

Turning Right

Judicial Selection and the Politics of Power

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Leadership Conference on Civil Rights Education Fund

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The individuals charged with dispensing justice in our society have a direct impact on all of our rights, as well as on protecting the environment, workers, and consumers. The nation's federal judges—who are appointed for life—must be moderate, fair and impartial. What could be more important than saving our courts from extremist ideologues? And yet, much of the battle over judicial nominations is taking place outside of public view. The purpose of this report is to highlight what's at stake and the implications for the civil rights and human rights agenda now and in the future.

The author and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

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Executive Summary

The men and women who sit on our nation's federal courts have the power to breathe life into the promise of our democracy. Far from being isolated interpreters of arcane aspects of our laws and Constitution, with one decision, federal judges can change how we work and live with one another — for better, or for worse.

Article II of the Constitution provides the President with the power to nominate federal judges, subject to the "advice and consent" of the Senate. In designing this structure for sharing power between the executive and legislative branches, the founders intended to ensure an independent federal judiciary.

Such independence is critical, since federal judges receive lifetime appointments and are called upon to make important decisions affecting the interpretation and enforcement of the Constitution, federal civil rights laws, and other key protections. Because of this, civil rights advocates have long monitored the integrity of the processes for nominating and confirming judicial and other key federal appointments—insisting that such processes be fair, open, and balanced.

Today, through his judicial appointments, President George W. Bush hopes to appease the far right wing of his party by packing the federal courts with the most conservative ideologues in our nation's legal community. Many of the men and women President Bush has nominated to the federal bench have built their careers at the ideological fringe of the law—calling for tax breaks for universities that practice racial discrimination, gutting Congress's power to pass civil rights laws, eliminating the role of the federal government to protect the rights of workers, and eliminating federal protections for the environment, among other things. Their views are out of the mainstream but consistent with the small band of ideological conservatives dominating the judicial selection process in the White House.

With lifetime appointments, these right-wing judges have the power to change the nation for decades to come.

What is at stake in the fight over judicial nominations is the continued ability of Congress to protect our civil rights and fundamental freedoms: the right to be free from discrimination based on race, national origin, religion, gender, sexual orientation, or disability; the right to organize in a union and be protected by national labor standards; the right to clean air and water; and the right to equal opportunity in employment and education for all Americans. While many have fought for years for these rights, they are not secure without a federal judiciary ready to stand vigilant to protect them.

Americans who care about civil rights, workers' rights, and consumer and environmental protections must wake up to the danger posed by allowing the radical right to control the Third Branch of government. They must demand that the Bush administration nominate and that their senators only confirm judges who are committed to protecting our basic rights and freedoms.

Much of the right wing effort to capture the courts is happening outside of public view. While most people know about the role of the Supreme Court and the importance of a Supreme Court nomination, far fewer pay attention to the lower federal courts. This report, part of a longer term effort of the Leadership Conference on Civil Rights and the Leadership Conference on Civil Rights Education Fund to monitor the federal judicial nominations that affect the state of civil rights in America, chronicles the battle over judicial nominations; the right wing's decades-long effort to capture the federal courts, the law, and the Constitution; and the implications for the civil and human rights agenda in 2004 and beyond.

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Chapter I of the Report discusses the early conservative efforts to affect judicial selection. In the 1970s and early 1980s, in response to federal court decisions upholding civil rights, civil liberties and privacy rights, right wing conservatives began to formulate their plan to re-shape our nation's legal landscape to better reflect their agenda. This process began with the creation of a number of policy think tanks and advocacy organizations that now form the intellectual core of the conservative revolution that has reshaped our federal judiciary.

In the 1980s and early 1990s, these groups and their allies, determined to shift the courts' philosophical balance to the right, found willing allies in the White House. For 12 years, the Reagan and George H.W. Bush administrations made a concerted effort to place their stamp on the judiciary and to appease social conservatives who advocated for rolling back civil rights, civil liberties, and privacy advances made during the 1960s, 1970s, and early 1980s.

The men and women nominated in the 1980s and early 1990s are our nation's most conservative judges today. They are leaving an indelible mark on the nation and are arguably the most enduring legacy of the presidencies of Ronald Reagan and George H.W. Bush.

Chapter II of the Report examines judicial nominations and the Clinton administration, and how, to the disappointment of many who advocated the nomination of ideological liberals to counterbalance the ideological conservatives nominated by Presidents Reagan and Bush, President Clinton nominated judicial moderates, by and large.

Despite President Clinton's efforts to work with Senators from both parties, once Republicans gained the majority in 1995, the Senate's most conservative Republicans began to foreclose all avenues to Senate confirmation for many of President Clinton's nominees. Blue slips, holds, and unnecessary debate were the tools most often employed to slow or stop confirmations. This chapter describes the organized attack on President Clinton's nominees, including, among others, Marcia Berzon, Richard Paez, and Ronnie White. In this way, Senate Republicans and their allies worked to undermine the nominations process and preserve judicial vacancies for the nominees of a hoped-for conservative President.

Chapter III of the Report discusses how the Bush administration has been driving the courts to the right, reaching deep into the ideological extreme of his party, and nominating men and women with records of extreme hostility toward the rights of racial and ethnic minorities, women, workers, consumers, individuals with disabilities and many others.

Senate Republicans, in the majority since the 2002 elections, have made clear that they will confirm President Bush's nominees by any means necessary. By late January 2003, the Judiciary Committee under the chairmanship of Senator Hatch, R-Utah, began moving nominees through the confirmation process at a pace that made any effort to scrutinize their individual records impossible. In addition, Chairman Hatch imposed a new blue slip policy designed to limit the longstanding ability of home-state Senators to delay or deny Committee process for objectionable nominees.

In light of a lack of consultation by the Republican majority and the erosion of long-standing Committee rules that would give voice to the Democratic minority, Senate Democrats began to use the one tool left in their arsenal to stop the confirmation of President Bush's most extreme nominees—the filibuster—successfully blocking the confirmation of some of the most extreme candidates. In response, Senate Majority Leader Bill Frist, R-Tenn., proposed a dramatic alteration of long-standing Senate rules, drastically shifting the balance of power in the Senate, and signaling a complete breakdown of the rule of law in the Senate—a proposal referred to colloquially as the "nuclear option."

And in a move sure to escalate the bad will between the administration and the Senate on this issue, President Bush took the extraordinary step of giving recess appointments in early 2004 to

two of his most controversial nominees, both of whom had been defeated by filibusters in the Senate—Charles Pickering to the Fifth Circuit and William Pryor to the Eleventh Circuit.

Today, the covenant between the White House and the Senate has been broken, the confirmation process is suffering, and the rule of law is at stake. While the overwhelming majority of nominees are confirmed by the Senate, the process creates bad will and breeds charges of bad faith and political manipulation. The Leadership Conference believes that all who are committed to social justice and equal rights must demand that those appointed to the federal courts have distinguished records as lawyers, are well respected by their peers, have integrity, and a commitment to the Constitution, including assuring equal rights and equal opportunities for all.

The report concludes with a recommendation that the President and Senate leaders agree on a fair-minded and neutral process that would identify the most qualified jurists for appointment to the federal courts. In addition, because the Constitution makes clear that the selection of federal judges should be done with the cooperation of both the U.S. president and the Senate, this process should involve both branches of government and should stress the need for bipartisanship.

Beyond the statistics and political battles, something of far greater importance is at stake—the integrity of the confirmation process, the independence of the judiciary, and the courts as a hopeful refuge for justice, equality, and fairness. These are not lofty ideals divorced from the everyday lives of American families. The federal courts—and the men and women who serve there—affect us all. Every person subject to the courts' decisions deserves a cooperative confirmation process that ensures a vibrant and responsible judiciary.

Introduction

"It is, emphatically, the province and duty of the judicial department to say what the law is."

—Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803)

The Role of the Federal Courts

Since the early days of our republic, the roles of our three branches of government have been clear: While Congress makes the laws and the President executes the laws, the courts interpret the laws, and thus have the last word on declaring what the laws mean. As we have seen over the last 200 years since *Marbury v. Madison*, the role of the interpreter is, in many ways, the most powerful.

The men and women who sit on our nation's federal courts have the power to breathe life into the promise of our democracy. Far from being isolated interpreters of arcane aspects of our laws and Constitution, with one decision, federal judges can change how we work and live with one another — for better, or for worse.

Decisions by federal courts have changed the course of our country. At times, the courts have led the country toward a broader recognition of individual rights and liberties. For example, the Supreme Court's decision in *Brown v. Board of Education*, striking down racial segregation in public schools, was a watershed decision that led to the dismantling of a wide range of racist institutions and the promotion of a culture of equal rights.

At other times, the courts have stood in the way of progress, limiting rights and freedoms, such as when the Supreme Court, in *University of Alabama Board of Trustees v. Garrett*, struck down a provision of the Americans with Disabilities Act permitting a state employee to sue his or her employer and collect money damages for discrimination based on disability.

However, the power of the courts to change the course of our country is not limited to the Supreme Court. Because of the volume of cases that they hear and because of the extremely limited Supreme Court docket, the federal courts of appeal can have an even greater effect on the law than the Supreme Court. While the Supreme Court typically hears fewer than 100 cases a year, the federal courts of appeal, which are the courts immediately below the Supreme Court, decide almost 30,000 cases a year. Thus, for most people, the courts of appeal are the courts of last resort.

The Threats to an Independent Judiciary

Article II of the Constitution provides the President with the power to nominate federal judges, subject to the "advice and consent" of the Senate. In designing this structure for sharing power between the executive and legislative branches, the founders intended to ensure an independent federal judiciary. Such independence is critical, since federal judges receive lifetime appointments and are called upon to make important decisions affecting the interpretation and enforcement of the Constitution, federal civil rights laws, and other key protections. Because of this, civil rights advocates have long monitored the integrity of the processes for nominating and confirming judicial and other key federal appointments—insisting that such processes be fair, open, and balanced.

While battles over nominations to the Supreme Court go back to the founding of our nation, battles over nominees to the federal courts of appeal are fairly new. In recent years, the civil rights community has focused on the federal courts of appeal, which because they are often the final

word, exercise enormous power in deciding cases that determine the rights of all Americans in such areas as civil rights, privacy rights, the rights of workers, and women's rights.

In the 1970s and early 1980s, in response to federal court decisions upholding civil rights, civil liberties, and privacy rights, right wing conservatives began to formulate their plan to re-shape our nation's legal landscape to better reflect their agenda. This process began with the creation of a number of policy think tanks and advocacy organizations including the Free Congress Foundation, the Family Research Council, the Eagle Forum, the Blackstone Institute, and the Federalist Society.

These and other organizations with similar missions now form the intellectual core of the conservative revolution that has reshaped our federal judiciary. In the 1980s and early 1990s, these groups and their allies, determined to shift the courts' philosophical balance to the right, found willing allies in the White House.

Today, through his judicial appointments, President George W. Bush is appeasing the far right wing of his party by packing the federal courts with the most conservative ideologues in our nation's legal community. Many of the men and women President Bush has nominated to the federal bench have built their careers at the ideological fringe of the law-calling for tax breaks for universities that practice racial discrimination, gutting Congress's power to pass civil rights laws, eliminating the role of the federal government to protect the rights of workers, and eliminating federal protections for the environment, among other things. Their views are out of the mainstream but consistent with the small band of ideological conservatives dominating the judicial selection process in the White House.

With lifetime appointments, these right-wing judges have the power to change the nation for decades to come.

The Judicial Nominations Battle-What's at Stake

The modern civil rights movement evolved through the struggles of men and women who rode for freedom, protested for improvement, and advocated for change in state and national legislatures. But, at every turn, the federal courts were present—in some cases, ensuring civil and constitutional rights and in others, turning back the hands of time.

The question now is not *whether* federal judges have the power and the ability to change the contours of our democracy. They clearly do. The question, rather, is whether the judges nominated by President Bush will use that power to further protect the rights of women, racial, ethnic, and religious minorities, individuals with disabilities, workers or consumers, or whether they will be a force for further roll-backs of important rights and liberties.

What is at stake in the fight over judicial nominations is the continued ability of Congress to protect our civil rights and fundamental freedoms: the right to be free from discrimination based on race, national origin, religion, gender, sexual orientation, or disability; the right to organize in a union and be protected by national labor standards; the right to clean air and water; and the right to equal opportunity in employment and education for all Americans. While many have fought for years for these rights, they are not secure without a federal judiciary ready to stand vigilant to protect them.

For example, over the past several years, some of our nation's most conservative courts of appeal, which have jurisdiction over regions of the country with very large minority populations, have not only limited the reach of affirmative action programs, but have put their very existence in jeopardy. Also, numerous courts of appeal have become increasingly hostile to claims of employment discrimination, including sexual harassment. These decisions significantly impact the economic and educational opportunities for thousands of women and minorities.

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The decisions of federal appellate judges also have had a tremendous impact on the ability of workers to exercise their rights under laws providing critically important workplace protections. These include the right to the minimum wage and overtime compensation provided by the Fair Labor Standards Act; the right to unpaid leave for a serious illness of the worker or family member, or the birth or adoption of a child, provided by the Family and Medical Leave Act; the right to a safe workplace provided by the Occupational Safety and Health Act; the right to organize a union and bargain over terms and conditions of employment, provided by the National Labor Relations Act; and the right of workers with disabilities to fair treatment, including reasonable accommodations. All of these rights are in jeopardy.

Americans who care about civil rights, workers' rights, and consumer and environmental protections must wake up to the danger posed by allowing the radical right to control the Third Branch of government. They must demand that the Bush administration nominate and that their senators only confirm judges who are committed to protect our basic rights and freedoms.

They must ask, for example, whether Judge Charles Pickering, who received a recess appointment to the Fifth Circuit in January 2004, will continue the work of great jurists like Elbert Tuttle, John Minor Wisdom, and Frank Johnson who ensured the success of desegregation in the South after *Brown v. Board of Education*, or will he diminish the law and the Constitution like Chief Justice Taney in *Dred Scott v. Sanford*, when he wrote for the Court in 1857 that no Black person, free or slave, could be a "citizen" of a state or of the United States.

Will Jeffrey Sutton, recently confirmed to the Sixth Circuit, protect the rights of individuals with disabilities, given that he was the chief architect of the plan to dismantle the Americans with Disabilities Act? Many pending Bush nominees, such as Alabama Attorney General William Pryor (who, while not confirmed, received a recess appointment in February 2004), share Judge Sutton's view of the Constitution, which places other federal civil rights laws in jeopardy.

President Bush's nominees to the D.C. Circuit will shape labor and environmental law, as well as immigration, consumer protection, and civil rights laws for decades. The Senate must decide if it will confirm a jurist-like California Supreme Court Justice Janice Rogers Brown—who has commented that America has become "a nation of whiners" and that policy makers are "handing out new rights like lollipops in the dentist's office." It must also decide whether Ken Starr protégé Brett Kavanaugh can divorce his political views from sound legal reasoning.

The White House and the Senate have an important role to play in the process that determines whether judicial nominees like Pickering, Brown, Kavanaugh, and others will be confirmed. On questions of civil rights, women's rights, labor and environmental law, they will be the final arbiters of justice. All who appear before them and are affected by their decisions must also believe in their impartiality and respect the process that led to their confirmation.

Much of the right wing effort to capture the courts is happening outside of public view. While most people know about the role of the Supreme Court and the importance of a Supreme Court nomination, far fewer pay attention to the lower federal courts. This report, part of a longer term effort of the Leadership Conference on Civil Rights and the Leadership Conference on Civil Rights Education Fund to monitor the federal judicial nominations that affect the state of civil rights in America, chronicles the battle over judicial nominations; the right wing's decades-long effort to capture the federal courts, the law, and the Constitution; and the implications for the civil and human rights agenda in 2004 and beyond.

Chapter I

Early Conservative Efforts to Affect Judicial Selection

Reshaping the Legal Landscape

The importance of the federal courts is not lost on ideological conservatives. In the 1970s and early 1980s, fuming in response to the decisions rendered by the Supreme Court under Chief Justice Earl Warren, and frustrated by thwarted attempts to roll back civil rights, civil liberties, and privacy rights in Congress, they put in place the cornerstones of today's largest and most powerful policy think tanks and advocacy organizations.

In the legal community, the most well known and powerful of these organizations is the Federalist Society. Founded in 1972 with the support of conservative law professors, including former D.C. Circuit Judge Robert Bork and Supreme Court Justice Antonin Scalia, the Federalist Society now boasts a membership of more than 20,000 lawyers, policy analysts, and business leaders. There are more than 5,000 law student members, and student chapters exist at 145 of the American Bar Association-accredited law schools.

Federalist Society members and supporters, some of our country's most conservative thinkers and activists, include Linda Chavez, President of the Center for Equal Opportunity; C. Boyden Gray, White House Counsel to President George H.W. Bush; Don Hodel, former President of the Christian Coalition; and Whitewater Independent Counsel Kenneth Starr. The Federalist Society seeks to reorder "priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law."¹ Their publications advocate for a legal system resting on the principles of private property ownership, freedom of contract, and limited government. They also advocate for rolling back President Franklin D. Roosevelt's "New Deal," which ushered in an era of important reforms that serve as the foundation for many of our most important legal protections today.

These organizations and others like them are determined to shift the courts' philosophical balance to the right and enshrine their ideological views in the law.

The Reagan and Bush Legacies

While George Bush has been successful at finishing the job of packing the federal branch with conservative ideologues, these efforts really began in the 1980s. For 12 years, the Reagan and George H.W. Bush administrations made a concerted effort to place their stamp on the judiciary and to appease social conservatives who advocated for rolling back civil rights, civil liberties, and privacy advances made during the 1960s, 1970s, and early 1980s.

Recognizing that the lower courts and the Supreme Court would have a significant affect on the direction of the law for years to come, conservatives inside the Reagan White House—led by White House Counsel Fred Fielding and Attorney General Ed Meese—made it clear that the Reagan administration would attempt to nominate candidates to the federal bench who would embrace the most conservative judicial philosophy.

In a series of reports, Reagan administration lawyers began articulating areas of "constitutional controversy," the administration's own view of the law, and the importance of judicial philosophy.

One report sent to the Attorney General by Justice Department lawyers, "The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation," focused on fifteen key areas of the law that could be "sharply influenced" by the judicial philosophies of those sitting on the federal

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bench. The report also made the point that the courts play an important role in shaping the law and therefore, the public, the media, and members of Congress should be attuned to the affect the judicial selection process—and the judicial philosophy of the nominee—will have on the decisions made by the courts.

As the traditional lead agency in the executive branch in the judicial selection process, the Department of Justice believes that this report will prove helpful in communicating to the public, the media and Members of Congress the growing importance of the judicial selection process. ... it is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible.

There are few factors that are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government — the federal judiciary.²

Yet another report, "Guidelines on Constitutional Litigation," provided government lawyers with the administration's view of the law—not necessarily the prevailing view—in a wide range of issue areas. Premised on the doctrine of "original intent," the report advocated for the narrowing of individual rights and government powers granted by the Constitution. As Indiana University School of Law Associate Professor Dawn Johnsen wrote, "rarely has any president sought to advance such comprehensive constitutional views in direct conflict with those of the Supreme Court."³

Armed with its own view of the Constitution and the law, as well as judicial selection criteria designed to identify only those whose ultra-conservative ideology matched their goals, the Reagan administration—and later the first Bush administration—methodically shifted the courts in the direction it desired. Many of the men and women nominated in the 1980s and early 1990s are our nation's most conservative judges today—including Judge Edward Earl Carnes, Jr. of the Eleventh Circuit, Judge Sidney Fitzwater of the Northern District of Texas, Judge Alex Kozinski of the Ninth Circuit, Judge Michael Luttig of the Fourth Circuit, Judge Daniel Manion of the Seventh Circuit, and Judge J. Harvie Wilkinson of the Fourth Circuit. These judges are leaving an indelible mark on the nation and are arguably the most enduring legacy of the presidencies of Ronald Reagan and George H.W. Bush.

Chapter II

Judicial Nominations and the Clinton Administration

The Clinton Approach

When President Bill Clinton assumed office in January 1993, 127 of the 828 authorized federal judgeships were vacant. To fill those vacancies, President Clinton worked with the Senate Democratic majority, as well as Senate Republicans, to find consensus nominees. To the disappointment of many who advocated the nomination of ideological liberals to counterbalance the ideological conservatives nominated by Presidents Reagan and Bush, President Clinton nominated judicial moderates, by and large. In the view of one court-watcher, the Clinton administration did not focus on countering, with the intellectual leaders of the left wing of his party, the conservative firepower the Reagan and Bush administrations loaded on the federal courts. "Clinton was not a die-hard liberal himself, and he tended to nominate centrist legal professionals in tune with his more centrist politics."⁴ Furthermore, as a political matter, the Clinton administration was reluctant to nominate judges unless more than 60 Senate votes for confirmation were expected.⁵

When Republicans gained the Senate majority in 1995, President Clinton continued his efforts to work with Senators from both parties, often asking Senate Republicans to help him identify prospective nominees and conferring with Senate Judiciary Committee Chairman Orrin Hatch, R—Utah. Notwithstanding this high level of consultation, the Senate's most conservative Republicans began to foreclose all avenues to Senate confirmation for many of President Clinton's nominees. Blue slips, holds, and unnecessary debate were the tools most often employed to slow or stop confirmations.

Blue Slips and "Holds"

Under longstanding Senate tradition, when a President nominates someone to a federal judicial position, the two Senators from the nominee's home state have an opportunity to indicate their approval or disapproval of the nominee to the Committee Chairman. Because returning a questionnaire printed on blue paper indicates approval, the process is known as the "blue slip" policy. Under Senate rules and custom, withholding a blue slip or returning a negative blue slip could forever doom a nomination or, at least, make the road to confirmation a bumpy one.

The blue slip process was largely unknown to the public until 1979, when Senate Judiciary Committee Chairman Edward Kennedy, D-Mass., turned public attention to the issue. Frustrated by the lack of diversity on the federal bench and recognizing that blue slips may have contributed to that problem, Senator Kennedy announced that the process would be reformed. At a Judiciary Committee hearing, he announced that although he would not ignore the 25-year old blue slip tradition, the withholding of a blue slip by a Senator would not preclude action on a nominee. Instead, in the absence of a returned blue slip, the Judiciary Committee would vote to determine whether or not the nomination should go forward.

Senator Joseph Biden, D-Del., took over the Chairmanship of the Judiciary Committee in 1987, but did not articulate a blue slip policy until 1989. In a letter to President George H.W. Bush, Senator Biden explained:

The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate. If such good faith consultation has not taken place, the Judiciary Committee

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*will treat the return of a negative blue slip by a home state Senator as dispositive and the nominee will not be considered.*⁶

When Republicans gained a majority in the Senate in 1995 and Senator Hatch became Chairman, he enclosed the Biden letter in his February 3, 1995 letter to White House Counsel Abner Mikva. He made it clear that his policy would be the "Biden Policy" until he articulated a new one.

In 1997, still relying on the Biden Policy, Chairman Hatch articulated more detail about his blue slip policy. Expressing concern about the level of consultation between the White House and Senate Republicans, he defined what would constitute the "good faith consultation" necessary for a nominee to be considered by the Committee. He wrote that the circumstances demonstrating an absence of such consultation would include:

- 1. failure to give serious consideration to individuals proposed by home state Senators as possible nominees;*
- 2. failure to identify to home state Senators and the Judiciary Committee an individual the President is considering nominating with enough time to allow the Senator to provide meaningful feedback before any formal clearance (i.e., by the ABA or FBI) on the prospective nominee is initiated;*
- 3. after having identified the name of the individual the President is considering nominating, failure to (a) seek a home state Senator's feedback, including any objections the Senator may have to the prospective nominee, at least two weeks before any formal clearances are initiated; and (b) give that feedback serious consideration;*
- 4. failure to notify a home state Senator, and the Judiciary Committee, that formal clearance on a prospective nominee is being initiated despite the Senator's objections; and*
- 5. failure to notify home state Senators, and the Judiciary Committee, before a nomination is actually made, that the President will nominate an individual.*⁷

Senator Hatch also added new wording to the blue slip: "No further proceedings on this nomination will be scheduled until both blue slips have been returned by the nominee's home-state Senators."

The "re-defined" policy and the revised blue slip document were used to ensure that nominees would not be given a hearing unless two positive blue slips were returned. Coupled with individual Senators' requests to "hold" a nomination indefinitely, Senate Republicans quietly slowed or stopped the confirmation of nominees. Brannon Denning, an Assistant Professor of Law at Southern Illinois University, writes:

*After 1994, for example, when Republicans regained control of the House and the Senate, senators used the power of the committee chairman and the "hold" to kill nominations for cabinet positions, department heads, ambassadorships, and judgeships on what seemed to be an unprecedented scale.*⁸

Blue Slips and Ideology: the Fourth Circuit

The Fourth Circuit, which includes Maryland, North Carolina, South Carolina, Virginia and West Virginia, is viewed by many as the most conservative federal appellate court in the country. It is also the circuit with the highest percentage of African Americans in the country. In recent years, the Fourth Circuit also has developed a reputation as an activist and very ideological court. As Deborah Sontag has written:

The Fourth Circuit is the appellate court closest in thinking to the Rehnquist Court. But the relationship is symbiotic: the Fourth Circuit does not just imitate; it also initiates. It pushes the envelope, testing the boundaries of conservative doctrine in the area of, say, reasserting states rights over big government

[W]hen it comes to high-profile decisions, the Fourth Circuit tends to divide neatly along party lines. And taken together, those decisions not only bespeak a conservative philosophy of law but also serve a conservative political agenda.⁹

While four of President Clinton's nominees to the Fourth Circuit were confirmed without great difficulty (two when Democrats controlled the Senate majority and one, William B. Traxler, who was first recommended by Senator Strom Thurmond, R-S.C., to President George H.W. Bush, in 1998), the real battle began when Clinton tried to integrate the Fourth Circuit.¹⁰ President Clinton tried four times to name an African-American to the Fourth Circuit. On each occasion, then—Senator Jesse Helms, R-N.C., blocked the nomination by failing to return his "blue slip." According to Sontag, "Helms still bore a grudge from Clinton's failure to re-nominate his former aide Terrence Boyle, after Boyle's nomination by the first Bush had elapsed."

During this period of obstructionism, Senator Helms insisted that the matter had nothing to do with race or politics. Instead, he argued that it would be a waste of taxpayer money to fill vacancies on the Fourth Circuit when the chief judge, Harvey Wilkinson, a strident and ideological conservative on the court, asserted that the court would function less efficiently if it were bigger.¹¹ Judge Wilkinson provided testimony on this question to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts on February 5, 1997. The Subcommittee hearing was convened in response to two existing vacancies and the possibility that the Judicial Conference would recommend additional seats for the Court.

Judge Sam Ervin—an active judge on the circuit and chief judge from February 1989 until February 1996—disagreed with Judge Wilkinson's assessment. He testified at the hearing, "[m]y appearance here today, though, is necessitated by Chief Judge Wilkinson's proposal that we do not need to fill the two judicial vacancies that presently exist in our circuit, and it is my conviction that our failure to do so would be a serious mistake."¹²

Although Judge Wilkinson did not testify on behalf of the Fourth Circuit, conservatives used his testimony to defend their resistance to confirming President Clinton's nominees. Senator Helms went so far as to introduce federal legislation to eliminate the two vacant judgeships on the Fourth Circuit.¹³

Blue Slips and Ideology: the Sixth Circuit

Senate Republicans also utilized the "blue slip" policy to block the confirmation of two Clinton nominees to the Sixth Circuit—Helene White and Kathleen McCree Lewis.

Helene White was nominated on January 7, 1997, after Judge Damon Keith assumed senior status. Senator Carl Levin, D-Mich., returned his blue slip on Judge White's nomination, while then—Senator Spencer Abraham, R-Mich., did not. Senator Abraham's blue slip remained unreturned and the 105th Congress ended without a hearing for Judge White.

On January 26, 1999, President Clinton again submitted Judge White's nomination. Senator Abraham again failed to return his blue slip, and therefore no hearing was held on the nomination. According to Senator Levin's July 2003 testimony before the Judiciary Committee:

The exercise of the blue slip power by Senator Abraham was clearly motivated during this period by his repeated efforts to obtain the nomination by President Clinton of Jerry Rosen, a district court judge in the Eastern District of Michigan, for Judge

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Kennedy's [now vacant] seat. However, on September 16, 1999, President Clinton decided to nominate Kathleen McCree Lewis to that seat.

On March 20, 2000, the Chief Judge of the Sixth Circuit, Boyce F. Martin, Jr., sent a letter to Chairman Hatch expressing concerns about an alleged statement from a member of the Judiciary Committee that "due to partisan considerations," there would be no more hearings or votes on vacancies for the Sixth Circuit during the Clinton administration. Finally, on April 13, 2000, Senator Abraham returned his blue slips for Judge White and Lewis, without indicating his approval or disapproval. Nevertheless, no hearing was ever held for either nominee.

In the end, Judge White's nomination was pending for more than four years—the longest period of time any circuit court nominee has waited for a hearing in the history of the Senate. Lewis's nomination was pending for more than a year and a half.¹⁴

Problems on the Senate Floor: the Nominations of Marsha Berzon, Richard Paez, and Ronnie White

Favorable reporting by the Senate Judiciary Committee was not synonymous with smooth sailing on the Senate floor. Once in line for consideration by the full Senate, many nominees faced another round of anonymous holds and delaying tactics that slowed—or stopped—their confirmation. Three of the most disturbing cases are those of Marsha Berzon, Richard Paez, and Ronnie White.

Marsha Berzon: Nominee to the Ninth Circuit

Marsha Berzon is often described as one of the nation's brightest legal minds. As a nationally known appellate litigator with a highly regarded San Francisco law firm, she wrote more than 100 briefs and petitions to the Supreme Court, and argued four cases there. Revered by her clients and respected by her opponents, Senator Hatch once commented that Marsha Berzon, "is one of the best lawyers I've ever seen."

Judge Berzon was first nominated to serve on the Ninth Circuit on January 27, 1998. On September 21, 1999, after her nomination had been pending for more than a year, an attempt to bring Judge Berzon's nomination to a vote before the full Senate was thwarted by a Republican filibuster. The filibuster was supported by 54 Republicans (all except Senator John McCain, R-Ariz., voted in favor), including Senators Hatch and the current Senate Majority Leader, Bill Frist, R-Tenn. It would take another six months for the Senate to break the filibuster and confirm Berzon's nomination by a vote of 64 to 34.

Richard Paez: Nominee to the Ninth Circuit

Ninth Circuit nominee Richard Paez received similar treatment by Senate Republicans. Despite a distinguished career on the district court and the conclusion by the *Los Angeles Daily Journal* that Judge Paez was a thoughtful, unbiased, and even tempered judge, it took three years for the Judiciary Committee to vote on his nomination.

The first attempt to consider Paez's nomination on the floor of the Senate was rejected by a Republican filibuster in September 1999. Fifty-three Republicans, including Senators Hatch and Frist, voted in support of the filibuster, therefore denying a vote on Judge Paez's nomination.

Another six months would pass before the Senate again turned to Judge Paez's nomination. On March 8, 2000, Senate Democrats finally succeeded in breaking the filibuster, thus paving the way for a floor vote. However, the following day,

conservative Republicans moved to indefinitely postpone consideration of the nomination. This motion was rejected, although 31 Republicans supported it, including Senator Frist. Judge Paez was finally confirmed by a vote of 59 to 39—more than four years after his nomination.

Ronnie White: Nominee to the Eastern District of Missouri

Though the Berzon and Paez confirmations were unnecessarily protracted and damaging, the Senate Republicans' treatment of Justice Ronnie White is one of the Senate's most disturbing moments. Justice White's record was distorted beyond recognition, and Senate rules were used to delay his confirmation until then-Senator John Ashcroft, R-Mo., corralled enough of his colleagues to defeat it.

Ronnie White, the first African American to sit on the Missouri Supreme Court, was nominated to Missouri's highest court by then-Governor Mel Carnahan and was twice nominated by President Clinton to serve on the District Court for the Eastern District of Missouri. At Justice White's first confirmation hearing, in the summer of 1998, Senator Ashcroft focused his questioning on partial-birth abortion, gay rights, random drug checkpoints, and the role of the legislature versus the judiciary. Only in subsequent written questions did he ask Justice White about the death penalty.

A year later, Governor Carnahan announced that he would run for the Senate in 2000 and the death penalty became an issue in the campaign. In the summer of 1999, Ashcroft began characterizing Justice White as "an activist with a slant toward criminals," a judge with "a serious bias against a willingness to impose the death penalty," and someone who seeks "at every turn" to provide opportunities for the guilty to "escape punishment." In a column appearing in the *St. Louis Post Dispatch* on August 18, 1999, Ashcroft claimed, "White voted to reverse the death sentence in more cases than any other (Missouri) Supreme Court judge." This was not true. In fact, four of six Ashcroft appointees serving on the Supreme Court have voted to overturn more death penalty convictions than Justice White.

Ashcroft repeatedly said he was reacting to concerns about Justice White voiced by Missouri law enforcement officials. In reality, it was Ashcroft who approached the law enforcement community seeking to instigate opposition. His efforts met with mixed results. The Missouri Sheriffs' Association did oppose Justice White based on his vote to overturn a death penalty conviction in a case involving the murder of three law enforcement officers and the wife of a county sheriff. The sheriff whose wife was murdered circulated a petition among sheriffs' department officials urging that "consideration be given to this dissenting opinion (by Justice White) as a factor in the appointment to fill this position of U.S. District Judge." The nomination was also opposed by the Missouri Federation of Police Chiefs and by some county prosecutors.

However, many in the law enforcement community supported Justice White. The State Fraternal Order of Police issued a statement expressing "great consternation" at the opposition from the Sheriffs' Association. The FOP said "The record of Justice White is one of a jurist whose record on the death penalty has been far more supportive of the rights of victims than the rights of criminals." Justice White was endorsed by the Chief of the St. Louis Metropolitan Police Department, and the President of the Missouri Police Chiefs Association described him as "an upright, fine individual" and said he had "a hard time seeing that he's against law enforcement."

Armed with a few law enforcement letters opposing Justice White's confirmation, Senator Ashcroft appealed to his Republican colleagues and—without notice or warning to the Democratic leaders—the caucus voted in lock step to unanimously

oppose Justice White's confirmation. The distortion of Justice White's record and the unfairness leveled against him by the Republican caucus led *The Washington Post* to call on President Bush to re-nominate Justice White when Bush assumed office in 2001.

The Numbers Tell the Story

The Berzon, Paez, and White confirmation battles are representative of the organized attack on President Clinton's judicial nominees by his political opponents. Senate Republicans and their allies recognized that if they slowed the process, they could undermine it and preserve judicial vacancies for the nominees of a hoped-for conservative President. Indeed, former Majority Leader Trent Lott, R-Miss., was quite clear in 1998 when he said, "[s]hould we take our time on these federal judges?" Lott asked rhetorically. "Yes. Do I have any apologies? Only one: I probably moved too many already."¹⁵

The statistics tell the story. During the first Bush administration—with a Democratic Senate—it took only 77 days for an appeals court nominee to receive a hearing. It took 81 days during President Clinton's first term. Clinton nominees waited considerably longer when Republicans controlled the Senate: an average of 231 days during 1997; 98 days in 1999; and 247 days in 2000. If Chairman Hatch had convened more hearings, the wait would have been shorter. The Judiciary Committee only had 11 hearings in 1998, seven in 1999, and eight in 2000. Some nominees never had a hearing, including Enrique Moreno to the Fifth Circuit, Elena Kagan to the D.C. Circuit, James Wynn to the Fourth Circuit, and Helene White to the Sixth Circuit.

Given those statistics, it is not surprising that when the Senate was under Republican control, 45.3 percent of President Clinton's appellate court nominees were returned to the White House—a rate 72 percent higher than the 26.3 percent return rate for Presidents Reagan and Bush when Democrats controlled the Senate.¹⁶ And because the Republicans refused to confirm so many Clinton nominees, at the end of the Clinton administration, there were 81 judicial vacancies—26 on the courts of appeal—and 63 Clinton nominees never had a hearing or a vote in the Judiciary Committee.

Chapter III

The Bush Administration: Driving the Courts to the Right

Completing the Court Packing Plan

During his presidential campaign, candidate George W. Bush made clear that, if elected, he would nominate judges to the federal bench in the mold of the Supreme Court's most extreme ideologically conservative justices—Antonin Scalia and Clarence Thomas. And President Bush kept his word. Rather than looking to the ideological middle for picks to the federal courts—as would have seemed appropriate after President Bush's narrow victory in the 2000 election and loss of the popular vote, reflecting a very divided electorate—President Bush instead reached deep into the ideological extreme of his party, nominating men and women with records of hostility toward the rights of racial and ethnic minorities, women, workers, consumers, individuals with disabilities, and many others.

After taking office, President Bush immediately began taking advantage of the judicial vacancies created by the Republican blockade of Clinton nominees. The administration put in place an ideology-based conservative judicial selection team and potential nominees were moved quickly through the screening process.

Ideology is what is driving President Bush to nominate the lion's share of his picks to the federal courts and ideology is the basis for the strong objections that are coming from the civil rights community and their allies in the Senate. Many of President Bush's nominees to the federal courts of appeal are from the far right extreme of the conservative movement. They are the intellectual leaders of efforts to scale back Congress's authority to legislate on civil rights. They are senior officers in the ultra-conservative Federalist Society. They are lower court judges with records hostile to equal opportunity. They are political operatives from the Whitewater and Monica Lewinsky investigations. They are former staffers of ultra-conservative members of Congress. President Bush, far from selecting the most respected lawyers from various fields, has focused his appointments on rewarding ideologues, pols, and operatives.

Changing the Rules

After the 2002 elections, Republicans regained a majority in the Senate, and Senator Hatch became Chairman of the Judiciary Committee once again. Senate Republicans were clear that they were going to confirm Bush's nominations by any means necessary. By late January 2003, the Committee began moving nominees through the confirmation process at a pace that made any effort to scrutinize their individual records impossible.

In the first 10 months of 2003, Chairman Hatch held 19 hearings—a sharp increase compared to the seven hearings he held as Judiciary Chair during the Clinton administration in 1999 and the eight hearings he held in 2000. In addition, Chairman Hatch imposed a new blue slip policy designed to limit the longstanding ability of home-state Senators to delay or deny Committee process for objectionable nominees. Unbridled by his past practices and policies, Hatch announced that blue slips would not play a role in the confirmation of circuit court nominees—those nominations belonged solely to the President. With regard to district court nominees, a negative blue slip—even two negative blue slips—would be taken into consideration but would not be dispositive. Thus, Senator Hatch made it clear that he retained the authority to schedule a nominee for a hearing regardless of the status of the blue slips from home state Senators.

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In addition, Chairman Hatch ignored longstanding committee rules in order to make sure that President Bush's nominees were approved. Since 1979, the Judiciary Committee Rules have included a provision to protect the rights of the minority party. Rule IV requires the acquiescence of at least one member of the minority party before debate on a matter—legislation or nomination—could be brought to a close. The rule remained in effect for 24 years, under the chairmanships of Republicans and Democrats alike. In fact, in 1997, Senator Hatch argued that Rule IV precluded the Committee from ending debate and voting on the nomination of Bill Lann Lee, then President Clinton's nominee to serve as Assistant Attorney General for Civil Rights at the Justice Department.

Though rarely used, Rule IV prevented the exercise of raw political power—until February 27, 2003. Prior to the Committee's February 27th executive business meeting, every Democrat on the Judiciary Committee asked Senator Hatch to hold a second hearing for Sixth Circuit nominee Deborah Cook and D.C. Circuit nominee John Roberts. Both were present at a January 29, 2003 hearing, but because the hearing included three controversial nominees, the Democratic members of the Committee were not able to appropriately question each of them. When Chairman Hatch refused to schedule another hearing and instead scheduled the nominees for a Committee vote, no Democrat was prepared to agree to vote on either Deborah Cook or John Roberts, nominees for whom they had additional questions. In response, Senator Hatch unilaterally decided to ignore Rule IV and proceed to a vote.

The Democrats Respond

In light of the lack of consultation and the erosion of long-standing Committee rules that would give voice to the Democratic minority, Senate Democrats began to use the one tool left in their arsenal to stop the confirmation of President Bush's most extreme nominees—the filibuster. Over the next year, Senate Democrats, usually joined by Independent Vermont Senator James Jeffords, successfully blocked the confirmation of six of Bush's most extreme nominees, including:

- Miguel Estrada, who refused to adequately answer numerous questions posed to him at his Judiciary Committee hearing and failed to demonstrate a commitment to the continued vigorous enforcement of critical constitutional and statutory rights in the areas of civil rights and civil liberties;
- Priscilla Owen, whose record on the Texas Supreme Court reveals her to be an extremely conservative judicial activist, including in one case trying to make it much harder for workers to prove discrimination in firing, contradicting what the majority called the "plain meaning" of the state anti-bias law;
- William Pryor, an ultra-conservative legal activist who has been one of the leading proponents of reviving states' rights at the expense of federal civil rights protections;
- Charles Pickering, who has a longstanding and demonstrated lack of commitment to the cause of civil rights and equal opportunity;
- Carolyn Kuhl, who, among other things, advocated for a reinstatement of tax exempt status for a racially discriminatory university; and
- Janice Rogers Brown, whose record as a California Supreme Court justice demonstrates a strong, persistent, and disturbing hostility toward affirmative action, civil rights, the rights of individuals with disabilities, workers' rights, and the fairness in the criminal justice system.

Miguel Estrada: Nominee to the D.C. Circuit

Miguel Estrada's record and his testimony before the Senate Judiciary Committee provided little information for those who wanted to appropriately scrutinize his record.

A former Supreme Court clerk and lawyer in the Solicitor General's office, Estrada refused to provide candid answers to questions during his hearing or in writing to the Judiciary Committee. The Department of Justice also refused to provide Judiciary Democrats memoranda written by Estrada when he served in the Solicitor General's office, although similar memoranda have been provided to the Committee in the past.

Without a complete hearing record or the memoranda, Senators had very little on which to judge the nominee's fitness to serve on the D.C. Circuit. All acknowledged his academic and career achievements, but serious questions remained unanswered, and red flags were everywhere.

For example, Estrada's direct supervisor in the Office of the Solicitor General raised questions about his temperament and his ability to separate his legal analysis from his ideological views. The few cases that were the focus of Estrada's activities while he was in private practice raised similar issues. Concerns about Estrada's record and the lack of more detailed testimony from him on his judicial philosophy caused numerous national civil rights groups, including many of the leading Hispanic groups, to oppose his confirmation. The Congressional Hispanic Caucus, the Mexican American Legal Defense and Educational Fund, the Puerto Rican Legal Defense Fund, and the National Association of Latino Elected and Appointed Officials, were among the many groups that opposed or expressed concerns about his nomination.

Hearing the issues raised by Senate Democrats and the growing concern and opposition in the Latino community, conservatives littered the Senate floor debate and the media with accusations that Democrats were hostile toward Estrada because he was Hispanic, but not liberal. Republican Senators accused Democrats of being "anti-Hispanic conservative." In a column for National Review Online, Robert Alt accused Democrats of opposing Estrada because he could not be counted on to write what Democrats deem to be "Hispanic decisions." Writing for conservative media watchdog ChronWatch, columnist Leo Lacayo asserts, "The Democrats have become the party of the true profilers"

Conservative attempts to make these accusations stick were met with a strong rebuke from the League of United Latin American Citizens (LULAC)—an organization opposing the filibuster of the Estrada nomination. National President Hector Flores was quoted in the *Columbus Post* in March 2003 expressing alarm at suggestions that Senate Democrats and Hispanic Caucus members were opposing Estrada's confirmation because of his ethnicity. "We do not subscribe to this view at all and we do not wish to be associated with such accusations."¹⁷

Democrats continued to oppose the Estrada nomination in the face of extraordinary political pressure and through seven cloture votes. Estrada withdrew his nomination from consideration on September 4, 2003.

Priscilla Owen: Nominee to the Fifth Circuit

Justice Priscilla Owen is considered to be among the most conservative justices on the Texas Supreme Court, a conservative court by any measure. She is also the second most frequent dissenter currently serving on the court. A review of her decisions on that court reveals that Justice Owen is a conservative judicial activist with a willingness to rewrite the law whole cloth in order to achieve a particular result.

A broad coalition of Texas-based organizations that represent the most vulnerable populations has monitored Justice Owen's work on the state supreme court for years. They argue that she favors the government and powerful corporations at the expense of Texas men, women, and children.

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Even more startling was the statement of White House Counsel Alberto Gonzales, who served with Justice Owen on the Texas Supreme Court. While serving on the court, Gonzales said that Justice Owen's interpretation of the Texas parental notification statute would amount to "an unconscionable act of judicial activism."

William Pryor: Nominee to the Eleventh Circuit

Alabama Attorney General William Pryor is one of President Bush's most controversial and conservative nominees. Rated by some on the ABA review panel as "unqualified" to serve on the appellate court, he has expressed hostility toward the Americans with Disabilities Act, the Violence Against Women Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. He is one of the driving forces behind the "new federalism"—a theory advanced by conservative activists determined to shrink Congress' authority to pass legislation protecting civil rights.

Ignoring Pryor's extreme legal views, Senate Republicans and other conservatives began asserting that Democrats opposed Pryor because he is a Catholic. In October 2002, Judiciary Committee Chairman Hatch told the Christian Coalition "Democrats are voting down judges based on their religious views."

Charles Pickering: Nominee to the Fifth Circuit

District Court Judge Charles Pickering, Sr. is the last judicial nominee Democratic Senators would have chosen to oppose. A long-time friend of powerful Republican Senator Trent Lott, Democrats and Republicans understood that opposing Pickering would be a direct attack on Lott, who was the Republican Leader.

Accordingly, few expected Pickering's nomination to fail, but an early review of Judge Pickering's record raised red flags that could not be ignored. First, it was discovered that Judge Pickering had not published a considerable number of his district court opinions. This fact became known just before Judge Pickering's October 2001 hearing and led Democratic Senators to believe that a second hearing might be necessary. A second hearing would give Judge Pickering a chance to share his unpublished opinions with the Committee and an opportunity to answer outstanding questions once Senators had an opportunity to review them.

Judge Pickering's second hearing was held on February 7, 2002. Many questions were focused on the significant number of times his decisions had been overturned by the Fifth Circuit, his seeming disdain for judicial precedent, his extraordinary efforts to engage in *ex parte* conversations with federal prosecutors in order to reduce the sentence of a defendant accused of a cross-burning, ethical concerns regarding Judge Pickering's efforts to solicit letters of support from lawyers who appeared before him on the district court, and documentation that conflicted with his testimony that he did not have a relationship with the Mississippi Sovereignty Commission.

Judiciary Democrats also were aware that local and national civil rights and legal organizations opposed Judge Pickering's nomination, including every chapter of the NAACP in Mississippi, the national NAACP, the Magnolia Bar Association (Mississippi's African American Bar Association), and a broad list of civil rights organizations.

Carolyn Kuhl: Nominee to the Ninth Circuit

Carolyn Kuhl, nominated by President Bush to the Ninth Circuit, was one of three Reagan Justice Department officials who persuaded the Attorney General to reverse

prior policy and support the granting of tax-exempt status to Bob Jones University, despite its racially discriminatory policies. More than 200 Justice Department lawyers, the Solicitor General, and the Treasury Department General Counsel objected to the change of position for which Kuhl advocated. According to *The New York Times* (May 1983), Kuhl was one of three characterized as a "band of young zealots" who urged the change in policy. By an 8 to 1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax-exempt status to Bob Jones University.

In addition, Kuhl worked to urge the Supreme Court to overrule its precedent on "associational standing." In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*,¹⁸ Kuhl not only argued that the requirement for associational standing had not been met in the particular case, but went on to urge the Supreme Court to overturn the doctrine of associational standing altogether, except in the most extraordinary circumstances. This view, if adopted, would have had a catastrophic effect on the ability of civil rights and other groups to file lawsuits on behalf of their members in order to vindicate their legal rights.

While at the Justice Department, Kuhl was also involved in a troubling effort to limit the reach of sexual harassment doctrine. As Deputy Solicitor General, she co-authored an *amicus curiae* brief in the landmark sexual harassment case of *Meritor Savings Bank v. Vinson*,¹⁹ asserting a position on sexual harassment which, had it been adopted, would have made it more difficult for women to prove sexual harassment in the workplace. In a unanimous opinion authored by then-Justice William Rehnquist, the Court rejected as incorrect the focus in Kuhl's brief on the "voluntariness" of the alleged sexual conduct, instead making clear that the test is whether the sexual conduct was "unwelcome."

Janice Rogers Brown: Nominee to the D.C. Circuit

Janice Rogers Brown, a Justice on the California Supreme Court and nominee to the D.C. Circuit, has demonstrated a strong, persistent, and disturbing hostility toward affirmative action, civil rights, the rights of people with disabilities, workers' rights, and criminal rights. Not only is she often the lone dissent on her court, but she also frequently ignores precedent set by the U.S. Supreme Court.

For example, her majority opinion in *Hi-Voltage Wire Works v. City of San Jose*,²⁰ made it practically impossible for California to have any kind of meaningful affirmative action program. In *Aguilar v. Avis Rent A Car*,²¹ Justice Brown argued in her dissent that the First Amendment protects the use of racial slurs in the workplace, even when it becomes illegal race discrimination. Her opinion also went so far as to suggest that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, violates the First Amendment and is therefore unconstitutional. On several occasions, Brown argued in her dissents to seriously limit the options for recourse available to victims of housing discrimination and to people with disabilities who had been discriminated against in their workplace.

Other Extremist Candidates: Sutton, McConnell, Shedd, and Cook

While a number of President Bush's most extreme nominees to the federal appellate courts have been successfully filibustered in the Senate, several already have been confirmed.

Jeffrey Sutton, now a judge on the Sixth Circuit, is the country's leading activist in the so-called "states' rights" movement, which aims to erode Congress's power to protect

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Americans against discrimination based on race, age, disability, and religion. Sutton personally argued key Supreme Court cases that, by narrow 5 to 4 majorities, have pushed the law in that direction. Sutton was Alabama Attorney General William Pryor's lawyer in many of the anti-civil rights cases brought by the state of Alabama in the late 1990s.

Another was Michael McConnell, now a judge on the Tenth Circuit. During his many years as an academic and zealous conservative activist, McConnell was one of the leading conservative voices in support of efforts to limit congressional authority to protect civil rights and weakening both statutory and constitutional protections against discrimination based on race, gender and sexual orientation. McConnell had even gone so far as to criticize a 1983 Supreme Court decision that denied tax-exempt status to Bob Jones University, which bans interracial dating by its students.

Dennis Shedd, a former staffer for then-Senator Thurmond, was another of the early batch of nominees. Shedd, now a judge on the Fourth Circuit, the federal circuit with the highest percentage of African American residents in the country, had a federal district court record demonstrating hostility toward plaintiffs in civil rights cases, including minorities, women, and individuals with disabilities. As a trial court judge, Shedd ruled against every employment discrimination plaintiff who appeared before him, and made racially-insensitive remarks when he rejected a suit to remove the Confederate flag from the South Carolina Statehouse.

Deborah Cook, who was recently confirmed to the Sixth Circuit, has a record as a state supreme court justice from Ohio that includes numerous dissents that reflect a reluctance to support enforcement of a number of legal and constitutional rights, particularly those affecting workers and consumers.

Challenging the Filibuster

In response to the successful effort to block the confirmations of Priscilla Owen and Miguel Estrada, Senate Majority Leader Frist proposed to change the Senate Rules to permit 51 Senators—instead of 60—to end debate on a judicial nomination pending on the Senate floor. Because this change would dramatically alter long-standing Senate rules, drastically shifting the balance of power in the Senate and signaling a complete breakdown of the rule of law in the Senate, members referred to this proposal colloquially as the "nuclear option."

Conservatives argued that the Democrats' use of the filibuster to prevent the confirmation of six Bush nominees (while confirming 168) constituted a constitutional crisis. Neither the Constitution nor historical record supports this argument. The Constitution grants Senators a co-equal role in the judicial confirmation process, and once the Senate receives a nomination, the nomination—like legislation—is subject to the Senate rules.

History and Senate practice also undermine the conservatives' rationale for changing the Senate rules. Cloture votes are routine in the Senate today, and have occurred on judicial nominations in numerous instances in the past few decades—on judicial nominations submitted to the Senate by Presidents of both parties, including nominations to the Supreme Court as well as lower federal courts.

As then-Senator Bob Smith, R-N.H., explained in a March 2000 press release to describe his support for a filibuster to prevent the confirmation of two Clinton appointees—Marcia Berzon and Richard Paez—filibusters of judicial nominees are routine and "have been based at least in part on concerns about the ideology or judicial philosophy of the nominee, or objections to the nomination process, or both."²² In his press release, Senator Smith even bragged that he "led the fight on the Senate floor to block the nominations of two activist Clinton judicial nominees...[and] led a

filibuster yesterday on the nomination of Richard A. Paez and Marsha Berzon to the 9th Circuit Court of Appeals."²³

In 1994, when other Senators were attempting to filibuster the nomination of H. Lee Sarokin to the Third Circuit, Judiciary Committee Chairman Hatch commented that the filibuster is "one of the few tools that the minority has to protect itself and those the minority represents."²⁴ Hatch, despite his current view that filibusters of judicial nominations are out of bounds, also supported the filibusters of Clinton nominees Berzon and Paez in 1999.

Recess Appointments

The Bush administration's actions to ensure that far right ideological conservatives are on the federal bench have been unprecedented. In early 2004, President Bush took the extraordinary step of giving recess appointments to two of his most controversial nominees, both of whom had been defeated by filibusters in the Senate—Charles Pickering to the Fifth Circuit and William Pryor to the Eleventh Circuit. The President's actions showed contempt for the Senate's advice and consent role, and are sure to escalate the bad will between the administration and the Senate on this issue.

The appointment of William Pryor also may have been unconstitutional. While the recess appointment of Charles Pickering took place during the "intersession" (i.e. between the two sessions of the 108th Congress), the recess appointment of William Pryor was made during a relatively short intra-session recess. According to several Attorney General opinions on this question, recess appointments cannot properly be made under such circumstances.

Recommendations and Conclusion—Where Do We Go From Here?

Over the last ten years, the process for selection of federal judges has become highly politicized and ideologically charged. While the overwhelming majority of nominees are confirmed by the Senate, the process creates bad will and breeds charges of bad faith and political manipulation. The Leadership Conference believes that all who are committed to social justice and equal rights must demand that those appointed to the federal courts have distinguished records as lawyers, are well respected by their peers, have integrity and a commitment to the Constitution, including assuring equal rights and equal opportunities for all.

The only way out of this quagmire around judicial nominations is for the President and Senate leaders to agree on a fair-minded and neutral process that would identify the most qualified jurists for appointment to the federal courts. In addition, because the Constitution makes clear that the selection of federal judges should be done with the cooperation of both the U.S. president and the Senate, we recommend a process that involves both branches of government and that stresses the need for bipartisanship.

Federal judges are not judges for one party or one ideological group. They are the guardians of our Constitution and the protectors of our system of government. The public must be assured that our federal judiciary is made up of the best candidates, not those who are the closest political or ideological allies of the party in power. This is particularly important given how closely divided the country is along political lines.

The current battle over judicial nominations is not another example of the partisan warfare gripping national politics or Democratic retribution for Clinton nominees denied hearings, votes, and judgeships. While Congress remains sharply divided and partisanship has never been higher, neither explains what lies at the heart of the current debate.

Embodied in the Constitution is the principle of judicial independence—a third branch, free from political winds and popular beliefs that blindly dispenses justice. The President and the Senate, co-equal partners in the judicial appointment process, contribute to the independence of the judiciary by ensuring that neither creates a federal bench in its own image. Today, however, the covenant between the White House and the Senate has been broken, the confirmation process is suffering, and the rule of law is at stake.

Cloaked in a distorted version of federalism, many of the men and women President Bush has nominated to the federal courts have been at the forefront of efforts to diminish congressional power in stark contrast to the clear dictates of our Constitution. While the President has the authority to forward such nominees to the Senate, he is also required—by the Constitution—to have a conversation with the Senate about his choices. Exercising raw political power to confirm his nominees does not comport with what the Constitution demands. It requires a vigorous response by those equally responsible for the appointment of federal judges—Democratic and Republican Senators alike.

The resolution of this crisis has broad implications for the country. Appellate court judges are often affected by the thoughts, philosophy, and experiences of their peers. As President Bush pursues the confirmation of radical conservatives to the bench, he hardens a more extreme brand of conservative thought and outcome by ensuring less diversity on the bench.

Beyond the statistics and political battles, something of far greater importance is at stake—the integrity of the confirmation process, the independence of the judiciary, and the courts as a hopeful refuge for justice, equality, and fairness. These are not lofty ideals divorced from the

everyday lives of American families. The federal courts—and the men and women who serve there—affect us all. Every person subject to the courts' decisions deserves a cooperative confirmation process that ensures a vibrant and responsible judiciary.

Endnotes

¹See The Federalist Society online: www.fed-soc.org.

²U.S. Department of Justice, Office of Legal Policy, "The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation" (1988).

³Dawn Johnsen, "Tipping the Scale," *The Washington Monthly*, July/August 2002.

⁴Deborah Sontag, "The Power of the Fourth," *The New York Times Magazine*, March 9, 2003.

⁵National Women's Law Center, "A Response to Current Attacks on Filibusters of Judicial Nominations," (2003) (quoting Neil A. Lewis, "At the Bar," *The New York Times*, December 9, 1994).

⁶Letter from Senator Joseph Biden to President George H.W. Bush (June 6, 1989).

⁷Letter from Senator Orrin Hatch to White House Counsel Charles C.F. Ruff (April 16, 1997).

⁸Brannon P. Denning, "The Blue Slip: Enforcing the Norms of the Judicial Confirmation Process," *William and Mary Bill of Rights Journal* (2001).

⁹Deborah Sontag, "The Power of the Fourth," *The New York Times Magazine*, March 9, 2003.

¹⁰President Clinton nominated Judge James Wynn and Judge James Beatty of North Carolina, Judge Andre Davis of Maryland, and Roger Gregory of Virginia. Judge Gregory was later recess appointed by President Clinton, renominated by President Bush, and confirmed by the Senate.

¹¹Deborah Sontag, "The Power of the Fourth," *The New York Times Magazine*, March 9, 2003.

¹²*Id.*

¹³Congressional Record, S2455, regarding S. 570, 106th Cong. 1st Sess. (1999).

¹⁴Statement of Senator Carl Levin, Judicial Nominations Hearing Before the Senate Judiciary Committee, 108th Cong., 1st Sess., July 30, 2003.

¹⁵*Id.*

¹⁶*See, Id.*

¹⁷*The Columbus Post*, March 19, 2003.

¹⁸*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986).

¹⁹*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

²⁰*Hi-Voltage Wire Works v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

²¹*Aguilar v. Avis Rent A Car*, 12 P.3d 1068 (Cal. 2000).

²²National Women's Law Center, "Requiring Cloture Votes on Judicial Nominations: The Precedents and the Rationale," January 2003.

²³Senator Bob Smith, press release, March 9, 2000.

²⁴Congressional Record, 140 Cong.Rec.S. 13973, Oct. 4, 1994.



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