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TELEVISION PROGRAM TO "CBS NEWS' FACE THE NATION. "**

CBS News

FACE THE NATION

Sunday, July 3, 2005

**GUESTS: Senator JOSEPH BIDEN, (D-DE)
Judiciary Committee**

**Senator ORRIN HATCH, (R-UT)
Judiciary Committee**

**RALPH NEAS
President & CEO, People For The American Way**

**JAY ALAN SEKULOW
Chief Counsel, American Center For Law And Justice**

**JAN CRAWFORD GREENBURG
The Chicago Tribune**

MODERATOR: JOHN ROBERTS - CBS News

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**FACE THE NATION - CBS NEWS
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JOHN ROBERTS, host:

Today on FACE THE NATION, a vacancy on the Supreme Court of the United States. After almost a quarter century as the centrist swing vote in the high court, Justice Sandra Day O'Connor announced her retirement on Friday. What impact will her departure have on a country that's already sharply divided over issues such as abortion, gay rights and religious freedom? Who should the president nominate and how contentious will the confirmation fight be? We'll ask two key members of the Senate Judiciary Committee, Joseph Biden of Delaware and Orrin Hatch of Utah. Then we'll talk with Ralph Neas, head of People for the American Way and Jay Sekulow, Council for the American Center for Law and Justice, about what's at stake and how activists on the left and right are bracing for the battle ahead. Jan Crawford Greenburg of the Chicago Tribune joins in the questioning. The future of the Supreme Court on FACE THE NATION.

Announcer: FACE THE NATION with chief Washington correspondent Bob Schieffer. And now from Washington, substituting for Bob Schieffer, CBS News correspondent John Roberts.

ROBERTS: And good morning to you and a happy Fourth of July weekend.

We've got a lot to talk about, so let's get right to it. With us now from Wilmington, Delaware, Senator Joe Biden and from Salt Lake City Senator Orrin Hatch, both of the Senate Judiciary Committee, and joining in the questioning this morning Jan Crawford Greenburg of the Chicago Tribune.

Good morning to you all and thanks for being with us.

Senator ORRIN HATCH (Republican, Utah; Judiciary Committee): Good morning.

ROBERTS: Senator Hatch, let's start with you. When do you think the president is going to make the announcement? Have you spoken to him about this at all and what timing works best for you?

Sen. HATCH: Well, I chatted with the White House for about an hour just yesterday and I suspect that when he gets back from the G8 conference he'll probably make this decision within maybe even the same day or within a day or two I would think he would probably make this nomination, but they are trying to consult with various senators and we'll see where that goes.

ROBERTS: How long do you need to get this nomination into the committee and to a vote?

Sen. HATCH: Well, the average during the Clinton years was 58 days. In other words, you'd have a hearing within about 32 days, and then by the 58th, you would make it. The average over the past 30 years as been as long as 72 days.

ROBERTS: One of the big issues that people are considering is this idea of consultation. Back in 1993, President Clinton came to you, Senator Hatch, and he said here's who I'm thinking about, Bruce Babbitt, as a member of the Supreme Court and you said, 'Well, no, why don't you consider Stephen Breyer or Ruth Ginsburg.' One of them he had considered. Ginsburg he hadn't. Not only did he consider them, but he ended up nominating both of them. What degree of consultation do you think President Bush should engage in with the opposition?

Sen. HATCH: Well, I think he'll do at least that. I mean, basically I didn't tell the president what to do and he basically said I'm interested in these people and Bruce Babbitt was at the

head. And I just said, 'Well, you know, he may very well make it,' and, you know, I even indicated I would support him because he is president, and then I mentioned these other two at the time and he knew a little bit about Breyer but he didn't know anything about Ruth Bader Ginsburg. But I would think the president is going to do consultation, but let's understand something. The Constitution does not require consultation. It's a courtesy that has only in recent presidencies been extended to any real extent, but the courtesy comes both ways. In other words, senators have to understand that it's the president's right to pick whoever the nominee is and it's our right to advise and consent which means a vote up and down.

Ms. JAN CRAWFORD GREENBURG (Chicago Tribune): Senator Biden, if I could go to you. You have said that you hope that President Bush would nominate someone in the mold of Justice O'Connor. Would you like to see him nominate a woman, someone who is considered to be a moderate conservative? What do you mean by that?

Senator JOSEPH BIDEN (Democrat, Delaware; Judiciary Committee): Well, I think it'd be nice to see him nominate a woman, not number one. Number two, you know, we kind of had a re-definition of conservative. Conservative today means an ideologue and that's not what conservative meant in the past. An activist is what they mean by conservative now. This has been the most activist court in history, overruling seven major national pieces of legislation by a Congress signed by a president. So I'd like to see someone like Ginsburg, like Powell, a mainstream conservative.

Ms. GREENBURG: Would you be more willing to accept a stronger conservative to replace the conservative chief than you would to replace the more moderate Justice O'Connor if the chief announces his retirement?

Sen. BIDEN: The United States Senate--I suffer from teaching constitutional law, so I apologize if I get a little turgid. I'll try not to. The bottom line is that whenever there has been a balance in the court that would change with the replacement of a nominee, the nominee has been more closely looked at relating to that balance. And so obviously replacing Rehnquist with another Rehnquist would not alter the balance of the court. Replacing O'Connor with another O'Connor would not change it, but replacing an O'Connor with a Rehnquist, that would change it. So it does come closer into play than it ordinarily would.

Ms. GREENBURG: Can I go to Senator Hatch on that? Senator Hatch, obviously the short list that people are talking about now to replace Justice O'Connor are a little different than some of the names that we've seen to replace the more conservative chief if he were to retire. Is that the way it should be? Should the president think about the ideology or the philosophy of the justice that's retiring when he's making the nomination?

Sen. HATCH: Well, the president ran on the concept that he was going to--if he was re-elected, he was going to appoint a conservative or conservatives to the court. Now he has said he will appoint mainstream conservatives who are strong, good people. And if you look at the plethora of names that have been--that have come up, you can't find one of those people who is not really an excellent lawyer; in most cases, an excellent judge, some with limited experience so far, but who really would do a very good job on the courts. So, you know, who knows what a person's going to be.

I think Sandra Day O'Connor was an excellent justice. I didn't agree with her on everything, neither did Joe Biden, but the fact of the matter is, that she was a decent, honorable person of integrity, intelligence, works hard to do what was right on the court, and that's all you can ask for. And I suspect whoever the president picks, if it's a very strong conservative, will do the

same, because the people I've seen are honest people of integrity, ability and capacity; and the people that are mentioned in the press today.

ROBERTS: Well, Senator Hatch, it's interesting to note that, in terms of people being mentioned in the press today, that the first shot against a potential nominee comes not from the left but from the right; conservatives saying that Alberto Gonzales, the attorney general, close friend of the president, is unacceptable. He doesn't have the conservative credentials to do it. What are your views of Gonzales? Would he be acceptable to you?

Sen. HATCH: Well, it's not my job to pick the nominee, but let me just say this. I think that's pure bunk. Gonzales is a terrific human being, a good lawyer, a person who has more than shown that he's a good human being and a person who could handle the job. If the president chooses Alberto Gonzales, I think Alberto Gonzales will do the job, do it well. And I think we would all feel pretty good about it. But some of the right-wing groups, of course, are trying to push the president into getting the most conservative person that they can get. And they don't consider Judge Gonzales to be as conservative as some of the others. But I can tell you, he's a person of integrity and a person of ability, a person with good temper--you know, temperance. You know, he's a very fine man. And if he gets picked, I'm certainly going to support him.

ROBERTS: Senator Biden, if the name Alberto Gonzales comes before you, could you support him?

Sen. BIDEN: I sure could look closely at him. I mean, my view is that I'd have to know more about what he thinks about the real big issues like the takings clause of the Fifth Amendment, the non-delegation document, things that will alter the way in which we look at the Constitution and I'd like to know what that is. But, you know, the last thing we need in this country is more ideological purity. My Lord, this is a chance for the president to resurrect his second term here. This is a chance for him to get back on his game. And for him to go and pick some pure ideologue--does anybody in America think we need in this diverse country more pure ideologues on the United States Supreme Court? I just think--I'm confident that he understands that. I don't know whether he'll be able to resist the pressure from the hard right but I sure hope he does for the country's sake and, quite frankly, his second term.

Ms. GREENBURG: Senator Biden, this is obviously a court that has refused to overturn Roe vs. Wade, the landmark decision that said a woman has a constitutional right to an abortion. Three justices on the court now would vote to overturn that decision. Is that a defining issue for you? Do you plan to aggressively question the nominee on his or her views about that decision and how they would rule on it?

Sen. BIDEN: No.

Ms. GREENBURG: It is not?

Sen. BIDEN: It is not.

Ms. GREENBURG: Why not? I mean, do you feel that Roe vs. Wade--is that a settled law? It's safe, you believe? That...

Sen. BIDEN: No, I just think--in my view, I don't think we should be talking about specific outcome of specific cases. I think it is important that we know what methodology a justice will use. For example, what does the liberty clause of the 14th Amendment mean to the justice and

how would that justice go about determining whether or not there was any right to privacy founded in that. It goes beyond Roe v. Wade.

But I think once we get into determining how you will set up a litmus test on how you'll vote on every single disputed issue out there, I think we do begin to go around the fringes of the--I think the two most important things that a justice has to possess and that is the independence and someone who does not come with a brief to the court. So I think looking at the methodology.

And I--for example, if the next justice concludes, as some very ideological, right-wing judges do believe that, for example, the takings clause of the Fifth Amendment means that you no longer have the ability through zoning laws to keep pornography shops from being placed next to schools because it violates the right of someone's property rights, then I think we should change 200 years of reading. That's when many of the conservatives are arguing. They wouldn't be arguing for pornography but that's an example of what could happen. That's much, much, much, much more important to me.

ROBERTS: Well, Senator Biden, on the abortion issue what has changed for you, then, since the days of the Clarence Thomas hearings when you were accused...

Sen. BIDEN: Not a thing.

ROBERTS: ...of badgering the witness over his--asking him about his views on abortion?

Sen. BIDEN: That is not true. No one ever said that. You're the first person in American history that said that. I've never asked the question about abortion. I've never asked him about that. I asked his--him questions on esoteric things that now turned out to be dispositive. What's his view on natural law? He wrote about that. How did he arrive at decisions relating to personal rights as well as property rights? That's what I asked him, Bob. I never once asked the question about a specific issue, particularly abortion.

ROBERTS: Senator Hatch, we talk about the potential of a nuclear option here, a ban against filibuster should the Democrats decide to engage in one. Do you believe that whomever President Bush nominates, they deserve an up or down vote?

Sen. HATCH: No question about it. For the whole history of this country, they've always had an up or down vote. We've never had a leader-led partisan filibuster against any Supreme Court nominee. In fact the system has worked so well that--and by the way I want to pay tribute to Joe Biden. During the Clarence Thomas hearings, he conducted reasonable and good hearings. He was fair and he did a very good job as chairman of the committee and I just want to compliment him.

But let's just be honest about it. We were able to put Thomas out of the committee with a--without recommendation, because we recognized that the president and his nominee deserve a vote up and down. That's what advice and consent means. We also at one time put Bob Bork out with a negative recommendation, because everybody on the committee knew that the process was for the president's nominee to have the consent or not consent. In the Bork issue we did not--I did, but the Senate did not consent to his nomination. In the case of Clarence Thomas the Senate did pass Thomas by a very close vote.

Ms. GREENBURG: Senator Hatch, if I could just--but has the atmosphere changed so much now?

Sen. HATCH: Oh, yeah.

Ms. GREENBURG: Could you see--would Justice Thomas be targeted by a filibuster if he were up for nomination today for that same seat?

Sen. HATCH: Well, I hope not. I have to say, I don't think the American people are going to put up with a filibuster against a Supreme Court judicial nominee. I think that if some of the Democrats advocate that, I think they're going to really hurt their party very badly. I think they realize--and look, as I look at every name that has been mentioned in the press so far, I can't name any of those that you would call an ideologue, or a right-wing ideologue. They are conservative, they are very decent people. They're all skilled in the law. They all have good temperament. They all have integrity. So you know, I just don't see any reason at all for even considering a filibuster, and I don't think my colleagues on the other side will do so.

Ms. GREENBURG: Well, can we ask? Let's ask Senator Biden.

ROBERTS: Yeah, let's find out.

Senator Biden, are there any circumstances...

Sen. BIDEN: Sure.

ROBERTS: ...under which would justify a Democratic filibuster of a nominee?

Sen. BIDEN: Yes, there are. But let me set the record straight on two things. One, Abe Fortas was filibustered and killed by a Republican-led United States Congress. He was...

Sen. HATCH: But not by a partisan Congress.

Sen. BIDEN: He was filibustered.

Sen. HATCH: Not by a partisan Senate, Joe.

Sen. BIDEN: Well...

Sen. HATCH: It was equally...

Sen. BIDEN: By Repub...

Sen. HATCH: It was bipartisan.

Sen. BIDEN: Well, the bottom line was Southern conservatives and conservative Republicans filibustered and killed him. And by the way, I was chairman at the time of Bork and Thomas, and it is true I did allow both to go out without recommendation. I could not--I could have stopped each of them from getting a vote in the full Senate. But it didn't--I didn't let them out because I believed that a filibuster was wrong. I let them out because I believe the Constitution says the Senate--the Senate--must decide whether or not to let a vote occur, not a committee.

Sen. HATCH: That's right.

Sen. BIDEN: And so I did not want to limit it to the committee but I did--that did not mean that if you let it out of committee that you weren't eligible to filibuster it. And--but I have no intention of filibustering, but he--it depends on who the president sends. But I could see a circumstance--for example, if he sent up Edith Jones I can assure you that would be a very, very, very difficult fight and she probably would be filibustered.

Ms. GREENBURG: What about...

ROBERTS: Well, what...

Ms. GREENBURG: ...Janice Rogers Brown, someone else?

Sen. BIDEN: Excuse me. I'm not--by the way, I misspoke. I misspoke. Janice Rogers Brown is what I meant to say.

Ms. GREENBURG: Oh, OK.

Sen. BIDEN: I misspoke. Thank you for saying that.

ROBERTS: But wasn't she just...

Sen. BIDEN: Janice Rogers Brown ...(unintelligible).

ROBERTS: Wasn't she just confirmed, though? How do you invoke the...

Sen. BIDEN: Yes.

ROBERTS: ...extraordinary circumstances clause of the agreement of the Gang of 14 for somebody...

Sen. BIDEN: I'll tell you why.

ROBERTS: ...who's just been confirmed?

Sen. BIDEN: Because a circuit court a judge is bound by star decisis. They don't get to make new law. They have to abide by the--for example, she could not, in the...

ROBERTS: So what you're saying is the Supreme Court's different than the appellate...

Sen. BIDEN: Different ball game.

ROBERTS: Right. OK.

Sen. BIDEN: Totally different ball game.

Ms. GREENBURG: And is a filibuster...

Sen. BIDEN: Totally different ball game.

Ms. GREENBURG: Is a filibuster, would you say, more likely to replace Justice O'Connor than if the president is replacing a more conservative like the chief justice?

Sen. BIDEN: Well, I--probably. But look, I don't know anybody talking about a filibuster right now. All I was responding to was would it be appropriate...

ROBERTS: OK.

Sen. BIDEN: ...to filibuster under any circumstances?

ROBERTS: All right.

Sen. BIDEN: The answer is it is appropriate under some cir--and by the way, one in every five justices nominated by a president of the United States since 1789 has been rejected by the United States Senate--one in five.

ROBERTS: All right. Well, listen, folks, we're out of time. Thanks very much for joining us. Really appreciate it.

Sen. BIDEN: Thanks a lot.

ROBERTS: Senator Joe Biden from Delaware, Senator Orrin Hatch from Utah, a lot of interesting times ahead.

When we come back, we're going to talk with two judicial activists who will be key players in the upcoming battle over the court nominee.

(Announcements)

ROBERTS: And we're back.

Joining us now is Ralph Neas, head of the liberal group People for the American Way, and Jay Sekulow, one of the president's key advisers on choosing a nominee. He's also chief counsel for the conservative American Center for Law and Justice.

So I think what the American people want to know, gentlemen, this morning is what kind of battle are we about to see in a nation that is already deeply divided?

Mr. RALPH NEAS (People for the American Way): I hope and pray, John, that there's not going to be a battle. We don't want a battle. We have been advising Republican senators and Democratic senators and the president to consult. Let's get a bipartisan consensus nominee, someone who can bring the country together. We don't need any more polarization. We're at war in Iraq. We have a war on terror. We've got economic challenges at home. Let's have a unity candidate that all Americans can support.

ROBERTS: Well...

Mr. JAY ALAN SEKULOW (American Center for Law and Justice): You know, a justice isn't running for the Supreme Court. You don't run for the Supreme Court. This idea of a consensus candidate, while it may sound laudable and within the American ideals, that's not the way the Constitution's set up. And I think one thing that has to be clear here is the president ran--when he was running for president during the re-election, he ran with the concept that he is going to appoint, as he has for the Court of Appeals, conservative judges that are going to not legislate from the bench, that are going to interpret the Constitution. So this idea that we've got to have a consensus candidate, I think, is ridiculous. The president has the

authority. The Senate can say yes or no. Hopefully it'll go through an orderly process. I think Ralph and I both hope for that. But this idea that the president has to come up with a consensus candidate with the Senate is just wrong.

Ms. GREENBURG: Jay, one thing that's come out already today--some groups on the right are saying that they would oppose Attorney General Alberto Gonzales if he were to be nominated to the Supreme Court, becoming the first Hispanic on the Supreme Court. What are your views on that?

Mr. SEKULOW: Well, there is concern on the right, there's no doubt about it. There's not a lot of enthusiasm. You've seen the articles; you've written about it. I think the concern is especially that, in the context of what's upcoming to the Supreme Court of the United States--you know, it's interesting; we have the vacancy of Justice O'Connor, and at the same time the court is taking one major life case involving parental notification. Alberto Gonzales, when he was a judge in the Texas Supreme Court, dealt with that issue, came out on the other side of it than where the conservative groups are. So there's some concern.

There's also the issue of--he's the attorney general of the United States. He's doing a fantastic job, by the way. He was a great White House counsel, too. You're in the middle of a war on terror, as we were just talking--Ralph was just talking about, and the idea that we're going to switch the attorney general out in the middle of that I find to be timing not particularly great, but look, it's the president's call. But there's concern on the right; there's no doubt about it.

ROBERTS: Well, you've been consulting with the White House, Jay. What's the president's thinking on all of this?

Mr. SEKULOW: Well, you know, look, only the president knows what his actual thinking is. I don't even think the advisers to the president know. The president has said--and I trust him--that he's going to appoint a nominee that is conservative in their judicial philosophy, that is going to not legislate from the bench, that's going to stick with the kind of nominees we've seen for the Court of Appeals. I don't think it's going to be any different for the Supreme Court of the United States.

ROBERTS: So that would suggest then a conservative replacing Sandra Day O'Connor...

Mr. SEKULOW: That's right.

ROBERTS: ...and, Ralph, what does that do from your side of the fence? Do you unleash those millions of dollars that you have pent up in a campaign against a conservative candidate?

Mr. NEAS: We hope there's not going to be a fight. If the president picks a fight, we're going to respond and, of course, fight strongly in a right-wing ideologue.

ROBERTS: But how would you respond?

Mr. NEAS: Listen, I think we can get someone in the mold of Sandra Day O'Connor. What we need is Sandra Day O'Connor's America. She's been the fifth vote on two dozen decisions to protect clean air and clean water, protect privacy, protect a woman's right to choose and reproductive health.

Mr. SEKULOW: But, Ralph...

Mr. NEAS: We want a consensus here. If it's someone...

Mr. SEKULOW: ...the Constitution doesn't say...

Mr. NEAS: Let me finish, Jay.

Mr. SEKULOW: ...a consensus, Ralph.

Mr. NEAS: Let me answer the question please. If there is a right-wing ideologue replacing a mainstream conservative like Sandra Day O'Connor, it would be a constitutional catastrophe. Dozens of Supreme Court decisions would be...

ROBERTS: What would you do if there is?

Mr. NEAS: If there is? We'll work with our 750,000 members and activists. We'll oppose such a nomination. We'll work with all of our progressive colleagues all across the country and make sure that we have a national public discussion. Let's engage the entire country.

Ms. GREENBURG: Let...

Mr. NEAS: There's so much at stake, not so much for us but for our kids and our grandchildren.

Mr. SEKULOW: I don't understand this stuff here, though.

Mr. NEAS: It's the next 30 years.

Mr. SEKULOW: John and Jan, I don't understand this idea, Ralph, that the president now has to shift the type of nominee he wants to put forward for the Supreme Court simply because Justice O'Connor has resigned. And by the way, I find it fascinating--and I like Justice O'Connor. She's ruled with me more times she's ruled against me in cases I've had up there, but it's fascinating to me that when Justice O'Connor was the fifth vote also in Bush vs. Gore, everybody was castigating her. And now all of a sudden, she's being held up as the model justice. Now I like Justice O'Connor personally. I've agreed with some of her decisions, disagreed with others, but the president gets the authority to nominate a conservative judge just as he ran. I don't expect that to be any different which means I think there will be a little engagement here.

Ms. GREENBURG: Would you be--are you going to more closely scrutinize and fight against a solid conservative to replace Justice O'Connor or would you give the president more of a pass if he nominates a solid conservative to replace the more solid conservative chief justice when he retires?

Mr. NEAS: Jan, we've got to put on the table here that over the last 200 years more than 20 percent of the Supreme Court nominees have been rejected, 14 of them without a vote. So we take it case by case...

Mr. SEKULOW: It tells you what it's going to be.

Mr. NEAS: ...and we will look at Gonzales. We'll look at everybody very carefully before we make a decision, but the hearings are the most important part. All of the confirmations are decided by the Senate hearings. With all due respect to Jay and me, it's the Senate hearings

and it's the advise and consent responsibility of the Senate, a co-equal branch of government with respect to this.

Mr. SEKULOW: The president gets to make the nomination, though. That's what the Constitution actually says.

ROBERTS: Gentlemen...

Mr. SEKULOW: Thanks.

ROBERTS: ...I'm sorry. We're out of time. So you want to see a consensus choice.

Mr. NEAS: Thank you. Thank you.

ROBERTS: Thank you very much, Ralph. You want to see the president make his own mind up. All right. There you go.

Mr. SEKULOW: The president will make his own mind up I can assure you.

ROBERTS: Now the battle lines have been drawn. We'll be back with a final word right after this. Stay with us.

(Announcements)

ROBERTS: And that's our broadcast for this Sunday. Bob Schieffer will be back again next week. Thanks for watching FACE THE NATION and have a happy and safe Fourth of July weekend. Bye-bye.