

Bush ends American Bar Association pre-screening of judicial nominees

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The Bush Administration last month broke with the US government's 50-year-old practice of using a special committee of the American Bar Association (ABA) to screen presidential nominees to federal judgeships. The ABA has been reviewing prospective presidential appointees to the federal bench for professional competence prior to their identities being made public since it was first requested to do so by the Eisenhower administration.

Bush spokesmen claimed the new administration was discontinuing the ABA review process because it did not want to "grant a preferential, quasi-official role in the judicial selection process to a politically active group." As with most statements emanating from the White House, this rationale is hardly credible. Far from seeking to depoliticize the appointment process, the administration is discontinuing ABA review of judicial nominees to facilitate the appointment of right-wing ideologues to lifetime positions at all levels of the federal judiciary, with minimal regard for judicial competence, integrity or temperament. The result will be to tighten further the extreme right's hold on the federal court system and intensify the attack on democratic rights.

The ABA began its review program in 1948 at the behest of the Senate Judiciary Committee, which acted in response to complaints that federal judicial appointments had become too political and ideological, and the quality of federal judges was suffering as a result. In 1953, Republican Dwight D. Eisenhower became the first president to use the ABA to screen potential nominees before submitting them to the Senate for confirmation.

For the last five decades, the identities of potential nominees have been provided to a 15-member ABA Standing Committee, whose members and staff contact lawyers, judges and other people familiar with the nominee. Eventually the Standing Committee rates each potential nominee "well qualified," "qualified" or "not qualified." Faced with an unfavorable rating, a president has had the option of declining to nominate the individual, or encouraging the individual to withdraw, thus avoiding an embarrassing public vetting of damaging information.

The ABA, long considered an authoritative voice of the legal establishment, is hardly a captive of liberal or left-wing sentiment. The charge that its review process is biased against right-wing nominees is manifestly false. Some 2,000 nominees have been rated by the ABA. Only 26 have been rated "not qualified," and 23 of those were nominated by Democratic administrations.

Nevertheless, corporate interests intent on removing all legal restrictions on business and extreme-right ideologues within the Republican Party have come to view the ABA as an impediment to their goal of purging the federal court system of whatever remains of liberal and civil libertarian sentiment. During the Clinton years, key members of Congress such as Senate Judiciary Committee Chairman Orrin Hatch used their positions to stall and block "well qualified" nominees. Now, with the ABA no longer pre-screening nominees, the Bush administration will have a freer hand to nominate ideologically extreme judges in their place, whether or not they

meet basic standards of competence.

The politicization of the federal judiciary has been instrumental in the right wing's efforts to expand its political influence far beyond its numbers and narrow social base. The strategy paid major dividends last December, when the right-wing majority on the Supreme Court threw aside any pretext of following legal doctrine and halted the vote count in Florida, thus allowing Republican George W. Bush—who lost the national popular vote—to obtain the electoral votes needed to win the White House.

This judicial putsch followed the impeachment drive against Clinton, itself made possible by Supreme Court Chief Justice William Rehnquist's selection of Appellate Court Justice David Sentelle, a former aide to North Carolina Senator Jesse Helms, to chair the three-judge panel charged with oversight of the Office of Independent Counsel. Sentelle installed Kenneth Starr as the special prosecutor and backed his legal assault on Clinton.

The anti-democratic installation of Bush and the Clinton impeachment are the most prominent of a series of judicial travesties over the last 10 years, following the elder George Bush's nomination of Clarence Thomas to fill the Supreme Court seat vacated by Thurgood Marshall, a liberal Democrat.

The current majority, Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Thomas, are responsible for decisions repudiating much of the precedent favoring civil rights and civil liberties created during the Supreme Court's years under Chief Justice Earl Warren. The current majority, for example, has resurrected the doctrine of "states' rights" to immunize state governments from federal anti-discrimination laws, while limiting state power to enforce anti-discrimination laws in state courts. The high court has also limited federal power under the Constitution's "Commerce Clause" in order to gut laws protecting individuals and the environment. While scaling back privacy rights and the protections afforded people accused of crimes, it has enshrined the "right" of private organizations such as the Boy Scouts to practice discrimination.

Owing his presidency to the right-wing majority on the Supreme Court, Bush will carry out his campaign promise to appoint more judges like Scalia and Thomas. Although the Supreme Court may be the most visible branch of the federal judiciary, there are more than 850 other judges who preside over the district courts, where trials take place, or who review district court rulings in the 12 Circuit Courts of Appeals. Because the Republican leadership on the Senate Judiciary Committee blocked dozens of Clinton's politically moderate nominees, Bush enters office with 94 vacancies ready to be filled.

No doubt there will soon be many more vacancies, as conservative incumbent judges make a point of retiring before 2003, when control of the Senate, which must confirm presidential nominees to the federal courts, might return to the Democrats. Until then, the Senate Judiciary Committee's Republican leadership can be expected to rubber stamp every Bush nominee who comes its way. Without a thorough pre-screening by the ABA Standing Committee, it will be much easier for the Bush

administration to nominate right-wing extremists. Although the ABA intends to continue to rate nominees, it will do so after the identities have been made public. Review under such circumstances will be more hurried and more subject to political pressures, and the ratings will carry less weight.

The Democrats, with control over half of the Senate seats, could use their parliamentary position to tie up the process of Senate confirmation as effectively as the Republicans did under Clinton. But the Democratic Party has repeatedly demonstrated—in its cowardly response to impeachment, its lack of serious opposition to the hijacking of the 2000 election, and its prostration before Bush since the inauguration—that it is neither able nor willing to seriously oppose the Republican right, and itself has little interest in defending democratic rights.

Bush administration spokesmen and their media partisans such as the *Wall Street Journal* have justified the scuttling of ABA pre-review by denouncing the ABA as a “liberal” organization. The ABA is comprised of over 400,000 attorneys, more than half of the lawyers in the United States, and reflects the generally conservative social and political outlook of the privileged middle class layer it represents.

Like the legal profession as a whole, the ABA is dominated not by personal injury trial lawyers or criminal defense attorneys—the right wing's usual whipping boys—but by attorneys for big business. For example, its current president, Martha Barnett, is a partner in Holland & Knight, a 1,100-attorney Florida-based firm which, according to its web site, specializes in representing “banking and finance, utilities, insurance, domestic and foreign governments, media, shipping lines and cruise operators, airlines and aircraft manufacturing, transportation, real estate development, mining, agriculture, trade, intellectual property, health care, construction, entertainment, telecommunications, and hotel, resort and timeshare.” The next ABA president will be Robert Hirshon, whose resume states that he “represents banks, insurance companies, trade associations and government entities.”

How truly narrow the social base of the Bush administration is—and how extreme its politics—is underscored by its inability to coexist with even mainstream establishment organizations such as the ABA.

The right wing's drive to eliminate the ABA pre-screening process began after Ronald Reagan's 1987 nomination of Robert Bork to the Supreme Court. Although rated “well qualified” by the ABA's Standing Committee, four members dissented, claiming that Bork had displayed a lack of integrity and judicial temperament in the course of his career. Independently of the ABA review, Senate Democrats held hearings exposing Bork's extremist right-wing views, and then voted to reject his nomination, igniting a right-wing frenzy that has not subsided to this day. Just last week, the *Wall Street Journal* called the anti-Bork vote a “jihad.”

In fact, the Senate's rejection of Bork was entirely appropriate. Bork first became a national figure with his unprincipled attempt to save the Nixon administration. After a secret White House taping system was disclosed, Watergate Special Prosecutor Archibald Cox insisted Nixon turn over the tapes, which would have confirmed or refuted allegations of a White House cover-up of the break-in at the Democratic National Committee offices in the Watergate complex. Nixon ordered the Attorney General, Elliot Richardson, to fire Cox. Richardson resigned instead, as did the next official in line, Deputy Attorney General William French Smith.

Bork, as the Solicitor General (the lawyer representing the United States in arguments before the Supreme Court) stood third in line. He agreed to do Nixon's dirty work, firing Cox and igniting a public outcry over the so-called “Saturday Night Massacre.” Ultimately, Nixon handed over the tapes, which were highly incriminating, and became the first US president to resign from office.

Both before and after Watergate, Bork published right-wing tracts, invariably drafted in the most pretentious and ponderous style. To cite one example among many, in 1963 Bork denounced the federal Public

Accommodations Act, the landmark civil rights law enacted to eliminate Jim Crow segregation by prohibiting businesses engaged in interstate commerce—hotels, restaurants and the like—from refusing to serve black people. Bork wrote:

“There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate.... Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country.”

In 1996 Bork published a screed entitled *Slouching Towards Gomorrah: Modern Liberalism and American Decline*. In it, as the WWS explained, Bork rejects the Declaration of Independence, denounces “the proposition that all men are created equal” as “profoundly unfortunate,” and claims his book demonstrates “the pernicious effects of our passion for equality and the lack of any intellectual foundation for that passion.”

The loudest cheers for Bush's elimination of ABA pre-screening came, not surprisingly, from the *Wall Street Journal*, the most rabid supporter of Bush's right-wing trajectory. The paper praised Bush for having “done what even the Gipper [Ronald Reagan] never could: He told the American Bar Association to take a hike.”

While there will be no formal replacement for the ABA's pre-screening procedure, there is no doubt that most, if not all, of Bush's judicial nominees will be selected by the Federalist Society, a self-described “group of conservatives and libertarians” which, according to its web page, “has created a conservative intellectual network that extends to all levels of the legal community.”

The co-chairs of the Federalist Society's Board of Visitors are Orrin Hatch and Robert Bork. Theodore Olson, the attorney who represented Bush in the Supreme Court election lawsuit, headed the Washington branch of the Federalist Society and also chaired the executive committee of its Practice Group. The Federalist Society supplied the key lawyers who worked behind the scenes on the anti-Clinton Paula Jones sexual harassment suit, and Kenneth Starr, the head inquisitor during the Clinton years, is also a member.

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