

As 109th Congress reconvenes

Bush to resubmit ultra-right judicial nominees

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One of the most contentious issues facing the new session of US Congress is George W. Bush's intention to resubmit 20 nominations to seats on the federal appellate and district courts which were blocked by Democratic Party opposition in the Senate.

While representing only a small fraction of the 299 federal judges appointed by Bush over the past four years—the bulk of them rubber-stamped by the Democrats—these 20 have become the focus of a frenzied campaign among Christian fundamentalists and other extreme-right elements in the Republican Party. Eight are nominees for federal district courts, the lowest level of the federal system, and 12 are nominees to appeals courts, the intermediate layer between the district courts and the US Supreme Court.

As the 109th Congress convened Tuesday, Senate Republicans vowed to pursue the renomination of the federal judicial candidates even if it means overriding long-established rules and procedures of the Senate which the Democrats have used to block a vote. Some of the nominees were stalled by filibuster on the Senate floor by the Democrats while others never made it out of the Senate Judiciary Committee for a vote.

This conflict is seen as a dress rehearsal for an even larger battle—the expected nomination of a new chief justice of the US Supreme Court, to fill the vacancy likely to be left by Chief Justice William Rehnquist, 80, who is being treated for an apparently aggressive form of thyroid cancer and was absent from the court for most of the fall. Seven of the other eight members of the high court are also at least 65 years old and several could retire during Bush's second term.

In the wake of Bush's reelection and a four-seat gain by the Republicans in the Senate, White House and Republican officials want to force a vote on the nominees, which include individuals known for their extreme conservative views and opposition to basic democratic principles.

According to Senate rules, a minority of the chamber can filibuster to prevent an issue—in this case a federal judicial nomination—coming to a vote, extending debate on the issue indefinitely. The filibuster can only be stopped by a "cloture" vote, requiring a supermajority of 60 of the 100 Senators.

With their narrow 51-49 Senate majority during the last Congress, the Republicans were rarely able invoke cloture. In the new Congress, they hold 55 seats in the Senate, just five short of the number required to halt a filibuster. They have sought to bludgeon wavering Democratic senators with the fate of Senate Democratic leader Tom Daschle, who was defeated for reelection last November as a result of a lavishly financed Republican campaign accusing him of obstructing

Bush's agenda in the Senate.

Senate Majority Leader Bill Frist of Tennessee has also added two ardently anti-abortion Republicans—Sam Brownback (Kansas) and Tom Coburn (Oklahoma)—to the Senate Judiciary Committee, the body that decides which judicial nominations are sent to the Senate floor. The 19-member panel already includes three members of the Federalist Society, an association of ultraconservative lawyers.

In a speech last month, Republican Senate Majority Leader Bill Frist (Tenn.) described the Democrats' filibustering of judges as "tyranny of the minority. He stated, "We must leave this obstruction behind," hinting at the possibility of changing long-standing Senate rules allowing the filibuster.

A number of Republicans have also floated the possibility of utilizing what has been referred to as "the nuclear option" to force a vote on Bush's nominees. This would dispense with either a cloture vote or a formal change in Senate rules. Instead, the presiding officer of the Senate, Vice President Dick Cheney, would simply declare filibusters of nominations to be out of order. Such a ruling—overturning 200 years of legislative precedent—could be upheld by only a simple majority of 51.

The Bush administration has sought to create the political climate to justify such an extraordinary action, portraying the Democratic filibusters as lawless and unconstitutional—although Republicans filibustered a Supreme Court nomination in 1968 and blocked action on dozens of lower-court nominees during the Clinton administration. White House press secretary Scott McClellan said last month that "the Senate has a constitutional obligation to vote up or down on a president's judicial nominees."

In the event of the "nuclear option," Senate Minority Leader Harry Reid (Nevada) has said Senate Democrats would tie the Senate into procedural knots. "It will be very difficult to get even the most routine work done in the Senate," a spokesman for Reid commented December 26.

Other Democrats reacted in a milder fashion to a proposal that would give the executive branch unprecedented powers. Typical was the comment of Democratic Senator Ken Salazar of Colorado: "To abandon a precedent which has been part of the history of the United States Senate for more than two centuries is something we ought not to do."

Bush also has a potential alternative strategy, which would empower him to place his nominees on the federal bench immediately, circumventing the Senate's constitutional role of providing "advice and consent" on judicial nominations. Facing filibuster, the president

could simply use his authority to make recess appointments to fill vacancies, including those on the Supreme Court.

The Constitution says recess appointees are to serve only until the beginning of the next Senate session. This has traditionally been interpreted to mean appointments during the interval between the adjournment of one session of Congress and the opening of the next, like the month-long break which ended Tuesday. But the Bush administration has already made two recess appointments during the last legislative session, at times—the weekend or at night—when the senators were not actually gathered in the Capitol.

This again rides roughshod over longstanding political practices. A critic of the Bush interpretation, Harvard Law School Professor Laurence Tribe, commented, “Under this novel reading, the president may make a ‘recess’ appointment whenever the Senate takes any intrasession break, even for a period as short as a half-hour.”

Who are Bush’s nominees?

A look at some of the candidates Bush plans to renominate gives an indication of extreme-right-wing trajectory of the federal courts if the White House and Senate Republicans succeed in forcing through their judicial agenda.

Bush plans to resubmit the nomination of William J. Haynes II to the influential 4th Circuit Court of Appeals, which covers the southern Atlantic Coast states, including Virginia, and has handled many of the cases involved detainees in Bush’s “war on terror.”

As Pentagon General Counsel last year, Haynes helped develop and defended some of the Bush administration’s most controversial policies. On the eve of the war in Iraq he oversaw a working group that developed a policy on torture which argued that Bush, as commander in chief during “war time,” is not bound to adhere to any rule of law—international or domestic—that bars the use of torture. He also advised against treating the hundreds of detainees at Guantanamo Bay as prisoners of war, helped develop the Pentagon’s military tribunal plan for trying suspected war criminals, and advocated the indefinite incarceration of “enemy combatants”—including US citizens—without counsel or judicial review.

Bush’s nomination of Priscilla R. Owen of the Texas Supreme Court was filibustered four times. Her nomination is to be resubmitted for the 5th Circuit Court of Appeals. Owen is known for her radical anti-abortion views, having campaigned largely unsuccessfully to interpret Texas state laws to make it virtually impossible for Texas teenagers to obtain abortions without parental consent. After one particularly brazen effort to twist the meaning of a statute, Owen was rebuked by a fellow justice for seeking to enact her religious beliefs by judicial fiat. That colleague was Alberto Gonzales, now Bush’s nominee for attorney general.

Janice Rogers Brown’s name is to be resubmitted for the District of Columbia Circuit Court of Appeals. The Leadership Conference on Civil Rights writes that a review of Brown’s record as a California Supreme Court justice “reveals a troubling pattern of persistent and disturbing hostility toward affirmative action, civil rights, the rights of individuals with disabilities, workers’ rights and fairness in the criminal justice system.”

Arguing against a California high court ruling overturning the conviction of a defendant forced to wear a stun belt during his testimony at trial, Brown defended the use of such tactics and accused her colleagues of “rushing to judgment.” In a case upholding the Fourth Amendment’s prohibition against warrantless searches, she dissented, arguing in her opinion that such searches should be considered part of law enforcement’s “community caretaking

functions.”

William H. Pryor Jr., Bush’s recess appointment to the 11th Circuit Court of Appeals, is a former Alabama attorney general. People for the America Way says Pryor “has amassed a staggering record of hostility toward the rights and interests of ordinary Americans, including attacks on the authority of Congress to prohibit discrimination and to protect the environment, separation of church and state, reproductive freedom, and equal protection of the laws for gay men and lesbians.”

Zealously anti-abortion, Pryor has described *Roe v. Wade* as “the worst abomination of constitutional law in our history.” A crusader for a greater role of religion in government, he has vigorously defended the display of the Ten Commandments in state courthouses. At a 1997 “Save the Commandments” rally in Montgomery, Alabama, he stated, “God has chosen, through his son Jesus Christ, this time and this place for all Christians ... to save our country and our courts.”

William G. Myers III is Bush’s nominee for the 9th Circuit Court of Appeals. Myers, who recently served as solicitor and chief attorney for the Interior Department under Bush, is a former lobbyist for the mining, grazing and cattle industries.

The 9th Circuit includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington, home to many of America’s national treasures. Myers’ record shows that he has taken deliberate actions to undermine environmental protection, conservation and the protection of Native American lands. In his two years with the Interior Department, he courted corporate interests, easing regulations to give the mining and grazing industries free rein over many natural resources.

Bush will resubmit the nomination of Brett M. Kavanaugh to the District of Columbia Circuit Court of Appeals. Kavanaugh spent five years as part of Kenneth Starr’s Office of Independent Counsel, which spearheaded the campaign to remove Bill Clinton from office.

As associate counsel to the president under Bush from 2001 to 2003, Kavanaugh served as Alberto Gonzales’s “main deputy on the subject” of selecting new federal judges, making him politically responsible for the other far-right nominees.



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