

Bush packs US federal courts with right-wing ideologues

Patrick Martin
30 June 2003

Largely shielded from public attention by the war in Iraq and its aftermath, the Bush administration is pushing ahead with plans to pack the federal judiciary with extreme right-wing nominees. It aims to consolidate a sweeping legal retrogression, shredding the gains in democratic rights made in the 1950s and 1960s in such landmark decisions as *Brown v. Board of Education*, *Roe v. Wade*, the Miranda case and those cases establishing the principles of one-man, one-vote and the right of poor defendants to government-paid legal counsel.

What little media attention has been given to Bush's judicial appointments has revolved around the filibusters by Senate Democrats, which have blocked two nominees to federal appeals courts. Senate Republicans have repeatedly failed to get the 60 votes out of 100 required to halt a filibuster against the nomination of Miguel Estrada to the US Circuit Court of Appeals for the District of Columbia, the second most powerful federal court. A second filibuster has blocked the nomination of Priscilla Owen to the Fifth Circuit Court, covering Texas, Louisiana and Mississippi.

Estrada would be the highest-ranking Hispanic jurist in US history, although this is so only because the Republican-controlled Senate blocked three Mexican-American nominees during the Clinton administration. The nominee himself hardly has a rags-to-riches biography, coming from a wealthy Honduran family aligned with the death squad regimes that dominated Central America in the 1980s.

Estrada emigrated to the United States as a young adult, enrolled at Harvard, graduated from Harvard Law School and became a US citizen. He served in the Justice Department during the Bush and Clinton administrations.

The Bush White House regarded his nomination as a trial run for the eventual appointment of an extreme-right Supreme Court justice, when the next vacancy occurs. Estrada was widely described in Republican circles as the Hispanic version of Supreme Court Justice Clarence Thomas—a nominee whose far-right ideology could be concealed because of his minority status and the absence of any written record of his political views.

When questioned by Democrats on the Senate Judiciary Committee, Estrada refused to give his opinions on issues such as abortion, using the same excuse as Thomas: that it would be wrong to speak publicly about issues that could come before the court in the future. The White House refused to hand over memos Estrada wrote during his years as a government lawyer, citing lawyer-client confidentiality and privacy, although its real concern was that the documents would reveal his political positions.

Estrada's refusal to answer questions was provocative and expressed a thoroughgoing contempt for democratic accountability. He declined to name a single Supreme Court decision that he disagreed with, and initially refused even to name any judges he personally admired.

Priscilla Owen, a Texas Supreme Court justice, was voted down by the Senate Judiciary Committee last September, when the Democrats

controlled the panel. The Bush White House resubmitted her name in January, following the November 2002 election in which the Republicans won back control of the Senate. The Judiciary Committee, now under Republican control, approved her nomination on a party-line vote. The Senate upheld the Democratic filibuster in May, when a cloture resolution won only 52 of the 60 votes required to end debate.

Opposition to Owen has focused on her strenuous efforts, while on the Texas state court, to impose restrictions on abortion in defiance of the *Roe v. Wade* decision. At one point, she was even rebuked by a fellow justice, Alberto Gonzales, now Bush's White House counsel, for ignoring the law and basing her rulings on her personal religious beliefs.

Filibusters are threatened against several other appeals court nominees whose records are particularly reactionary. These include Carolyn Kuhl, a Los Angeles County Superior Court judge, named to the US 9th Circuit Court of Appeals, covering nine western states, including California. Her nomination was pushed through the Judiciary Committee on a 10-9 party-line vote, despite opposition from both of her home state senators, Dianne Feinstein and Barbara Boxer. In the past, in accordance with long-standing political practice in the Senate, the opposition of the home state senators would have automatically killed the nomination.

Kuhl worked as a Justice Department attorney in the Reagan administration, where she argued in court for the restoration of a tax exemption for Bob Jones University, the fundamentalist college in South Carolina, which at that time barred interracial dating and described Catholicism and Judaism as Satanic religions.

Opponents have also cited an October 1999 decision by Kuhl to dismiss an invasion-of-privacy claim filed by Azucena Sanchez-Scott, a breast cancer patient whose doctor allowed a drug company representative to watch her physical examination while she was disrobed from the waist up. Sanchez-Scott did not object at the time, thinking that the man was another doctor brought in for consultation, but was outraged when the doctor's receptionist told her he was a salesman.

Judge Kuhl found that the cancer patient had no "reasonable expectation of privacy" during her breast examination, a ruling that was unanimously overturned by a state appellate court, citing multiple precedents.

A more notorious far-right extremist is William Pryor, the Republican attorney general of Alabama, named by Bush to the US Court of Appeals for the 11th Circuit in Atlanta. Pryor is a right-wing Catholic with close ties to the fundamentalist Protestant groups, based on shared hysteria over abortion.

In an appearance before the Senate Judiciary Committee, Pryor claimed that despite public statements that the *Roe v. Wade* decision was "the worst abomination in constitutional law and history," which "has led to the slaughter of millions of innocent unborn children," he would issue judicial rulings on abortion based on law and precedent, not his religious beliefs.

In the course of his tenure as state attorney general, Pryor has gone to court to support posting the Ten Commandments in public buildings in

Alabama, to support laws criminalizing homosexual relations, to oppose the Violence Against Women Act, and to deprive state employees of protections mandated under the Family and Medical Leave Act.

Speaking to the Senate panel, Pryor declared that he knew of no case where an innocent person had been executed since the Supreme Court reinstated the death penalty in 1976. He also confirmed that he and his wife had scheduled vacations and travel to avoid gay pride days in Alabama and at Walt Disney World, because they regarded such occasions as morally dangerous for their young daughters.

Senate Democrats' posture of adamant opposition to the administration's efforts to pack the federal courts with right-wing extremists is largely a pretense, since they have gone along with the vast majority of Bush nominees for district and appeals court slots, allowing 127 out of 129 to go through—not counting Kuhl and Pryor, where filibusters have not yet begun.

More significant than the nominees the Democrats have opposed—including Charles Pickering, the Mississippi former segregationist who was rejected by the Senate Judiciary Committee last year but has been renominated this year by Bush—are the nominees they have allowed to win confirmation, many of whom are politically indistinguishable from Estrada, Owen, Kuhl or Pryor.

These include:

* Jeffrey Sutton, confirmed to the 6th Circuit in Cincinnati, Ohio, despite widespread opposition from activists on behalf of the disabled. Sutton was the lead attorney in a 2001 case in which the Supreme Court ruled that the Americans With Disabilities Act did not apply to state employers. The case concerned a state nurse fired after she was diagnosed with breast cancer. He also argued before the Supreme Court, successfully, for overturning the Violence Against Women Act.

* Deborah Cook, also confirmed to the 6th Circuit, approved by the Judiciary Committee with only two Democrats voting against. As an Ohio Supreme Court justice, Cook was frequently in a minority of one in her opposition to all findings against corporations charged with poisoning, injuring or discriminating against their employees. In one case, a 6-1 majority of the largely Republican court found that the family of a warehouse worker killed by a forklift should be allowed to sue his employer, Wal-Mart, because company officials had destroyed documents in the case and lied about it. Cook was the only dissenter.

* Claude Allen, chosen for the 4th Circuit in Richmond, Va., Bush's most prominent black judicial nominee. A former campaign spokesman for Senator Jesse Helms of North Carolina, a one-time segregationist turned icon of the fascistic wing of the Republican Party, Allen baited Helms's Democratic opponent in 1984 for his support from "the queers." He later served as a Helms aide on the Senate Foreign Relations Committee, and was named assistant secretary of the Department of Health and Human Services by Bush.

* Steven M. Colloton of Iowa, who served on the legal staff of Independent Counsel Kenneth Starr in the attempt to impeach and remove President Clinton, nominated for the 8th Circuit Court of Appeals in St. Louis.

* Timothy M. Tymkovich, named to the 10th Circuit in Denver, an outspoken opponent of laws to outlaw discrimination based on sexual orientation. As solicitor general of the state of Colorado, he defended the anti-gay Amendment 2, later struck down by the Supreme Court, and argued that the state should not authorize Medicaid-funded abortions for victims of rape or incest.

* Jay Bybee, confirmed to the 9th Circuit in San Francisco by a 74-19 vote, with a majority of Democrats approving his nomination, including Minority Whip Harry Reid. Bybee is an extreme proponent of states' rights, arguing for the repeal of the 17th Amendment, which would end popular election of US senators and revert to their election by state legislatures. He has also written extensively against gay rights laws and in

favor of relaxing the separation of church and state.

* James Leon Holmes, named to the federal district court in Little Rock, Ark., and backed by both of the Democratic senators from Arkansas, Blanche Lincoln and Mark Pryor. Holmes is the former president of Arkansas Right to Life and publicly compared abortion rights supporters to Nazis. He also authored articles upholding, from the standpoint of Catholic religious doctrine, the legal and social subordination of wives to husbands.

But the most revealing of all these nominations—and the one that expresses most clearly the political trajectory of the Bush administration—is the report June 19 that Bush was naming Bret Kavanaugh to the Court of Appeals for the District of Columbia, the most influential circuit court, and one from which many Supreme Court nominees have emerged.

Kavanaugh, now 38, is a former deputy of Kenneth Starr in the Monica Lewinsky investigation and was principal author of the 450-page quasi-pornographic report on Clinton's sex life released by the Office of Independent Counsel in September 1998. This report became the basis of the House vote to impeach Clinton. Kavanaugh has been a deputy White House counsel since Bush assumed the presidency.

The Starr investigation was a central focus of the far-right campaign to delegitimize and subvert the Clinton administration, using methods of back-room conspiracy and political provocation to overturn the results of two presidential elections. This drive to carry out a political coup d'état was blocked in the Senate trial of Clinton, which failed to convict and remove the president. However, the Republican coup was consummated in the 2000 presidential election, which was hijacked by the Republicans after their candidate lost the popular vote, thanks to the intervention of the Republican majority on the US Supreme Court.

Now the wheel comes full circle, with the Republican president, installed in office by right-wing judges, naming one of Kenneth Starr's hatchet men to one of the highest judicial positions in the land. The takeover of all branches of the federal government by the extreme right is now virtually complete.

Even the *Washington Post*, which has supported the vast majority of Bush's judicial nominations and editorialized against the Estrada filibuster, was compelled to comment on the provocative character of this selection: "Kavanaugh's nomination would suggest Bush is spoiling for a fight with Senate Democrats."

By provoking a series of filibusters over lower-level judicial appointments, the White House is testing out the opposition it may encounter in the event of a much-rumored vacancy on the Supreme Court, when one or two justices retire from the five-member bloc that placed Bush in the White House.

Already, in response to the limited opposition from the Democrats, Bush and Republican congressional leaders have suggested sweeping changes in Senate rules that would essentially do away with filibusters. This would make it possible for the Republicans to use their narrow 51-49 majority in the upper house to confirm an extreme-right nominee to the Supreme Court modeled on Antonin Scalia or Clarence Thomas, whom Bush described as his favorite justices during the 2000 campaign.

Such a rules change, however, would itself require a two-thirds majority, even more than the 60 votes required to end a filibuster. The alternative, widely discussed in official circles, is that the Senate's presiding officer, Vice President Dick Cheney, seek a ruling from the Senate parliamentarian that filibusters are permitted only on legislation, not nominations.

Both Republicans and Democrats have characterized this as the "nuclear option," recognizing that it would amount to an unprecedented assertion of executive power, and could trigger a breakdown in the functioning of the Senate. Senator Charles Schumer, Democrat from New York, warned, "When you go nuclear, it's bad for everyone. You vaporize every bridge,

every bipartisan bridge or every other bridge, in sight.”

Senate Minority Leader Thomas Daschle complained that Republicans were insisting on a success rate of 100 percent in the confirmation of judicial nominees, instead of the current rate of 98 percent. “If that doesn’t make us a rubber stamp, I don’t know what does,” he told a press conference.

Daschle and the ranking Democrat on the Judiciary Committee, Senator Patrick Leahy of Vermont, wrote to the White House appealing for Bush to consult with Democrats in the event of a Supreme Court vacancy, in order to avoid “a divisive confirmation fight.”

This groveling only provoked an arrogant rejection by the White House, with press secretary Ari Fleischer dismissing the suggestion as “a novel new approach to how the Constitution guides the appointment process.”

The Democratic Party has demonstrated repeatedly over the last decade—from impeachment to the 2000 elections to the post-9/11 drive to create the legal framework for a police state—that it has no stomach for a fight against the creeping right-wing seizure of power in Washington. There is no significant constituency in any section of the ruling elite, liberal or conservative, for the defense of basic democratic rights.

Nonetheless, so massive is the buildup of unresolved social, economic and political tensions within American society that a Supreme Court vacancy, especially in the event of a Senate filibuster, could well produce a major political and constitutional crisis in the United States.



To contact the WSWWS and the
Socialist Equality Party visit:

wsws.org/contact