denied a service can appeal to Medicare and sometimes get a relatively quick decision.

Medicare law allows a patient to be reimbursed only for out-of-pocket costs that were incurred after the treatment had been improperly denied. If the patient disagrees with the government's decision, he or she can appeal in federal court subject to the same limitations.

Certain kinds of complaints will still have to be submitted to the Medicare process, despite Thursday's decision. A dispute over whether a treatment is covered by Medicare and an attempt to be reimbursed for care must be brought in the Medicare system, lawyers said.

McCall's lawsuit alleges negligence, willful misconduct, fraud, negligent and intentional infliction of emotional distress, and unfair business practices. The lawsuit does not name a specific dollar amount, but some attorneys believe the damages could run into the millions.

In dissent, Baxter wrote, "It is not the prerogative of this court to second-guess the measured trade-offs enacted by Congress. "Today's decision all but assures that Medicare administrative review process will cease to function as a meaningful limit on judicial review. I cannot, and will not, join in its undoing."

The dissent exceeded the majority opinion in length, a possible sign that the case was originally assigned to Baxter but that he was unable to persuade a majority of the justices to go along with his views.

PacifiCare praised the dissent. In a prepared statement, company officials said: "Like the dissenting justices, we are concerned that the efficiency and integrity of the [Medicare] program's administrative review process will be compromised."

Consumer activist Jamie Court called the ruling a major victory for HMO patients.

"This decision was a very reasonable one, but it firmly drew the line in the sand against HMO efforts to take away the right of legal redress from patients in Medicare," said Court, executive director of the Foundation for Taxpayer and Consumer Rights.

Jeffrey Ehrlich, an appellate attorney in Claremont, said his firm alone has about 10 cases pending that will be allowed to go to trial because of Thursday's ruling.

He predicted that the ruling will "nip in the bud" attempts by HMOs in other states to prevent

Medicare patients from suing in state courts.

GRAPHIC: PHOTO: (Orange County Edition, B1) Medicare Ruling: Lawyers for Santa Ana-based PacifiCare of California, the state's second-largest HMO, are considering an appeal of a state Supreme Court ruling that Medicare patients in California can sue when denied necessary but expensive medical treatment.

LOAD-DATE: May 4, 2001

Copyright 2001 The Chronicle Publishing Co.
The San Francisco Chronicle

MAY 4, 2001, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A1

LENGTH: 811 words

HEADLINE: Medicare patients allowed to sue HMOs;

Top state court rules in denial-of-care case

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:

In a major victory for 1.5 million Californians, the state Supreme Court ruled yesterday that Medicare beneficiaries can sue health maintenance organizations for damages when they are denied adequate care.

By a 5-to-2 vote, the court rejected an HMO's claim that beneficiaries are limited to administrative relief and cannot turn to the state courts.

The decision allows the family of an Orange County man who suffered from a degenerative lung disease to sue PacifiCare Health Systems for allegedly refusing to refer him to a specialist or a transplant program.

"This is a landmark decision," said Carol Jimenez, the Los Alamitos attorney for the late George McCall and his wife, Barbara, who sued PacifiCare. "This opens the floodgates for people with Medicare to sue their HMOs." In 1998, a state appeals court had ruled that the federal Medicare Act prevented beneficiaries from suing HMOs.

But yesterday, the state's highest court said that in passing the Medicare Act, Congress did not intend to prevent beneficiaries from suing.

"Congress left open a wide field of operation for state law pertaining to standards for the practice of medicine and the manner in which medical services are delivered to Medicare beneficiaries," wrote Justice Kathryn Mickle Werdegard in the majority opinion.

She noted that the Medicare administrative review process covers "a limited class of claims," primarily relating to reimbursement disputes. She said it does not cover claims relating to the quality of care.

Justice Marvin Baxter dissented, saying that the decision undermines Medicare's administrative review process, which he said gave patients an efficient and expert review of any complaints. **Justice Janice Rogers Brown** joined in Baxter's opinion.

Barbara McCall called the decision "bittersweet" because her husband died two years ago. "It's not going to bring my husband back," she said. "But if it makes one person more aware of how the HMOs control the medical system, it will have been worth all the work and effort."

Jimenez said that the ruling is consistent with federal decisions around the country that have allowed Medicare beneficiaries to sue in state court. "California was an anomaly," she said.

"This is a big win for HMO patients," said Jamie Court, executive director of the Foundation for Taxpayer and Consumer Rights in Santa Monica. He said that the court is allowing people to sue even when there is an administrative review available. "The industry had really tried to close themselves off from liability," Court said.

He said Medicare beneficiaries will be able to take advantage of a new state law sponsored by his group that allows patients to sue HMOs for denial of adequate health care.

Jon Manzanares, the lawyer for PacifiCare, said that his client was disappointed with the decision and he did not rule out filing an appeal with the U.S. Supreme Court.

He said that patients can get immediate relief through the administrative process, unlike the court system, which can drag on for years.

George McCall, who suffered for years from a degenerative lung disease, filed suit in 1997, charging that PacifiCare for more than 12 years repeatedly refused to refer him to a specialist, put him on a lung transplant list or provide other needed care. He was forced to end his membership in the HMO and ultimately received a lung transplant paid for by Medicare.

Barbara McCall said the doctors told her husband that a lung transplant would probably not be successful because most patients with his disease die.

"My husband trusted them," she said. "He was an honest man and he thought they were, too."

A trial judge threw out McCall's suit. But a state appeals court reinstated the complaint, saying his suit was not precluded by the federal Medicare Act.

McCall died just before the appeals court ruling came out. Meanwhile, a federal appeals court ruled in 1996 that patients could sue in state court. But the following year, the state appeals court in San Jose ruled the other way, saying Medicare beneficiaries were limited to administrative relief.

The ruling

-- What the court did: The California Supreme Court ruled that Medicare beneficiaries can sue health maintenance organizations in state court for denying adequate health care.

-- Who's affected: The decision will affect 1.5 million beneficiaries in the state who are covered by an HMO.

-- The reasoning: The court said that the Congress did not intend to prevent beneficiaries from suing

in state court when it passed the Medicare Act, which sets out an administrative review for complaints.

-- What it means: "This opens the floodgates for people with Medicare to sue their HMOs."

-- Carol Jimenez, attorney. E-mail Harriet Chiang at hchiang@sfchronicle.com.

GRAPHIC: PHOTO

LOAD-DATE: May 4, 2001

Copyright 2001 American Lawyer Media, L.P.
Fulton County Daily Report

May 2, 2001 Wednesday

LENGTH: 1526 words

HEADLINE: The Supreme Court's Possible New Lineups

BYLINE: Stuart Taylor Jr. Stuart Taylor Jr. is a senior, writer with National Journal, magazine and a contributing editor, at Newsweek. His e-mail address, is staylor@njdc.com., Contained in Author Tag

BODY:

As George W. Bush passes the 100-day mark, he faces an unusual problem for a new president: Time is already running out on his ambition-advertised during last year's campaign-to make the Supreme Court more conservative.

Washington has been abuzz for months with Supreme Court-retirement speculation, mostly centering on 76-year-old Chief Justice William H. Rehnquist and 71-year-old Justice Sandra Day O'Connor. She is said to have told friends she would like to retire. He is considered more likely to do so by some in the conservative legal network, which includes many Rehnquist friends and former clerks.

Both may well fool people, some Court watchers say, by staying on for years to come, but liberal groups are taking no chances. Still steaming about what they saw as naked partisanship in the Dec. 12 decision in Bush v. Gore-in which Rehnquist and O'Connor helped make Bush president-liberals are preparing. They are raising money, rallying troops, researching the records of possible Bush nominees, and readying rhetorical rapiers for the mother of all confirmation battles. Bush suggested last year that he would appoint judges in the mold of Antonin Scalia and Clarence Thomas, who are currently the Court's most conservative members. That was when Republicans had a 54-46 Senate majority. Now, with ideological polarization over judicial appointments at (or close to) a high, it would be hard to get a conservative nominee past the 50-50 Senate. But next year-when Congress will be preoccupied with the midterm elections-it would be even harder.

Law and Politics

Justices are not supposed to let political calculations influence them. But they are only human. Legend has it that the late Justice Thurgood Marshall told clerks during the Reagan administration: "If I die while that man's president, just prop me up and keep on voting." And Rehnquist recently told television host Charlie Rose of PBS: "I think (that) traditionally, Republican appointees have tended to retire during Republican administrations. And Democratic appointees during Democratic administrations. It's not invariable. But there's surely a slight preference for that."

All justices naturally hope for the survival of the legal principles most dear to them, such as the recent line of 5-4 decisions expanding states' rights. Those decisions would probably be overruled if Rehnquist or O'Connor were to retire on a Democratic president's watch.

So perhaps they have given some thought to how they could best perpetuate their principles. At the

same time, they seek to ensure an orderly succession, avoiding a bloody confirmation battle, making some history, and helping Bush put his stamp on the court and enhance his political capital.

Here's how: The conservative Rehnquist retires in late June, at the end of the court's current term. Bush nominates the more centrist O'Connor (who defers any thoughts of retiring) to be chief justice. He picks a politically unassailable states' righter-most likely 45-year-old White House Counsel Alberto Gonzales-to fill the resulting vacancy.

The Democrats, who have been spoiling for a fight, would see no advantage in trying to block the popular O'Connor-who supports abortion rights-from becoming the first female chief justice. Nor would they block an up-from-poverty Latino such as Gonzales from becoming the first Hispanic justice. Both easily would win confirmation amid bipartisan hosannas to diversity. Bush would rack up political points with women and Hispanics.

And then we would wait for months, perhaps years, to find out whether Bush had moved the court to the right (or the left). The answer would depend on whether Gonzales-whose record, including two years on the Texas Supreme Court, sheds little light on his leanings-proves to be even more conservative than Rehnquist. That's not very likely. But Gonzales does seem a good bet to uphold Rehnquist's precedents on states' rights.

This scenario is not a prediction. It depends on two highly speculative assumptions: that Rehnquist is ready to retire and that O'Connor would be happy to stay on as chief. There are, of course, many other scenarios. Among them:

Rehnquist retires. O'Connor becomes chief justice. But rather than choosing Gonzales, Bush goes to someone more pleasing to the Republican Right. Take J. Michael Luttig, of Alexandria, Va., or Emilio Garza, of San Antonio, both federal appellate judges much more experienced and better qualified than Gonzales by the traditional (race-neutral) measures, for example.

Although replacing Rehnquist with another conservative would not tip the court's balance, liberals still would go to war. They might well be able to stop a white male like Luttig, despite his stellar scholarly qualifications. Garza's Mexican-American ancestry would make him harder to beat.

Both Rehnquist and O'Connor retire. Bush names two strong conservatives to replace them. That would tip the Court's balance to the right-if they were confirmed-on some big issues on which the pivotal O'Connor has aligned herself with the court's liberals, including abortion, gay rights, and, to a limited extent, race-based affirmative action.

But don't bet on Bush attempting such a move. It would provoke an all-out assault by Democrats-whose Senate leader, Thomas Daschle, has vowed to mount a filibuster in such a situation-probably ending in the defeat of one or both nominees. And the bitterness of the battle would cast a pall over Bush's first year in office.

Rehnquist and O'Connor retire. Bush seeks to strike a deal with Senate Democrats by choosing a chief justice acceptable to them-possibly even Justice Stephen Breyer, a Clinton-appointed Democrat respected by key Senate Republicans-if the Democrats agree to confirm both (say) Gonzales and a favorite of conservatives to fill the vacancies. One prospect said to be on the White House radar screen is California Supreme Court **Justice Janice Rogers Brown**, an African-American whose strong conservative-libertarian views and opposition to racial preferences have impressed some

politically connected conservatives (such as the Institute for **Justice's** Clint Bolick).

None of the **justices** retires, either this year or next. All nine seem in good health, including the court's oldest and most liberal member, John Paul Stevens, who turned 81 on April 20. (He has expressed no interest in stepping down.) Rehnquist has hired clerks for the court's next term. And O'Connor has done so for the next two terms.

First Hispanic Justice

With all these variables, one constant is that Bush seems eager to put the first Hispanic justice on the court. Of the two leading prospects, the 53-year-old Garza has a far more conservative judicial record, including a 1992 opinion arguing that "the decision to permit or proscribe abortion is a political choice" that the Supreme Court should leave to the states. He would draw furious opposition, at least if named to replace O'Connor, which would narrow the pro-abortion-rights majority to a shaky 5-4.

The dignified, forceful Gonzales seems to have the inside track. He is a close Bush confidant from Texas. He was virtually unknown in Washington a year ago. He was raised in humble circumstances by parents who never got past elementary school and graduated from Harvard Law School. He then spent 13 years as a business lawyer with a large Houston-based firm (Vinson & Elkins), and became a key member of then-Gov. Bush's inner circle as his legal counsel from 1995 to 1997 and as Texas secretary of state from 1997 to late 1998, when Bush put him on the Texas Supreme Court.

Gonzales spent just under two years there before Bush made him White House counsel. He has pleased conservatives and worried liberals by putting several high-powered conservative veterans of Washington's legal-political wars on his 12-lawyer staff. And he ended the special role that the American Bar Association-now seen by conservatives as a liberal interest group-had played since 1953 in rating the qualifications of prospective judicial nominees.

At the tender age of 45, Gonzales-like Clarence Thomas at the time of his 1991 nomination-does not yet have the experience or professional stature to be considered highly qualified to sit on the Supreme Court, let alone to be chief justice. And the same bland paper trail that presents potential critics with so little ammunition makes some conservatives nervous. It's a bit reminiscent of David Souter, whom Bush's father chose in 1990. Souter's paper trail was also unrevealing, and he ended up joining the court's liberal wing on big issues such as abortion, racial preferences and religion. "No more Souters" has become a conservative mantra.

Liberals find it hard to imagine that Bush would put another Souter on the court and thereby replicate what many Republicans call his father's worst mistake. The president, of course, knows far more about where Gonzales fits on the ideological spectrum than the rest of us do. But he isn't about to tell us. Why should he?

)2001 National Journal. Reprinted by permission; all rights reserved.

LOAD-DATE: June 15, 2001

Copyright 2001 American Lawyer Newspapers Group, Inc.
The American Lawyer

May, 2001

SECTION: arguments

LENGTH: 1111 words

HEADLINE: Transferred Intent--It's a sad day when a plain speaker advocates obfuscation.

BYLINE: George M. Kraw

BODY:

Robert Bork wants to retire "strict construction" not the concept, just the term. "He's really tired of it," explained former Bork aide turned aspiring pundit Barbara Olson to a packed house at the recent Conservative Political Action Conference in Washington, D.C. Olson and Bork were appearing on a panel called "Reasonable Construction: The Federal Judiciary Under Bush."

Bork, the erstwhile Yale law professor of Bill and Hillary Clinton, solicitor general in the Nixon administration, and rejected Supreme Court nominee of Ronald Reagan, understands better than most lawyers the politics of language.

He's watched his own name evolve into Republican shorthand for a nasty confirmation proceeding marked by personal attacks. (There remains understandable reluctance among Democrats to use the term when Democratic nominees get "Borked.")

In a world of opaque legal concepts and disingenuous political slogans, expressions such as Borked or strict (from the Latin word *stringere*, to bind tight) construction have a refreshing directness even for those who disapprove of the practices the terms describe. Borking involves disparaging individuals when attacks on their legal competence alone won't get the job done. Strict construction resists interpretations that stray from the literal meaning of the Constitution and statutes.

Unfortunately for citizens who favor clarity in public discourse, saying what you mean and meaning what you say are poor strategies for winning confirmation in an evenly split Senate. These days the most plainspoken of judges are the most likely to receive a full Borking if nominated for a federal position.

Enthusiasts for stymieing President George Bush's Supreme Court nominations haven't waited for an opening to occur before blasting away at potential conservative nominees. Among their early targets are U.S. Court of Appeals for the Fifth Circuit **judge** Edith Jones and California Supreme Court **justice Janice Rogers Brown**, both of whom suffer from the often fatal flaws of habitual intellectual honesty and substantial paper trails.

At the conference, Bork himself said he wasn't certain the president could succeed in appointing a conservative to the Supreme Court. And he didn't suggest that "reasonable construction" would in practice mean anything different than what he has advocated in the past. But reasonable construction doesn't carry the same political baggage that strict construction does. Like its cousin "compassionate conservatism," the term camouflages ideology without necessarily changing its substance. It also satirizes the language of Washington politicians.

Bush administration nominees may want to adopt the new terminology before being frog-marched up and down rhetorical hills by Democrats in the Senate Judiciary Committee. The friendly fuzziness of reasonable construction promises partial refuge from ideological inquisitions and senatorial importunings to pledge "Read my lips; *Roe v. Wade* is settled law."

But there would be no small incongruity in Bork's reasonable construction becoming a dodge allowing conservative judges to slip past liberal gatekeepers in the Senate. Bork's popularity among social conservatives comes from his unapologetic absolutist worldview, which he makes no effort to disguise or soften.

Political failure has freed him from public office ambitions and the need to seek the approval of others. He accuses the Supreme Court of having "just about successfully expunged [religion] from our public life" and turning "the First Amendment inside out." He told his Washington audience that "we are in a culture war, and the [Supreme] Court is part of the heavy artillery of the left."

One criticism of strict construction and similar theories is that they are mechanistic and ignore moral considerations. During the panel discussion, Olson asked Bork what he would have done if he were a judge in Nazi Germany. A second hypothetical concerned enforcement of fugitive slave laws in the United States between the Dred Scott decision and the Civil War.

How would reasonable construction deal with these situations? Was a judge obligated to follow the law in violation of his or her conscience?

Bork answered that any judge in Nazi Germany should have resigned and left the country. A judge serving on the Supreme Court at the time of the Dred Scott decision should have dissented. And a lower court judge opposed to the return of fugitive slaves should, according to Bork, either have followed the law or resigned from the bench with a "blistering statement."

In his incarnation as solicitor general, Bork was faced with the lesser but still distasteful dilemma of whether to follow President Richard Nixon's order to fire Watergate prosecutor Archibald Cox.

Nixon was trying to block an investigation into his own wrongdoing. But as president he had the authority to oust Cox. Then attorney general Elliot Richardson resigned rather than obey the order.

His deputy, William French Smith, also refused and was fired before he could quit. Smith believed someone would have to stay on to keep the government running and told Bork he would support him if Bork carried out the order. So Bork became acting attorney general and dismissed Cox. Perhaps in the same circumstances today, Bork would resign with a "blistering statement."

Real-life judicial decisions are more difficult for those who have to make them than for those who critique them through the lens of historical hindsight. Political ideology and theories of jurisprudence are also based on past experience. This doesn't guarantee that they will always fit future circumstances. Sometimes a judge's personal strengths will be more important than judicial philosophy. That is how both Democrats and Republicans justify Borking nominees they don't like. During last year's campaign, Bush said that his favorite Supreme Court justices are Clarence Thomas and Antonin Scalia. Any Bush nominee making a similar statement has zero chance of being confirmed by the current Senate. The president is likely to settle for individuals who are discreet in their public professions and promise not to cause him political grief, either with supporters or the citizenry at large.

Still, it would be better for the long-term health of the courts if lapses into plain speech were not disqualifying events for Supreme Court or other federal judicial appointments. After all, if blandness, mediocrity, and the ability to hide beliefs (or the lack of them) behind slogans become the most important criteria, we should just elect the judges.

George M. Kraw is a name partner in San Jose's Kraw & Kraw.

LOAD-DATE: April 26, 2001

Copyright 2001 The Chronicle Publishing Co.
The San Francisco Chronicle

APRIL 29, 2001, SUNDAY, FINAL EDITION

SECTION: NEWS; Pg. A6

LENGTH: 1633 words

HEADLINE: NEWSMAKER PROFILE;

Janice Rogers **Brown**;

Majority opinion -- passionate but hard to peg;

State Supreme Court's wild card could be key in upcoming votes

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:

On first take, it's hard to believe that Janice Rogers **Brown**, the daughter of Alabama sharecroppers and the first African American woman on the California Supreme Court, would write a decision jeopardizing hundreds of affirmative action programs throughout the state.

But friends say **Brown** has always resisted stereotypes based on her gender or race. A conservative and a Republican, she was Gov. Pete Wilson's chief legal adviser and eventually became his final appointment to the state's highest court.

After four years as a justice, **Brown** has staked a claim for herself as the outspoken conservative on a court steering a moderate course. Her opinions are pointed and provocative, and she doesn't mind taking swipes at her colleagues. "She's a very gutsy justice," said Gerald Uelmen, a professor at Santa Clara University School of Law, who closely follows the court. "She's not afraid to stand alone."

And with the court increasingly divided, **Brown** could play a pivotal role in the next few months as justices decide key issues of gun control, jury nullification and taxpayer rights. The court will also tackle a case -- the first of its kind nationally -- involving the 101 California St. shooting. In it, justices will decide whether gunmakers can be held legally responsible for the criminal use of weapons.

Brown is best known for her November decision upholding Proposition 209, the 1996 voter-approved initiative barring preferential treatment for women and minorities. In writing the majority opinion, **Brown** attacked the entire history of affirmative action, a move that Chief Justice Ronald George, in a rare dissent, condemned as being "unnecessary and inappropriate."

Ward Connerly, one of the prime backers in the 1996 initiative, is a big fan of **Brown's**. He says she has "a profound respect for civil rights," but also believes in individual responsibility. Although she is

a prominent minority woman, he said, "she doesn't carry on her shoulders the burdens of anybody else or the expectations of anybody else."

A liberal in her college days, the 51-year-old justice became a conservative after law school convinced her that the courts should be not be used for sweeping social changes.

She is full of contradictions and also unpredictable. She anchors the right wing of the high court, but occasionally displays an independent streak and bolts to the liberal side in both criminal and civil matters, suggesting a libertarian leaning.

As a conservative, she has voted to require drug testing of employees and to allow cities to clear the streets of gang members. But she joined the liberal members in objecting to child molesters being prosecuted years after the alleged crime.

She is a quiet, intensely private person -- **Brown** refused repeated requests to be interviewed for this story and others. In court, she asks few questions when lawyers argue their cases. But when she writes an opinion, she becomes a pugnacious street fighter on legal-size paper.

"She's very passionate about what she believes in and that passion comes across in her dissents," said Justice Vance Raye of the state appeals court in Sacramento and a friend of the justice's for many years.

Brown came onto the court in 1996 amid controversy. She was the only justice ever to be rated "not qualified" by the state agency that evaluates all nominees to the court. The State Bar Commission on Judicial Nominees found her inexperienced -- she had been an appellate court judge for less than two years -- and overly subjective.

Five years later, she has surprised even liberal commentators, who say they are impressed with her intelligence, historical perspective and independence.

Her bare-knuckles style of writing can delight legal experts or make them wince. At the very least, she shakes the stereotype of court opinions as mind-numbingly dull recitations.

Even when she's in the majority, she often writes separate opinions, taking a more extreme position than the rest.

Brown sprinkles her decisions with quotes and characters from Plato's "Republic," George Washington's farewell address, John Grisham novels and songwriter Billy Preston's 1970s song "Nothing From Nothing Leaves Nothing."

Some legal experts find her approach a welcome contrast to most decisions, which tend to be dry and written by law clerks. But court observers say she can get unnecessarily personal with those who disagree with her.

"She's not building consensus," said one appellate court judge. "She's seen as stridently advancing a certain ideological philosophy more than a legal position."

Her defenders say that **Brown** is motivated by a sense of justice, not by any preconceived notions or political beliefs. "She's not an ideologue, and she gets to her position after a lot of deep thought," said

state Sen. Chuck Poochigian of Fresno.

Her passions and forthright opinions came through in the majority opinion she wrote in the Proposition 209 case.

With the court deeply divided, **Brown** wrote a majority opinion that stung liberals and minorities because of her condemnation of several key civil rights rulings. "There was something there to offend just about everyone," Uelmen at Santa Clara University said.

Clark Kelso, a professor at McGeorge School of Law in Sacramento, was not as harsh on **Brown** and her version of affirmative action. "It may be an uncomfortable version of history to read," he said, "but I don't find it a particularly surprising history."

Brown was born May 11, 1949, in Greenville, Ala., about 50 miles south of Montgomery. As a child growing up in the segregated South, she was surrounded by color barriers in schools, restaurants and hospitals.

"We could, however, live our lives without seeing a movie if it meant being relegated to the balcony," **Brown** recalled in a 1996 interview with California Women Lawyers.

After graduating from UCLA law school, **Brown** spent eight years at the state attorney general's office working on both civil and criminal cases. In 1991, she became Wilson's legal affairs secretary, advising him on such issues as term limits, executions and reapportionment.

Wilson appointed her to the state Court of Appeal in October 1994. In May 1996, she was confirmed to the state Supreme Court.

Brown is not particularly close to any of her colleagues, court sources say. Although she works in San Francisco, she chooses to live in Rancho Murieta, about 20 miles outside of Sacramento, in a gated community with her husband, a jazz musician. Most of her colleagues see her only on Wednesdays, when they meet to decide what cases to review.

While many minority lawyers find her conservative leanings at odds with their own beliefs, several insist they are not disappointed with **Brown**.

"There is perhaps an expectation or a hope that she could do more for African Americans and other groups historically underrepresented or discriminated against," said Lindberg Porter, a former president of the Bar Association of San Francisco and an African American.

"But that is a heavy burden to carry, that's why I can't be critical. She has an absolute right to say, 'No. Why should I have greater sensitivity than anybody else on this court.' "

-----Biography
State Supreme Court justice- BORN: May 11, 1949, in Greenville, Ala.- EDUCATION: California State University at Sacramento (B.A., 1974); University of California at Los Angeles (J.D., 1977).- BACKGROUND: Admitted to the California Bar on Dec. 28, 1977. Served as deputy legislative counsel from 1977 to 1979; deputy attorney general from 1979 to 1987; and deputy secretary and general counsel for the California Business, Transportation, and Housing Agency from 1987 to 1989.

Worked in private practice from 1989 to 1991.

Became legal affairs secretary to Gov. Pete Wilson in 1991.

Appointed to the state Court of Appeal for the Third District, Nov. 4, 1994.

Elevated to the state Supreme Court on May 3, 1996.

-----**Justice Brown** -- in her own words-- **Justice Janice Rogers Brown** may ask few questions in court, but she holds little back in written opinions. **Brown** has a broad sense of history, an undeniable literary flair and a tendency to fling a few zingers. While all of her decisions can be lively, she saves most of her rhetorical punches for dissenting opinions. Here is a sampling.-- In a 1997 decision that allowed cities to clear the streets of gang members who annoy or intimidate residents, she wrote: "Liberty unrestrained is an invitation to anarchy."-- She backed drug testing for both job applicants and current employees up for promotion in government, calling it one of the trade-offs of being a public employee. "Such choices are neither easy nor comfortable," she wrote. "But that is life. Sometimes beauty is fierce; love is tough; and freedom is painful."-- When the court ruled that the governor and Legislature could appoint members of the State Bar Court, a power that previously belonged solely to the state Supreme Court, **Brown** took a jab at colleagues in her dissenting opinion: "The preservation of a viable constitutional government is not a task for wimps."-- She was also aghast when the majority allowed a judge to ban racial slurs in the workplace, saying they had frivolously brushed away free speech rights. "I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind."-- In a relatively obscure antitrust case, she offered this reminder to her senior colleagues: "The quixotic desire to do good, be universally fair and make everybody happy is understandable. Indeed, the majority's zeal is more than a little endearing. There is only one problem with this approach. We are a court." Harriet Chiang

GRAPHIC: PHOTO, State Supreme Court **Justice Janice Rogers Brown**, a liberal turned conservative, has made decisions favoring both sides of the political fence. / Fiona McDougal/The Recorder 1999

LOAD-DATE: April 29, 2001

Copyright 2001 The National Journal, Inc.
The National Journal

April 28, 2001

SECTION: LEGAL AFFAIRS; Vol. 33, No. 17

LENGTH: 1574 words

HEADLINE: Psst! Pass It on. The Successor to Rehnquist Will Be ...

BYLINE: Stuart Taylor Jr.

HIGHLIGHT:

One scenario has O'Connor becoming Chief Justice. Another scenario Bush picking Breyer for the post.

BODY:

As George W. Bush passes the 100-day mark, he faces an unusual problem for a new President: Time is already running out on his ambition-advertised during last year's campaign-to make the Supreme Court more conservative.

Washington has been abuzz for months with Supreme Court-retirement speculation, mostly centering on 76-year-old Chief Justice William H. Rehnquist and 71-year-old Justice Sandra Day O'Connor. She is said to have told friends she would like to retire. He is considered more likely to do so by some in the conservative legal network, which includes many Rehnquist friends and former clerks.

Both may well fool people, some court watchers say, by staying on for years to come, but liberal groups are taking no chances. Still steaming about the naked partisanship (as they see it) of the Dec. 12 decision in Bush vs. Gore-in which Rehnquist and O'Connor helped make Bush President-liberals are raising money, rallying troops, researching the records of possible Bush nominees, and readying rhetorical rapiers for the mother of all confirmation battles. Bush suggested last year that he would appoint judges in the mold of Antonin Scalia and Clarence Thomas, who are currently the Court's most conservative members. That was when Republicans had a 54-46 Senate majority. Now, with ideological polarization over judicial appointments at (or close to) a high, it would be hard to get a conservative nominee past the 50-50 Senate. But next year-when Congress will be preoccupied with the midterm

elections-it would be even harder.

Justices are not supposed to let political calculations influence them, of course. But they are only human. Legend has it that the late Justice Thurgood Marshall told clerks during the Reagan Administration: "If I die while that man's President, just prop me up and keep on voting." And Rehnquist recently told television host Charlie Rose of PBS: "I think (that) traditionally, Republican appointees have tended to retire during Republican Administrations. And Democratic appointees during Democratic Administrations. It's not invariable. But there's surely a slight preference for that." All Justices naturally hope for the survival of the legal principles most dear to them, such as the recent line of 5-4 decisions expanding states' rights, which would probably be overruled if either Rehnquist or O'Connor were to retire on a Democratic President's watch.

So perhaps they have given some thought to how they could best seek to perpetuate their states' rights principles, among others, while at the same time ensuring an orderly succession, avoiding a bloody confirmation battle, making some history, and helping Bush put his stamp on the Court and enhance his political capital.

Here's how: The conservative Rehnquist retires in late June, at the end of the Court's current term. Bush nominates the more centrist O'Connor (who defers any thoughts of retiring) to be Chief Justice. He picks a politically unassailable states' righter-most likely 45-year-old White House Counsel Alberto R. Gonzales-to fill the resulting vacancy. The Democrats, who have been spoiling for a fight, would see no advantage in trying to block the popular O'Connor-who supports abortion rights-from becoming the first female Chief Justice. Nor would they block an up-from-poverty Latino such as Gonzales from becoming the first Hispanic Justice. Both would easily win confirmation amid bipartisan hosannas to diversity. Bush would rack up political points with women and Hispanics.

And then we would wait for months, perhaps years, to find out whether Bush had moved the Court to the right (or the left). The answer would depend on whether Gonzales-whose record, including two years on the Texas Supreme Court, sheds little light on his leanings-proves to be even more conservative than Rehnquist. That's not very likely. But Gonzales does seem a good bet to uphold Rehnquist's precedents on states' rights, at least.

This scenario is not a prediction. It depends on two highly speculative assumptions: that Rehnquist is ready to retire and that O'Connor would be happy to stay on as chief. There are, of course, many other scenarios. Among them:

* Rehnquist retires. O'Connor becomes Chief Justice. But rather than choosing Gonzales, Bush goes to someone more pleasing to the Republican Right, such as J. Michael Luttig, of Alexandria, Va., or Emilio M. Garza, of San Antonio, both federal appellate judges much more experienced and better qualified than Gonzales by the traditional (race-neutral) measures. Although replacing Rehnquist with another conservative would not tip the Court's balance, liberals would still go to war. They might well be able to stop a white male like Luttig, despite his stellar scholarly qualifications. Garza's Mexican-American ancestry would make him harder to beat.

* Both Rehnquist and O'Connor retire. Bush names two strong conservatives to replace them. That would tip the Court's balance to the right-if they were confirmed-on some big issues on which the pivotal O'Connor has aligned herself with the Court's liberals, including abortion, gay rights, and (to a limited extent) race-based affirmative action. But don't bet on Bush attempting such a move. It would provoke an all-out assault by Democrats-whose Senate leader, Thomas A. Daschle, has vowed to mount a filibuster in such a situation-probably ending in the defeat of one or both nominees. And the bitterness of the battle would cast a pall over Bush's first year in office.

* Rehnquist and O'Connor retire. Bush seeks to strike a deal with Senate Democrats by choosing a Chief Justice acceptable to them-possibly even Justice Stephen G. Breyer, a Clinton-appointed Democrat respected by key Senate Republicans-if the Democrats agree to confirm both (say) Gonzales and a favorite of conservatives to fill the vacancies. One prospect said to be on the White House radar screen is California Supreme Court **Justice Janice Rogers Brown**, an African-American whose strong conservative-libertarian views and opposition to racial preferences have impressed some politically connected conservatives (such as Clint Bolick).

* None of the **Justices** retires, either this year or next. All nine seem in good health, including the Court's oldest and most liberal member, John Paul Stevens, who turned 81 on April 20. (He has expressed no interest in stepping down.) Rehnquist has hired clerks for the Court's next term. And O'Connor has done so for the next two terms.

With all these variables, one constant is that Bush seems eager to put the first Hispanic Justice on the Court. Of the two leading prospects, the 53-year-old Garza has a far more conservative judicial record, including a 1992 opinion arguing that "the decision to permit or proscribe abortion is a political

choice" which the Supreme Court should leave to the states. He would draw furious opposition, at least if named to replace O'Connor, which would narrow the pro-abortion-rights majority to a shaky 5-4.

The dignified, forceful Gonzales seems to have the inside track. A close Bush confidant from Texas who was virtually unknown in Washington a year ago, he was raised in humble circumstances by parents who never got past elementary school, graduated from Harvard Law School, spent 13 years as a business lawyer with a large Houston-based firm (Vinson & Elkins), and became a key member of then-Gov. Bush's inner circle as his legal counsel from 1995-97 and as Texas secretary of state from 1997 to late 1998, when Bush put him on the Texas Supreme Court. Gonzales spent just under two years there before Bush made him White House counsel. He has pleased conservatives (and worried liberals) by putting several high-powered conservative veterans of Washington's legal-political wars on his 12-lawyer staff, and by ending the special role that the American Bar Association (now seen by conservatives as a liberal interest group) had played since 1953 in rating the qualifications of prospective judicial nominees.

At the tender age of 45, Gonzales-like Clarence Thomas at the time of his 1991 nomination-does not yet have the experience or professional stature to be considered highly qualified to sit on the Supreme Court, let alone to be Chief Justice. And the same bland paper trail that presents potential critics with so little ammunition makes some conservatives nervous. It's a bit reminiscent of David H. Souter, whom Bush's father chose in 1990, in part because Souter's own paper trail was so unrevealing. Souter ended up joining the Court's liberal wing on big issues such as abortion, racial preferences, and religion. And "no more Souters" has become a conservative mantra.

Liberals find it hard to imagine that Bush would put another Souter on the Court and thereby replicate what many Republicans call his father's worst mistake. The President, of course, knows far more about where Gonzales fits on the ideological spectrum than the rest of us do. But he isn't about to tell us. Why should he?

LOAD-DATE: May 1, 2001

Copyright 2001 The Chronicle Publishing Co.
The San Francisco Chronicle

APRIL 27, 2001, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A6

LENGTH: 534 words

HEADLINE: Child in incest is always the victim, state high court says;

Minor can't be held complicit even if sex act consensual

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:

A minor who has consensual sex with a parent is not guilty of incest and cannot be an accomplice to the crime, the California Supreme Court ruled yesterday.

The court overturned a controversial state appeals court ruling that had found a San Jose teenager an accomplice to the crime when she had a sexual relationship with her father. The lower court said the jury should have considered her testimony against her father in that context. But in yesterday's decision, the high court said the burden is on the adult to refrain from having sex with the minor.

"A child under 18 who has an incestuous sexual relationship with an adult is a victim, not a perpetrator of the incest," **Justice Janice Rogers Brown** wrote in the majority opinion. "This conclusion remains valid even when the child consents to the sex."

The **justices** upheld the conviction of Joel Robert Tobias, who was convicted of 10 counts of incest.

In July 1995, Tobias' 16-year-old daughter moved into his apartment with her infant daughter. The teenager, identified by the court as "V." had been living with her mother and said she wanted to get to know her father.

Within a few weeks, the father and daughter began having sex.

V. said she didn't want to have sex with her 38-year-old father, but admitted that he didn't force her. She said she continued to live with him because, in other respects, "he was a good father."

After six months, she moved out. She gave birth to a baby a few months later, and tests showed Tobias was the father.

Tobias was convicted of incest and sentenced to 18 years in prison because he had a prior conviction for performing a lewd act on a child.

Tobias appealed, claiming the trial judge should have cautioned the jury about V.'s testimony because

she was an accomplice to the crime.

A state appeals court agreed with Tobias' argument, although the justices upheld his conviction, finding that there was enough evidence supporting his daughter's testimony.

In yesterday's opinion, the state Supreme Court said the appellate court decision was an aberration, going against 75 years of consistent law.

Incest is different from other sex crimes because "the act itself is unlawful, whether or not it is consensual or a minor is involved," **Brown** wrote.

When a minor is involved, the court said it doesn't matter who initiates the relationship because the minor will always be the victim and can't be convicted of a crime with the adult.

The court noted that there is a heavy stigma associated with incest, and if a child could be charged, the parent could use that threat to keep the minor from reporting the crime.

Although all seven justices agreed with the result, three disagreed with the majority's reasoning. In a separate opinion, Chief Justice Ronald George said a child can't be an accomplice to incest because a minor is incapable of giving legal consent to having sex with an adult.

"All the justices agree that a minor does not commit incest by having consensual sex with an adult," said Deputy Attorney General Jeremy Friedlander. "That is the correct reading of the law, and it is not a close question." E-mail Harriet Chiang at hchiang@sfchronicle.com.

LOAD-DATE: April 27, 2001

Copyright 2001 Bulletin Broadfaxing Network, Inc.
The Bulletin's Frontrunner

April 23, 2001

LENGTH: 317 words

HEADLINE: Bush May Try To Sidestep Abortion Fight In First Supreme Court Nomination.

BODY:

USA Today (4/23, Biskupic) reports, "A Supreme Court vacancy would be the ultimate test of President Bush's position on abortion rights. His choice of a new justice would be influenced not only by his opposition to abortion, but also by party politics, public reaction and a prospective nominee's chances of being confirmed by the evenly divided Senate." USA Today adds, "Because six of the nine justices now support a woman's right to end her pregnancy, it would take at least two new appointments to swing the court the other way and make a potential five-justice majority against abortion." Republicans "who would be involved in any nomination process say Bush would be unlikely to choose an outspoken foe of abortion who would incite a major confirmation battle. Rather, he likely would seek someone who has expressed conservative views of a judge's role in social policy and suggested a narrow interpretation of the right to privacy." That "would allow the White House to avoid a battle like the 1987 fight over conservative jurist Robert Bork (who was rejected by a Democrat-led Senate). But it still could assure the GOP's right wing that Bush would be picking a nominee whose views on privacy could lead to tough scrutiny of abortion." USA Today adds, "Bush aides won't discuss strategy but acknowledge they have to be ready for a vacancy." Among the "potential nominees, GOP insiders say, are two men who have the chance to become the first Hispanic justice: Alberto Gonzales, now White House counsel, and Emilio Garza, a US appeals court judge in San Antonio." USA Today adds, "Other possible choices include J. Harvie Wilkinson and J. Michael Luttig, both veteran **judges** on a US appeals court in Richmond, Va.; Samuel Alito, a federal appeals **judge** in Philadelphia; and **Janice Brown**, a California Supreme Court **justice**, who was among the first African-Americans on that bench."

LOAD-DATE: April 23, 2001

Copyright 2001 The McGraw-Hill Companies, Inc.

BusinessWeek

Business Week

April 23, 2001

SECTION: LEGAL AFFAIRS; THE JUDICIARY; Number 3729; Pg. 88**LENGTH:** 1191 words**HEADLINE:** NEW ORDER IN THE COURT**BYLINE:** By Dan Carney and Alexandra Starr in Washington**HIGHLIGHT:**

Despite his centrist talk, the President is racing to fill the federal bench with conservatives

BODY:

One day in early January, well before he was sworn in, George W. Bush sat down with Alberto R. Gonzales, his soon-to-be-named White House Counsel. The incoming President's instructions: Start interviewing candidates immediately for federal judicial vacancies. "He [said] that we needed to move as quickly as we could," recalls Gonzales, a former Texas State Supreme Court justice. "It is important to the President, which makes it important to me." Nominating judges isn't something Bush talked about a lot during the campaign. And he still doesn't give the issue much airtime. But it's critically important to many conservatives who rallied behind Bush when he was fighting for the GOP nomination. And now it's payback time. "This was the most important issue of the last election," insists Clint Bolick, co-founder of the conservative Institute for Justice. "We were electing a judiciary, not a President." RACING AHEAD. So, with a determination unseen since the Reagan years, Bush has been racing ahead with a bold effort to put his stamp on the federal judiciary. In March, he decided to eliminate the American Bar Assn.'s traditional role in screening nominees. In recent days, his 15-member selection committee has interviewed more than 70 potential candidates. The first nominees should be announced in the weeks after the Senate's Easter recess -- a pace well ahead of the Clinton and first Bush administrations. Indeed, the judicial push is likely to delay the day the President's own team is fully staffed, because the Senate and the FBI, which check the background of judicial nominees, are already bogged down with sub-cabinet nominees and will probably have to hold off on some of them to vet judges.

Despite the centrist tenor of Bush's candidacy, the ideology of many of his nominees is expected to be well to the right of most Americans. Indeed, the President's judicial selection committee is dominated by committed conservatives, including Attorney General John Ashcroft, as well as three young veterans of the impeachment wars: Timothy Flanigan, Brett Kavanaugh, and Bradford Berenson, all of whom worked for former Independent Counsel Kenneth W. Starr or cheered him on.

Many others belong to the conservative Federalist Society. When it comes to judicial selection, the Federalists have one mantra: "no more Souters." That's a reference to U.S. Supreme Court Justice David H. Souter, who was appointed by Bush senior but has bitterly disappointed conservatives because of his refusal to overturn *Roe vs. Wade*, as well as for his moderate stance on other cases.

With an evenly split Senate, judicial politics could be the next blood sport. The Senate must confirm all nominees, and Democrats are already gearing up for nasty confirmation battles. Many are not about to let a President elected without a popular mandate make long-lasting changes to the federal bench. "There are two ways President Bush can approach the judicial selection process," says Senator Charles E. Schumer (D-N.Y.). "He can work with the Democrats...and get things done relatively smoothly. Or he can try to work around us, which is a surefire recipe for conflict."

Bush is well aware of the likely opposition. And he knows that his window of opportunity to shape the federal bench may be limited. Given the frail health of 98-year-old Senator Strom Thurmond (R-S.C.), the tied Senate could tilt in favor of the Democrats at any time. The 2002 midterm elections could also be a problem, since more Republicans than Democrats face reelection.

There are 97 vacancies out of 859 federal judicial positions. Bush's top priority will be filling several trial court vacancies along the U.S.-Mexico border, which has seen a huge upsurge in trafficking and immigration cases. But he's also got his eyes on the bigger prize -- openings on powerful appellate benches. The biggest plum may be the three vacancies on the D.C. Circuit Court of Appeals, a key forum for battles between business and regulators.

None of the nominees has yet been named publicly. But sources say those under consideration for key appellate posts in the West include Congressman Christopher Cox of Orange County, Calif., California Supreme Court **Justice Janice Rogers Brown**, an African American who has become a darling of the right, and conservative law professor Michael W. McConnell of the University of Utah. Topping the list for the D.C. Circuit are big-time law firm partners Maureen E. Mahoney of Latham & Watkins, and John G. Roberts Jr. of Hogan & Hartson LLP. HOSTILE. Most of Bush's nominees are expected to be conservative on social issues such as abortion and school vouchers. They are also likely to be hostile to regulation, skeptical of antitrust enforcement, apt to find constitutional objections to environmental and land-use laws -- and generally more pro-business than Clinton's nominees (table). For example, many Bush appointments may be willing to rule that restrictions on development unconstitutionally infringe on property owners' rights. His picks are also likely to scrutinize rules promulgated by state and federal agencies. "I think they'll review these regulations much more closely," says University of Virginia law professor A.E. Dick Howard. "They will be much less deferential to agency expertise."

Because the Republican-controlled Senate slowed the confirmation process to a trickle during the Clinton Administration, Bush faces more judicial vacancies than normal. What's more, he could get as many as three picks for the Supreme Court, given the possible retirement of Justices William H. Rehnquist, Sandra Day O'Connor, and John Paul Stevens. "Looking at this past election," Gonzales says with a smile, "people realize it really is important who sits on the federal bench." And if Bush gets his way, his marginal victory could change American jurisprudence for decades.

The Bush Bench

How the President's judicial appointments will affect business

Class Actions Bush's

nominees will make it harder for plaintiffs' attorneys to get class actions started. They'll also be skeptical of expert testimony that defense lawyers attack as "junk science." This could be a boon to high-tech, health-care, and other industries prone to class actions.

Employment

The President's nominees are likely to be less sympathetic to workers' rights than Clinton's. Discrimination and harassment suits will be harder to bring in their courtrooms, while mandatory arbitration clauses will be more frequently honored.

Property Rights

There will be an increase in the number of judges supportive of arguments that environmental laws and zoning ordinances constitute unlawful property "takings" under the Fifth Amendment. This could help the real estate industry and natural resources companies.

Red Tape

Look for judges who will be less deferential to state and federal agencies and more willing to hear the complaints of regulated industries. It will probably be easier for companies to attack regulations by arguing that costs exceed the benefits.

Data: BusinessWeek

URL: <http://www.businessweek.com/index.html>

LOAD-DATE: April 19, 2001

Content and Programming Copyright 2001 Fox News Network, Inc. ALL RIGHTS RESERVED. Transcription Copyright 2001 eMediaMillWorks, Inc. (f/k/a Federal Document Clearing House, Inc.), which takes sole responsibility for the accuracy of the transcription. ALL RIGHTS RESERVED. No license is granted to the user of this material except for the user's personal or internal use and, in such case, only one copy may be printed, nor shall user use any material for commercial purposes or in any fashion that may infringe upon Fox News Network, Inc.'s and eMediaMillWorks, Inc.'s copyrights or other proprietary rights or interests in the material. This is not a legal transcript for purposes of litigation.

FOX NEWS NETWORK

SHOW: FOX THE EDGE WITH PAULA ZAHN (22:30:00 ET)

April 23, 2001, Monday

Transcript # 042302cb.260

SECTION: News; Domestic

LENGTH: 1965 words

HEADLINE: In Focus: The Battle for Seats on the U.S. Supreme Court Bench

GUESTS: Richard Thornburgh, Richard Ben-Veniste

BYLINE: Paula Zahn

BODY:

THIS IS A RUSH TRANSCRIPT. THIS COPY MAY NOT BE IN ITS FINAL FORM AND MAY BE UPDATED.

ZAHN: Welcome back to THE EDGE.

"In Focus" tonight: The battle for seats on the U.S. Supreme Court bench is heating up as America waits to see if any Justices appointed by Republican presidents will retire this summer. Three Justices are over the age of 70, but the guessing game centers on Chief Justice William Rehnquist and Justice Sandra Day O'Connor. Groups from both the left and the right are mobilizing right now for what some predict to be a nasty political war over abortion. Joining us now from Washington, former U.S. attorney general Dick Thornburgh and former Watergate prosecutor Richard Ben-Veniste. Mr. Ben-Veniste is also the former Whitewater counsel for the Democrats.

Good to have the two of you with us. Welcome.

Mr. Thornburgh, if you would, fill us in on the battle lines that are being drawn right now in the expectation that we may have some retirements on the Court as early as this summer.

RICHARD THORNBURGH, FORMER U.S. ATTORNEY GENERAL: Well, unfortunately, in

recent years these appointments have taken on much more of the trappings of a political campaign than they have a reasoned examination of the qualifications of nominees to the Court. It reached its apex in the nomination of Judge Robert Bork, where you had the phenomenon of radio and television ads and full-page newspaper ads in opposition to Judge Bork. And I hope that some of the dampening that's taken place in that process is going to carry over, if there are vacancies to fill this time, and that the Senate gets down to the business of looking at the qualifications in a reasoned, careful way.

ZAHN: Mr. Ben-Veniste, do you expect that to happen? Because we know several groups are already starting letter campaigns asking their supporters to absolutely pummel their senators and representatives if either a pro-choice person is picked or a pro-life person is.

RICHARD BEN-VENISTE, FORMER SENATE WHITEWATER COUNSEL: Well, I think. Clearly, it's a little premature, inconveniently for the media, I guess, no one on the Court has indicated that he or she is leaving. Maybe we ought to adopt some sort of "Survivor"-type mechanism, where if they don't grace us with a resignation, they get to vote one of their members off.

(LAUGHTER)

ZAHN: That'd be too good of an idea for a television show. Reality TV, I'm afraid, is here to stay.

BEN-VENISTE: In a more serious vein, I don't see any dampening down of the effects of this politicization of the process, principally because of the highly political nature of the Court's intervention in the presidential election. I think that was very unfortunate. It has created a great deal of cynicism in the country about the Court. I'm sorry to say, much of it warranted. And so I do not expect there to be any punches pulled.

ZAHN: Well, what do you expect as a result of the aftermath of that who election deadlock, Mr. Thornburgh?

THORNBURGH: Well, I think once the Court got back into session in all of the hype over the decision in Bush versus Gore really dissipated. Surely, on partisan grounds, they are going to be lingering feelings about that case. Whichever way it was decided, it was susceptible to being criticized as political decision. But when the Court gets a case, it's got to decide it and move on. And I think that's what's happened here.

I think that the challenge for the president is to choose a nominee, in the event of a vacancy, who reflects his judicial philosophy, who is of impeccable credentials and integrity and one who's going to be able to stand up to the kind of attacks that Mr. Ben-Veniste predicts may be coming.

ZAHN: Mr. Ben-Veniste, what role do you think the issue of abortion will play in the selection of these nominees?

BEN-VENISTE: I think once again it will be an essential role. The issue of women's reproductive rights has always been at the forefront. Indeed, anyone who was looking ahead in the presidential election looked toward the possibility of a conservative president appointing a new Supreme Court member who would change the balance and roll back the rights that women have achieved in terms of their own reproductive freedom. And so I think that will be the central issue that people will look at, in terms of any Supreme Court nominee coming down the pike.

ZAHN: Mr. Thornburgh, I'm only going to give you a short time to answer this question. We can

finish on the other side. But do you think the president will use the issue of abortion as a litmus test?

THORNBURGH: Absolutely not. I went through two processes of screening Justices on the Supreme Court for the senior Bush as president and never once was there any kind of litmus test applied on any issue. And I think that's a red herring. You don't appoint someone for their position on a particular issue. You appoint them looking at their qualifications as a whole.

ZAHN: All right, gentlemen, if you would, please stand by. We're going to have more of our debate on the other side of the break.

And a little bit later on, we're going to show you new, exclusive pictures of Elian Gonzalez in Cuba one year after he was seized by federal agents in Florida.

Keep it right here on THE EDGE for photos you won't see anywhere else.

(COMMERCIAL BREAK)

ZAHN: And we are back discussing a possible shake-up at the U.S. Supreme Court with former U.S. attorney general Dick Thornburgh and former Watergate prosecutor Richard Ben-Veniste.

Welcome back.

All right, Mr. Ben-Veniste, I'll give you a chance to address what Mr. Thornburgh said before we went to the break, that the issue of a litmus test is a red herring, that when you're president, you don't put someone on the Court for a particular political issue. And even President Bush has said repeatedly that he will not have a litmus test for Supreme Court nominees. Do you believe him?

BEN-VENISTE: Well, he's indicated that the two Justices he most admires were Justice Clarence Thomas and Justice Antonin Scalia, both of whom oppose reproductive rights and would reverse Roe versus Wade. It's clear that there will be howls of protest from the center and the women's organizations, and I think the majority of Americans, if an attempt is made to put someone on the bench who has expressed a view about overturning Roe versus Wade. And I think properly so.

ZAHN: Now, are you telling me you would expect the president to do that?

BEN-VENISTE: I would hope he would not, but we've already seen the controversy that had occurred over his appointment and nomination and the eventual confirmation of Attorney General Ashcroft. And so I think the lines were drawn there, even though Mr. Ashcroft had expressed firm opposition to abortion rights, that in confirming him, I think the Senate sent a message along with that confirmation that someone with similar views appointed to the Supreme Court would not receive confirmation. And I think that's true. You still hear...

THORNBURGH: To suggest...

ZAHN: Let's let Mr. Thornburgh weigh in on that.

THORNBURGH: Richard suggests...

ZAHN: And what does it suggest when the president has said that Judge Scalia and Judge Thomas...

THORNBURGH: Well...

ZAHN: ... or Justice Thomas and Scalia...

THORNBURGH: Richard suggests...

ZAHN: ... were among those he most admires?

THORNBURGH: Richard suggests a very unique doctrine for the president to apply in appointing Supreme Court Justices or officials in the Justice Department, that he should seek out, choose and appoint people who disagree with his views. That's simply nonsense. No president is going to appoint enemies or opponents to key positions that he has the right to appoint to. And I think it's quite clear that this president is not going to that. He's going to appoint people whose views are consistent with his. No surprise.

BEN-VENISTE: But I think there's a difference between an individual's personal views and what's best for the country. And we still hear the howls of conservative Republicans over the nomination of Justice Souter, who I think Governor Thornburgh had some very specific connection to in terms of the nomination process. And if you...

ZAHN: Well, they felt they got burned by him, right? They were...

BEN-VENISTE: Absolutely.

(CROSSTALK)

ZAHN: ... and that's not what they got.

BEN-VENISTE: And only because Justice Souter...

THORNBURGH: All that illustrates is that...

BEN-VENISTE: ... has...

THORNBURGH: ... every time you make an appointment, you run the risk of being disappointed. I think that a lot of the appointments that have been made by presidents in the past have turned out quite different from what they thought to be. But they chose the best person they thought was available.

BEN-VENISTE: And the disappointment over Justice Souter has been, I think you will agree, over the fact that he has been a centrist and a moderate rather than an arch-conservative who was seeking to overturn Roe versus Wade.

ZAHN: I know Mr. Thornburgh...

BEN-VENISTE: Why else...

ZAHN: ... in some interviews...

BEN-VENISTE: Why else would they howl over Justice Souter? His record has been exemplary in

all other respects.

ZAHN: All right, gentlemen, what I'd love for you to do -- I'm going to quickly put up on the screen some of the names that are being mentioned as potential candidates for nominees to the U.S. Supreme Court, and we're just going to roll these one after the other. And I'm going to give you 20 seconds apiece to go through them. Orrin Hatch, among others -- we'll quickly put these up. Michael -- Alberto Gonzalez...

THORNBURGH: Gee, NFL teams had more time than this debate.

ZAHN: All right. Actually, let me -- let me quickly do this -- **Janice Brown**, Michael McConnell, Edith Jones and **Judge** Emilio Garza. Any of those names ring out loud and clear to you, Mr. Thornburgh?

THORNBURGH: I think they all resonate with the kind of philosophy that this president has about what his **Justices** should be bringing to the Court, yeah.

ZAHN: And Mr. Ben-Veniste?

BEN-VENISTE: I think Orrin Hatch is a very interesting name on that list. Senator Hatch is chairman of the Senate Judiciary Committee, is a very distinguished and well-liked member of the Senate and, while conservative, I think has also a great common-sense approach to things. And I'd be interested in Governor Thornburgh's view about the possible appointment of Senator Hatch.

THORNBURGH: Oh, I think the...

ZAHN: Well, you know what we're going to have to do, Mr. Thornburgh? Give you 10 seconds now. We'll bring you both back as it gets closer to the time this actually will happen.

THORNBURGH: The best...

ZAHN: You get the last word.

THORNBURGH: The best argument for an Orrin Hatch appointment is he's a member of the Senate, member of the club, well-liked among his colleagues and shouldn't have much trouble in being confirmed.

ZAHN: All right, as it gets closer to the day that this actually might happen, we'll bring the two of you back. Thank you again for joining...

THORNBURGH: Don't hold your breath.

ZAHN: ... us tonight.

Coming up next: The two men who rescued Elian Gonzalez join us to discuss what's happening to the families since Elian was seized by federal agents last year. We have new pictures of the boy in Cuba you're not going to see anywhere else but here. We will also talk with the lawyer who represented Elian's Miami relatives.

(BEGIN VIDEO CLIP)

heartbroken at this moment with a sense of sadness that an injustice has occurred and especially a sense of sadness in our concern for this child.

(COMMERCIAL BREAK)

LOAD-DATE: April 24, 2001

Copyright 2001 The National Journal Group, Inc.
The Hotline

April 20, 2001

SECTION: NATIONAL BRIEFING

LENGTH: 3102 words

HEADLINE: BUSH: LOOKING FOR AN EH-PLUS ON TRADE TRIP

BODY:

San Francisco Chronicle's Lochhead writes "as thousands of anti-globalization protestors mass today outside old Quebec City," Pres. Bush "will make his international debut" at the Summit of the Americas, where he will pledge to "fight for an ambitious new free trade zone stretching from Argentina to the Yukon" (4/20). Bush's "expects a warm welcome" from fellow leaders as his "emphasis on better relations within the Western Hemisphere is welcome news for many countries that often feel unappreciated by their powerful neighbor." Trade experts maintain that the summit will "give Bush an ideal platform to test his diplomatic skills in an international forum" (Hutcheson, Knight Ridder/Philadelphia Inquirer, 4/20). Bush, who is attending his first international summit, "will face pressure to establish himself as a global leader." The "spotlight will be on Bush as he seeks to pull together his peers and create momentum" for the new free-trade zone. The three-day summit "will avoid nitty-gritty negotiations," but "with Bush's help could provide crucial momentum for the next big step in liberalizing trade worldwide" (Bendavid/Jones, Chicago Tribune, 4/20). Preparing for his trip, Bush maintained: "The sooner we get a free-trade agreement for the Americas in place, the better off the continent will be." At his debut speech on 4/21, Bush "will offer his own vision" for the hemispheric free-trade zone that "extends beyond trade." Officials maintained that the U.S. plan at the summit "will basically be Bush's domestic agenda written large for the hemisphere: quality education, improved teacher training, expansion of access to information technology and combat against drugs" (Wright, Los Angeles Times, 4/20). More Bush: "Open trade fuels the engines of economic growth that creates new jobs and new income. ... It applies the power of markets to the needs of the poor. It spurs the process of economic and legal reform" (Hancock, Baltimore Sun, 4/20). To "muster support" for his trade plan, Bush is taking a "large congressional delegation" with him and the WH "is planning to make the case that the U.S. economy would reap substantial benefits" from a hemispheric free-trade zone (Milbank/Blustein,

Washington Post, 4/20).

FAST-TRACK LINKED TO SUMMIT

With his tax-cut and education plans "moving through Congress," Bush "plans to turn to his bid" for fast-track trading authority. U.S. Trade Rep. Robert Zoellick said that the WH is "ready to commit political capital to winning authority, and he expects to get it this year." Zoellick: "This is a president who governs on priorities. ... I've now got trade as one of the key items on the legislative agenda for this year. So I've pushed my way ahead in the queue ahead of Social Security and Medicare" (Milbank/Blustein, Washington Post, 4/20).

CAN HE BRING US BACK SOME CUBANS?

Seattle Post-Intelligencer's Pope writes that Canadian law "requires that visitors entering the country declare whether they have been convicted of a crime." This includes, according to the U.S. State Dept., a "DWI charge." The advisory maintains: "Any prior conviction (no matter how long ago or how minor the infraction) is cause for exclusion from Canada." But being pres. "carries some perks, especially when travelling." As pres. "your motorcade gets waved through red lights" and Air Force One "almost always leaves on time," the "most significant" perk for Bush is that he "does not have to answer those pesky questions at border crossings." A spokesperson for Canadian immigration "said he could not speak directly about Bush's circumstances because of privacy rules." But he did maintain that immigration officials "have wide latitude over how aggressively they enforce the law." That "discretion," the official contended, "is stretched even wider for heads of state" (4/20).

THE DIRTY DOZEN

Bush, "in a high-profile Rose Garden announcement" on 4/19, said that he will support a treaty "aimed at eliminating a group of toxic chemicals" known as the "dirty dozen." Bush, who was accompanied at the announcement by EPA Admin. Christie Whitman and Sec/State Colin Powell, said he will sign the Stockholm Convention on Persistent Organic Pollution Caps (Blomquist, New York Post, 4/20). Bush used the Rose Garden announcement "to color his environmental policies green after weeks of intense criticism" from Dems and enviro activists (Martin, San Antonio Express-News, 4/20). Bush: "The risks are great and the need for action is clear. ... We must work to eliminate, or at least severely restrict the release of these toxins without delay." The announcement "followed three straight days of

environment-friendly moves, including decisions to protect wetlands, monitor lead emissions, and reexamine arsenic levels in drinking water" (Kornblut, Boston Globe, 4/20).

The Rose Garden event was Bush's "most ambitious attempt yet to demonstrate his environmental bona fides after a series of controversial acts widely regarded as pro-industry and anti-environment." In an interview after the event, Whitman maintained that Bush is "very frustrated" by some perceptions that he is anti-environment. Whitman contended that Bush's "overall" record is "really very good." Whitman: "His natural instincts are to do the right thing by the environment" (Chen/Shogren, Los Angeles Times, 4/20). On "World News Tonight," ABC's Moran reports that admin officials "admit they are scrambling to repair the president's image on the environment, which was why it was Green Day in the Rose Garden. ... On cue this morning, the president's loyal lieutenants sang his praises on the environment. The elaborately staged event was the clearest sign yet that [WH] knows that the president has a problem" (4/19).

Blinded Me With Science

Yesterday's Rose Garden announcement "was unexpected," as Bush "praised the treaty as an "environmental action that relies on cooperation rather than regulation." Bush: "This treaty shows the possibilities for cooperation among all parties to our environmental debates. Developed nations cooperated with less-developed nations. Businesses cooperated with environmental groups. And now a Republican administration will continue and complete the work of a Democratic administration" (Bendavid, Chicago Tribune, 4/20). The WH "contends that its daily dose" of enviro announcements and their "proximity to Earth Day ... is not politically motivated" (Enda/Borenstein, Knight Ridder/Miami Herald, 4/20). CNN's Woodruff: "The White House insists it has no political motives. But when the president crams several environmental announcements into a single week, political observers are likely to read between the lines. And that is exactly what's happening again today" ("IP," 4/19). WH aides "stopped short of declaring" that the WH "had gone green." WH press sec. Ari Fleischer: "He's a balanced president. ... These decisions should be made on the basis of the merits and science, not public relations. ... That's what's driving the president" (Bazinet, New York Daily News, 4/20).

THE GREEN MILE ...

While environmentalists "praised the move, they noted it was relatively risk-free" for Bush to support a "widely accepted ban." Nat'l Env't Trust spokesperson Philip Capp: "The

international toxins treaty is a political no-brainer. There is no political cost to signing it" (Roth, Houston Chronicle, 4/20). Giving a lecture at the Univ. of NV, Reno, enviro atty Robert Kennedy "criticized Bush for rolling back" some of the Clinton admin.'s last-minute regulations. R. Kennedy: "He's a disaster. It's one thing after another. ... It's not a surprise. He had the worst environmental record in the country as a governor and he's bringing the same policies to Washington" (Griffith, AP/Las Vegas Sun, 4/19).

Enviros "say the Bush team has offered more talk than action so far." Greenpeace exec. dir. John Passacantando, who was also one of 10 activists "arrested yesterday after chaining themselves to a fence outside EPA headquarters in a protest of administration policies": "We want this token Texan to know that thrashing 30 years of environmental gains, then making a few token announcements for Earth Day is an unacceptable environmental agenda" (Dewar, Baltimore Sun, 4/20). On "Crossfire," CNN's Novak maintained that "politically ... Bush for the first time is looking like his father. And that is a formula for a one-term presidency. He could never get the garden clubs from Connecticut. He better start playing again to the people in the South and the West, who don't like all this environmental regulation" (4/19).

OR A GREEN SMILE?

Nat'l Wildlife Fed. staff scientist Michael Murray: "A cynic would say that Earth Day is coming up this weekend, and that is prompting some of this response. ... But I give him some benefit of the doubt that this is a sincere desire to push environmental measures" (Bendavid, Chicago Tribune, 4/20). Enviros "called some of Bush's moves a good first step," but they "said they were taking a long-term wait-and-see approach" (Bazinet, New York Daily News, 4/20). Washington Times' Sammon, on whether Bush's enviro policies hurt him with swing voters: "Too much is being made of these soccer moms [who] aren't going to forgive him for the environment. He doesn't have any worse an environmental reputation than he did during the campaign. He ran against 'Mr. Environment.' ... I think we are making too much out of that, in less than 100 days into his presidency, that this is going to somehow come back to haunt him" ("Special Report," FNC, 4/19).

"Moving rapidly from pro-industry to pro-green," Bush's "latest decisions have once-pessimistic environmentalists thinking the president may be starting to see things their way." League of Conservation Voters spokesperson Lisa Wade: "Undoubtedly, in this week preceding Earth Day, the Bush administration appears to be cognizant of the public support for

environmental protection and how their policies of the first months have been out of step" (Blomquist, New York Post, 4/20).

Rep. Sherrod **Brown** (D-OH), who is also the ranking Dem on the House Energy and Commerce Health Subcommittee: "This is a victory for public health. ... This is a groundbreaking agreement" (Hillman, Dallas Morning News, 4/20). While enviro activists "remain unimpressed," they are not the WH's "target audience." One senior admin. official maintained: "There's nothing we can do that will please them long term. ... We're going to look green enough for the ordinary person" (Cummings/Harwood, Wall Street Journal, 4/20). Rep. Christopher Shays (R-CT): "This is a president who's just trying to find a little balance in environmental law. He wants sound science, so he's going to accept the things where he thinks there's sound science and he's going to reject it where he thinks there isn't. And that's difficult for both sides of this debate" ("Crossfire," CNN, 4/19).

NOT DONE YET?

Bush "is not done yet" as on 4/23 the WH will announce its decision on a Clinton admin. regulation that bans snowmobiles in nat'l parks. In addition, the WH is also "grappling with a far-reaching regulation promoting patients' rights for Medicaid recipients." WH aides contend the review of regulations "has been methodical." The individual agencies "make the initial call before sending the regulations" to the WH budget office. If "no dissent emerges, the budget office can make the decision on whether a regulation stands or falls. If significant disagreements emerge," the WH or even Bush "makes the final decision" (Weisman/Hall, USA Today, 4/20).

KEYNOTES HOLOCAUST REMEMBRANCE GATHERING

Bush was the keynote speaker on 4/19 at the Nat'l Commemoration of the Days of the Remembrance, which is an annual event "to honor the victims of the Holocaust." Bush, at the "emotional yet restrained ceremony" at the Capitol: "This day of remembrance marks more than a single historic tragedy, but six million important lives -- all the possibilities, all the dreams and all the innocence that died with them. ... We remember at the Capitol because the United States has accepted a special role. We strive to be a refuge for the persecuted" (Abejo, Miami Herald, 4/20).

BLUES TRAVELER

Bush is scheduled to make his first trip to the New Orleans

area and his second to LA since his election next week to "push for his tax cut plan and budget." Bush is "especially interested in swaying" LA Sens. Mary Landrieu (D) and John Breaux (D). While details of Bush's visit are "still tentative," he is "expected to address an outdoor rally" on 4/25 at Zephyr Field. It is part of a "busy day" for Bush as he is also scheduled to visit FL to give a "defense-related speech" in FL earlier in the day. After his stop in LA, Bush is scheduled to travel to AR for a fundraiser for Sen. Tim Hutchinson (R-AR). Bush will complete his travel when he arrives in Crawford to stay over night at his TX ranch. Rep. David Vitter (R-LA): "I think the more he gets out and the people hear the facts ... the president builds support for the tax cut, and I think that has some senators like John (Breaux) concerned" (Alpert, New Orleans Times-Picayune, 4/19). Commerce Sec. Don Evans: "I think the president will continue to talk about the importance of his tax relief bill and how important it is to get money in the hands of the American consumer. And for them to know that they're going to continue to receive that tax relief in the years ahead" ("IP," CNN, 4/19).

ABORTION ISSUE SNEAKING ITS WAY ON STAGE?

USA Today's Hall writes that to win a second term, Bush "may need to improve his standing" with women voters and "as he tries to push an ambitious agenda through" the Senate, he "can't afford to alienate" pro-choice GOPers. WH CoS Andy Card, on Bush's abortion stance: "I don't believe he feels that he'll be able to eliminate abortions." Card, when asked "specifically where abortion ranks" on his priority list: "It's a high moral priority for the president ... but his public policy priorities are education, tax reform and tax reduction, reforming Social Security, reforming the Medicare system and improving our national defense." However, "despite Bush's reluctance to wade" into the abortion debate, pro-lifers in Congress are "pressing ahead" with legislation." Bush's "attempt to walk a narrow political line on abortion is expected to be tested" this year as Congress considers several issues -- including a review of the RU-486 pill, a ban on partial-birth abortion, embryonic stem-cell research, fetal-tissue research and the a bill that makes it a crime to transport a minor to another state for an abortion to "avoid a state law that requires parental consent or notification" (4/20).

AND THEN THERE'S THE SUPREME COURT

USA Today's Biskupic writes that a vacancy on SCOTUS "would be the ultimate test" of Bush's position on abortion. GOPers "who would be involved in any nomination process say Bush would be unlikely to choose an outspoken foe of abortion who would

incite a major confirmation battle." Bush aides "won't discuss strategy but acknowledge they have to be ready for a vacancy." Whomever Bush chooses, he "likely would play down the nominee's record on abortion, just as he has minimized the issue when discussing policy priorities." GOP "insiders" contend that WH counsel/ex-TX Supreme Crt Justice Alberto Gonzalez and U.S. Appeals Court Justice Emilio Garza are among the "potential nominees" who have a chance at becoming the first Hispanic on the court. Other possible choices include: U.S Appeals Court **Justices** Harvie Wilkinson and Michael Luttig, Philadelphia fed. **Judge** Samuel Alito and CA Supreme Crt **Justice Janice Brown** (4/20).

CHINA NEGOTIATIONS UPDATE

CNN's King reports that the admin. is "telling the Chinese privately, we're told, that the longer this goes on, the harder it will be for the president to make the case publicly here in the United States -- especially to some conservatives in the U.S. Congress that there should not be tougher sanctions, say trade sanctions against the Chinese." King notes that the "private message to the Chinese we're told from the administration is that plane needs to come home soon if they are to salvage U.S.-China relations. But the administration [is] frustrated so far" ("Wolf Blitzer Reports," 4/19).

"MEGA" TRANSITION TRACKER

- o Columbia State's Bandy reports that ex-Gov. David Beasley (R-SC) has asked the WH to "remove his name from consideration" as the next dir. of the Peace Corps (4/20).
- o On 4/18, Bush named Amarillo First Nat'l Bank CEO Don Powell as the chair of the Fed Deposit Insurance Corp. In addition, Bush named Bank of America's Int'l Private Bank pres. Eduardo Aguirre first vp of the U.S. Export-Import Bank. Also, Bush has chosen TX Woman's Univ. prof/interim dir. of the School of Library Robert Martin to be the next dir. of the Institute of Museum and library Services (Dallas Morning News, 4/19).
- o Also on 4/18, Bush announced that he will nominate MI office of Great Lakes dir. Tracey Mehan to become EPA assit. admin. for water programs (Detroit Free Press, 4/19).
- o Denver water atty Bennett Raley was nominated by Bush on 4/16 to be assit. sec. of the Interior for water and science (Coile, San Francisco Chronicle, 4/19).
- o Bush has nominated Lt. Gen. William Begert to become the next Pacific Air Forces Commander (AP/Maui News, 4/18).
- o Lincoln Journal Star's Walton writes that Omaha atty Bill Riley "appeared" 4/19 to be the "likely" choice to fill a vacancy on he 8th U.S. Circuit Court of Appeals (4/20).

- o Career prosecutor John Gordon was named interim U.S. atty on 4/19 as the "top federal law enforcement authority" in Southern CA (Meyer/Weinstein, Los Angeles Times, 4/20).
- o Cardinal Edward Edwin "has added his name to the list of supporters" that are asking Bush to name Gov. George Pataki (R-NY) "top" aide Charles Gargano to be the next U.S. amb. to Italy (AP, Buffalo News, 4/18).
- o According to a "knowledgeable drug policy source," John Walters, "a hard-liner who was former drug czar William Bennett's deputy during the first Bush administration, has emerged as the leading candidate" to become the next dir. of the Office of Nat'l Drug Control Policy (Forbes, Salon.com, 4/20).

LOAD-DATE: April 20, 2001

Copyright 2001 Gannett Company, Inc.
USA TODAY

April 20, 2001, Friday, FINAL EDITION

SECTION: NEWS; Pg. 13A

LENGTH: 1058 words

HEADLINE: High court choice complex for Bush Multiple factors regarding abortion have influence

BYLINE: Joan Biskupic

DATELINE: WASHINGTON

BODY:

WASHINGTON -- A Supreme Court vacancy would be the ultimate test of President Bush's position on abortion rights.

His choice of a new justice would be influenced not only by his opposition to abortion, but also by party politics, public reaction and a prospective nominee's chances of being confirmed by the evenly divided Senate.

Because six of the nine justices now support a woman's right to end her pregnancy, it would take at least two new appointments to swing the court the other way and make a potential five-justice majority against abortion.

Republicans who would be involved in any nomination process say Bush would be unlikely to choose an outspoken foe of abortion who would incite a major confirmation battle. Rather, he likely would seek someone who has expressed conservative views of a judge's role in social policy and suggested a narrow interpretation of the right to privacy.

That would allow the White House to avoid a battle like the 1987 fight over conservative jurist Robert Bork (who was rejected by a Democrat-led Senate). But it still could assure the GOP's right wing that Bush would be picking a nominee whose views on privacy could lead to tough scrutiny of abortion.

Bush aides won't discuss strategy but acknowledge they have to be ready for a vacancy. Several factors play into nomination politics

and any shift in abortion law:

* Current law. The touchstone is the court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania vs. Casey*. In that case, the court upheld the abortion rights established in 1973 in *Roe vs. Wade* but put in place a more lenient standard for testing whether a regulation infringes on a woman's right to abortion. Three key justices (Sandra Day O'Connor, Anthony Kennedy and David Souter) emphasized that however they may feel about abortion, it has become part of liberty in America.

They noted that for two decades people had lived with the right to have abortions and that any change would have great social repercussions. They stressed the importance of having the issue settled.

That set a high hurdle for any future court that might rule that abortion rights are not grounded in the Constitution's implicit right of privacy -- the core finding in *Roe*.

The other justices backing abortion rights are John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer. Opposing abortion are Chief Justice William Rehnquist, Antonin Scalia and Clarence Thomas.

Kennedy has suggested a willingness to give states more power to restrict access to abortion. Last term, he endorsed a Nebraska statute that would have banned a mid-pregnancy procedure opponents call "partial birth" abortion.

Some abortion rights advocates fear that the future of *Roe vs. Wade* hangs on a five-justice majority -- without Kennedy -- but many court scholars believe the right is more secure. "We have every reason to believe that Justice O'Connor and Justice Kennedy are strongly anti-abortion, but they upheld *Roe*," says David Garrow, an Emory University law professor. "Not because of anything to do with abortion, but because of the damage the court would have suffered had *Roe* been overturned."

* Potential retirements. Rehnquist, 76, and O'Connor, 71, are GOP appointees inclined to step down while a Republican is president. If Rehnquist were to retire and be replaced by a Bush appointee who also opposes abortion, there would not be a change in the court's overall view. But an O'Connor retirement

would put abortion rights in play. People close to them say they are mulling retirement. Speculation about their timing is rampant. It's unclear whether either will leave as early as this summer, when the current term ends.

Stevens, who turns 81 today, is the oldest justice. He was appointed by GOP President Ford but has become one of the court's most liberal members. He does not seem to be interested in leaving the bench.

* Potential appointees. Whomever Bush chooses, he likely would play down the nominee's record on abortion, just as he has minimized the issue when discussing policy priorities.

Past confirmation battles suggest Bush would do advance work in the Senate, which has the authority to confirm or reject nominees and which is now evenly divided between Democrats and Republicans. The White House likely would try to make sure that swing-vote senators, particularly Southern Democrats, would endorse its nominee.

Among the potential nominees, GOP insiders say, are two men who have the chance to become the first Hispanic justice: Alberto Gonzales, now White House counsel, and Emilio Garza, a U.S. appeals court judge in San Antonio.

Other possible choices include J. Harvie Wilkinson and J. Michael Luttig, both veteran **judges** on a U.S. appeals court in Richmond, Va.; Samuel Alito, a federal appeals **judge** in Philadelphia; and **Janice Brown**, a California Supreme Court **justice**, who was among the first African-Americans on that bench.

Gonzales, a former Texas Supreme Court **justice**, has the scantiest record on abortion. Last year, he was part of a state court majority that allowed some exceptions from a state parental-notification law for young women seeking abortions.

After the *Casey* ruling in 1992, Garza was on a panel that rejected an anti-abortion law in Louisiana. But he wrote an opinion saying, "*Casey* . . . causes me concern" and that he believes decisions concerning abortion regulation should be left to the people of the state.

Wilkinson and Luttig voted in 1998 to uphold a Virginia law compelling physicians to notify a parent before performing an abortion on a minor. Abortion rights advocates view Luttig as a greater threat because he has been more active on the subject, ensuring that Virginia's ban on "partial-birth" abortions took effect while it was being challenged in court.

Alito backed the abortion regulations at issue in *Casey* -- including a requirement that women tell their husbands before having an abortion -- when the case was in lower court. The high court rejected the spousal notification mandate. In California, **Brown** dissented from a 1997 decision against a law that would have required minors to get a parent's permission to have an abortion.

GRAPHIC: PHOTO, B/W, Bill Janscha, AP; O'Connor: Swing-vote justice may be considering retirement.

LOAD-DATE: April 20, 2001

Copyright 2001 American Lawyer Media, L.P.
Fulton County Daily Report

April 9, 2001 Monday

LENGTH: 939 words

HEADLINE: Getting Over The Bar

BYLINE: George M. Kraw

BODY:

George W. Bush might have felt pressure under other circumstances to continue the American Bar Association's part in choosing federal judges. But the ABA made it easy for him to fire the group's Standing Committee on the Federal Judiciary.

ABA president Martha Barnett's appointment last year of committee chair Patricia Hynes-the "Hynes" of plaintiffs class action firm Milberg, Weiss, Bershad, Hynes & Lerach-pretty much iced the decision.

Standing Committee members aren't allowed to give money to politicians, but their firms can. Milberg Weiss is a major donor to Democratic causes. Partner William Lerach is a multi-million-dollar Democratic fund-raiser. To the U.S. Chamber of Commerce, The Wall Street Journal editorial pages and most Republican office-holders, Lerach is capitalism's anti-Christ. For a pro-business and pro-tort-reform administration, there could not have been a worse choice to head the Standing Committee than Hynes-other than Lerach himself.

Bush's father and Ronald Reagan before him put up with ABA preliminary reviews. Despite urging from conservatives like former Attorney General Richard Thornburgh, they figured that dumping the Standing Committee was more trouble than it was worth.

Housecleaning of the appointment process was long overdue. Presidential Counsel Alberto Gonzales' valedictory letter to ABA president Martha Barnett stated that it was "inappropriate" to grant a "preferential, quasi-official role" to a group that "takes public positions on divisive political, legal and social issues that come before the courts."

That, not the committee makeup, is the main problem with the ABA role. The organization is hopelessly conflicted by its political pretensions and its separate charge to provide an objective and fair appraisal of judicial candidates.

It doesn't do a good job with either part. And it misleads the public when it claims to be a neutral evaluator of judicial candidates.

Before Bush's move, the ABA's 15-member Standing Committee on the Federal Judiciary received advance notice of possible appointments and rated them "well-qualified," "qualified" or "not qualified." It was supposed to restrict the review to issues of integrity, professional competence and

judicial temperament. The results were disclosed after the nomination was announced.

Subjective and vague criteria made it possible to inject political and ideological considerations into a process that was supposed to be free of them. Nominees could be criticized for a lack of "sensitivity," "compassion" or "open-mindedness," and then rejected as lacking judicial temperament.

Among the major ABA review absurdities was a split qualified/not qualified rating for the distinguished legal scholar and now 7th U.S. Circuit Court of Appeals Judge Richard Posner that almost derailed his nomination. Posner, who has gone on to become one of America's most influential jurists, was opposed because of his libertarian-conservative political views. Of course, committee members and other ABA opponents wouldn't publicly admit this.

Democratic support for the Standing Committee ebbs and flows with the political tides and the usefulness of ABA participation. Judiciary Committee Sens. Patrick Leahy, D. Vt., and Charles Schumer, D.N.Y., criticized the Bush decision. But in 1994, Sen. Joe Biden, D.Del. attacked the ABA's preferential role, a point made in Gonzales' letter to Martha Barnett.

The Bush administration is capable of determining on its own if a potential candidate has the professional skills and stature to be a federal judge.

It has competent lawyers that it trusts making the same professional background checks that the ABA's Standing Committee on the Federal Judiciary does. Gonzales already has begun interviewing a long list of candidates for the 29 court of appeals and 65 district court vacancies.

In California, governors have had various problems with the State Bar's ostensibly neutral Judicial Nominees Evaluation Commission. By law, the group has to review all candidates but the governor doesn't have to follow its recommendations. The group occasionally takes a laid-back attitude toward keeping confidential its reports on potential appointees. In 1996, details of a negative JNE Commission evaluation of California Supreme Court **Justice Janice Rogers Brown** were leaked to the Los Angeles Times in an unsuccessful effort to block her nomination to the California Supreme Court.

The two-year-old administration of Gov. Gray Davis, which is under attack for failing to fill judicial vacancies, has apparently been unable to create the same efficient in-house vetting system that the Bush administration had in place in two months.

But Davis won't use the JNE Commission or local bar association review boards to do large preliminary screenings. Those groups don't use the governor's litmus tests on the death penalty and other social issues. Moreover, the JNE Commission can't be trusted not to embarrass Davis by releasing ratings of favored candidates in order to pressure the governor to make an appointment (in a reverse of what was done to **Brown**).

These days it seems only a trickle of candidates are going through the JNE review process.

Bar associations continue to believe that they should have a special role in the selection of judges, instead of being relegated to the status of just another interest group. The politicians that actually do the appointing see the bar vetting groups as nothing better than a nuisance. When sufficiently provoked, as Bush was by the ABA, they're more than willing to dump them.

LOAD-DATE: June 15, 2001

Copyright 2001 / Los Angeles Times
Los Angeles Times

April 3, 2001, Tuesday, Home Edition

SECTION: Part A; Part 1; Page 3; Metro Desk

LENGTH: 706 words

HEADLINE: CALIFORNIA AND THE WEST;
RULING LETS IMMIGRANTS RESCIND PLEAS;
COURTS: STATE JUSTICES SAY DEFENDANTS MUST SHOW THAT THEIR LAWYERS
FAILED TO TELL THEM ABOUT THE CHANCE OF BEING DEPORTED.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

Immigrants who face deportation because they have pleaded guilty to a felony may withdraw that plea if they can show that their lawyers misrepresented their likelihood of being expelled from the country, the California Supreme Court ruled Monday.

Four of the state high court's seven justices decided that immigrants are not adequately protected simply because California judges are required to tell them that a guilty plea could result in their deportation if they are not United States citizens.

Instead, the majority said, immigrants may be able to withdraw a guilty plea if, in response to a question, their defense lawyer provided inaccurate information about the consequences for a noncitizen.

Legal analysts predicted that the ruling will be of little help to immigrant defendants, however. To rescind a guilty plea after being sentenced, an immigrant will still have to show that he or she has a good chance of winning their criminal trial. "I doubt this opinion is going to result in very many people being able to satisfy the legal requirements" for withdrawing a guilty plea, said McGeorge School of Law professor J. Clark Kelso.

In Monday's decision, the court ruled against Hugo Rangel Resendiz, a Mexican immigrant who pleaded guilty to drug charges in return for a relatively light sentence and then changed his mind when authorities sought to deport him.

The court said Resendiz failed to show that he would have elected to go to trial even if he had known that a guilty plea would result in deportation.

Resendiz was a permanent resident of the United States who lived and worked here for more than 25 years. His two children are U.S. citizens.

In June 1997, Resendiz pleaded guilty to drug charges in Orange County Superior Court and received a 180-day jail sentence and three years' probation.

He said his attorney told him that if he did not plead, he probably would be convicted at trial and sentenced to five years in prison.

Resendiz said he told his lawyer he was concerned about keeping his green card. The lawyer told him he would have "no problems with immigration" if he pleaded guilty but would not be able to become a U.S. citizen, Resendiz said.

If Resendiz had been found guilty in a trial, he would have served his prison sentence in California and then been deported.

The state Supreme Court, in an opinion written by Justice Kathryn Mickle Werdegarr, declined to decide whether Resendiz had been improperly advised by his attorney.

The court said the question of whether his lawyer had given inadequate representation was moot in Resendiz's case because he failed to show that he had a chance of winning the criminal case in a trial.

"Nothing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial," Werdegarr wrote.

Justice Stanley Mosk said Resendiz should be given a trial. Every criminal defense lawyer should ask clients whether they are U.S. citizens, Mosk said.

"If the answer is negative, counsel must advise the client of the immigration and nationality consequences of a criminal conviction," Mosk wrote.

The immigration consequences of criminal conviction have become "monstrously cruel" in recent years, Mosk complained.

He noted that immigrants can be deported under federal law even for such misdemeanors as possession for sale of a single marijuana cigarette.

"Few with petitioner's family and cultural ties to the United States would turn down a chance, even a slight chance, of escaping the talons of federal law," Mosk said.

Justice Janice Rogers Brown, joined by **justices** Marvin Baxter and Ming Chin, agreed only that Resendiz should not be allowed to rescind his guilty plea.

The three conservatives on the court said no immigrant should be allowed to withdraw a plea after sentencing as long as the judge gave the legally required warning about immigration status.

John Philipsborn, who supported Resendiz on behalf of criminal defense lawyers, called Monday's decision regrettable. He complained it will do little to ensure that criminal defense lawyers know immigration law and properly advise clients.

LOAD-DATE: April 3, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

April 3, 2001, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES SPLIT ON ADVICE FOR IMMIGRANTS

BYLINE: SONIA GIORDANI, RECORDER STAFF WRITER

BODY:

Immigrants who get bad legal advice about the consequences of a guilty plea can bring ineffective assistance of counsel claims, the California Supreme Court ruled Monday.

Declining the government's request that it adopt a bright-line rule prohibiting such claims, a four-member majority said instead that they should be considered on a case by case basis.

But six of the justices concluded that Hugo Resendiz -- a legal immigrant and father of two who had been living in the United States for 25 years before his arrest on drug charges -- hadn't met his burden of showing that he wouldn't have pleaded guilty had his attorney explained that it was likely he would be deported.

Three of the justices, led by Kathryn Mickle Werdegar, said while judges are already required to inform immigrant defendants of the potential for deportation, that doesn't foreclose a claim of ineffective assistance of counsel. "The existence of a state statute requiring courts to deliver a specified immigration advisement cannot deprive defendants of these federal constitutional rights," wrote Werdegar, who was joined by Chief Justice Ronald George and Justice Joyce Kennard.

In a separate concurring and dissenting opinion, Justice Stanley Mosk agreed that the claim was viable, but went further to say that Resendiz should have been allowed to withdraw his plea and take his chances at trial.

Mosk said that federal immigration policies favoring deportation of convicted criminals "verged on the monstrously cruel in their harshness compared to many of the crimes on which they are imposed."

Citing a slew of examples of non-citizens banished from the United States - and their families - Mosk said he would impose on all attorneys a requirement to inquire about a client's immigration status and then advise noncitizens about the consequences of a guilty plea.

In Resendiz' case, he wrote, "If Mexico refused to accept petitioner, he will enter an American Gulag that few know to exist. The federal government will imprison him indefinitely, as it has imprisoned countless other legally deportable but practically undeportable individuals."

Three of the **justices**, led by **Janice Rogers Brown**, criticized the majority's holding, saying it offered "protection nobody needs, for reasons that are nowhere explained, through a method that will impose prohibitive costs on the administration of criminal **justice**."

According to Resendiz, his trial lawyer, Leonard Basinger, knew he was a noncitizen but told him that he would have "no problems with immigration" as a result of the plea deal, except that he wouldn't be able to become a citizen.

Resendiz faced about five years in prison on charges of possessing marijuana and cocaine for sale. His plea deal called for three years on felony probation and 180 days in jail.

He signed papers indicating that the judge had advised him that his plea could subject him to deportation.

Indeed, all three opinions noted that state law already requires judges to instruct non-citizens that pleading guilty to certain crimes can have adverse immigration consequences.

Brown said the opinions by Werdegarr and Mosk failed to explain "why concerns about immigration entitle a defendant to multiple accurate advisements when the express waiver of constitutional rights is satisfied with one."

But Oakland attorney Norton Tooby said **Brown** - who was joined by Justices Marvin Baxter and Ming Chin -- was just "plain wrong."

"The alert the trial court is supposed to give is just that -- an alert," said Tooby, who filed an amicus brief on Resendiz' behalf. "But you can't say that just a warning of the possibility of deportation is enough. You would expect the defendant and defense counsel to talk about what's really going to happen."

Tooby added that the last five years have been characterized by extremely harsh federal anti-immigrant legislation that calls for "mandatory deportation for the tiniest of crimes." He also noted that California is a state of immigrants, where these questions often come up in criminal courtrooms - and he praised the majority for "refusing to go along with the prosecutors' effort to rotate back the clocks and pretend the immigrant cause can be ignored by defense counsel."

Garrett Beaumont, who argued *In re Resendiz*, 01 C.D.O.S. 2643, for the attorney general's office, declined to comment.

Resendiz' attorney, Michelle Rogers, said, "We sincerely appreciate the opinion from Justice Mosk, who saw the merits of our client's case." Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com.

LOAD-DATE: April 19, 2001