

# Democrats signal retreat on Supreme Court nomination

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With official Washington closed down for the Fourth of July weekend and President Bush preparing for his trip to the G8 summit, leading Democrats made public statements pleading for unity and moderation in the upcoming nomination of a replacement for retiring Supreme Court Justice Sandra Day O'Connor.

Republicans, on the other hand, have adamantly defended Bush's right to select a right-wing jurist for the high court, while indicating that they will work to circumvent any serious questioning of the nominee during the Senate confirmation process.

That the nomination process will push the Supreme Court further to the right is a foregone conclusion. The tenor of the debate over the nomination is indicated by a concerted campaign on the part of the religious right to block any move to select Bush's attorney general, Alberto Gonzales, for the bench.

Within these circles, Gonzales is anathema. They cite his rulings in abortion-related cases while sitting on the Texas state Supreme Court and accuse him of watering down the administration's brief on the 2003 University of Michigan affirmative action case. Right-wing Republicans have adopted the slogan "Gonzales is Spanish for Souter," referring to Justice David Souter, a nominee of the first President Bush, who has voted more often than not against the three hard-right members of the court—William Rehnquist, the chief justice, and Justices Antonin Scalia and Clarence Thomas.

In the past year, Gonzales has been exposed before the world as a war criminal, having played a key role in the drafting of legal policy briefs defending the use of torture against detainees captured in Washington's "global war on terror". Previously, as then-Texas Governor Bush's legal counsel, he expedited executions by issuing legal memos that systematically excluded mitigating circumstances in capital cases. Elected to the Texas Supreme Court in a campaign financed largely by Enron, he dutifully ruled in the interests of big business.

This is the individual who is now being cast as too liberal for the US Supreme Court!

In an interview with *USA Today* Monday, Bush called for the rhetoric to be toned down. Responding to a question about the campaign against Gonzales, he said, "[W]hen a friend gets attacked, I don't like it."

There is little doubt that if Gonzales were to be nominated, the Democrats would provide a comfortable margin for his confirmation, just as they did when he was tapped for the attorney

general post earlier this year.

Key Democrats are appealing to Bush to nominate a justice in the mold of O'Connor, praising the outgoing judge as a champion of justice and democracy.

Typical was an opinion piece by Democratic Senator Edward Kennedy of Massachusetts published in the *Washington Post*.

Kennedy, a senior member of the Senate Judiciary Committee, wrote that the nomination would offer Bush "a unique opportunity to unite us by choosing for the Supreme Court someone who can win support from a broad bipartisan majority in the Senate and whom the vast majority of Americans will be proud of." He continued, "Justice O'Connor's appointment to the high court is a useful model."

Heaping praise on O'Connor, a life-long Republican who was named to the court in 1981 by Ronald Reagan, Kennedy declared: "For 24 years she has demonstrated that the Senate's confidence in her was eminently justified. She has faithfully applied her own extraordinary life experiences, her broad knowledge of the law and her dedication to the Constitution to complex issues. She had no agenda except being the best possible justice."

The reality is that O'Connor voted with conservative Chief Justice Rehnquist 80 percent of the time last year. Over the course of her 24 years on the bench, she has been a consistent supporter of states' rights, and repeatedly backed the expedited and unregulated implementation of the death penalty, including in a decision that upheld executing the mentally retarded.

Perhaps most infamously, she cast a deciding vote in *Bush v. Gore*, the 2000 Supreme Court case that confirmed Bush's theft of the presidential election by suppressing the vote count in Florida.

Cynically noting the Democrats' exaltation of O'Connor, Republican Senator Orrin Hatch of Utah, a former chairman of the Judiciary Committee, commented to the *New York Times*, "She's suddenly the goddess of all jurists."

Even if the Democrats had an inclination to wage an uncompromising battle over the Supreme Court nomination, an earlier capitulation has left them with little room to maneuver. Last May, seven leading Democrats joined with seven Republicans in a compromise deal aimed at staving off a vote on the so-called nuclear option—a change in Senate rules that would have barred the use of the filibuster to block presidential nominations.

This deal assured the confirmation of three extreme right-wing nominees—previously blocked by filibusters—to the federal courts, and extracted from the Democrats a pledge that the filibuster itself

could only be used under “extraordinary circumstances”.

Republican members of the group of 14 Senators who drafted the agreement now insist that “extraordinary circumstances” do not include extreme political or judicial views held by the nominee.

“Ideological attacks are not an ‘extraordinary circumstance,’” Republican Senator Lindsey Graham of South Carolina told the *Washington Post*. “To me, it would have to be a character problem, an ethics problem, some allegation about the qualifications of the person, not an ideological bent.”

Graham predicted that Bush would nominate “a solid conservative”, adding, “This idea of an ideological balance maintained by a particular president has never been the standard.”

The newspaper reported that one of the Democratic signers of the deal, Senator Ben Nelson of Nebraska, “largely concurred” with Graham’s statement. His spokesman told the *Post* that Nelson “would agree that ideology is not an ‘extraordinary circumstance’ unless you get to the extreme of either side.”

Meanwhile, the White House and the Republican majority in the Senate are preparing a nomination process designed to suppress any serious probing of the future nominee’s views and record.

Senator Hatch told the *New York Times* July 4: “I don’t think nominees have to answer certain questions. They don’t have to answer questions about how they are going to vote in the future. They don’t have to answer stupid questions. They don’t have to answer argumentative cases.”

The *Times* went on to quote an unnamed White House official who stated, “There has been a long-term standard that the appropriateness of questioning does not include asking judges to take specific sides or positions regarding cases they may hear one day.”

Republican staffers have reportedly prepared briefing notes counseling the future nominee to evade pointed questions as to where they stand on controversial social issues.

The *Times* further reported: “Republicans say they will try to limit the access senators would have to FBI documents on the potential nominee—the unpredictable wild card in any judicial confirmation because even the White House cannot fully anticipate the outcome of the background investigation when the president makes his choice.”

The attempt to suppress disclosure about the nominee’s views may have more to do with the divisions within the Republican Party itself than any concern that the Democrats will block the nomination.

As evidenced by the campaign against Gonzales, the Christian fundamentalist right, upon which Bush has rested so heavily for political support, is demanding a nominee who is unequivocally committed to its agenda. It has repeatedly cited Bush’s campaign statements that he intended to appoint a nominee similar to Justices Antonin Scalia and Clarence Thomas, the two most right-wing members of the conservative court.

Both have made it clear that they would overturn the 1973 *Roe v. Wade* decision legalizing abortion, repeal affirmative action decisions and clear the way for virtually unlimited state aid to religious schools.

The religious right sees the appointment of a new justice with similar views as a major step toward realizing this retrograde

agenda and has therefore launched a massive and well-funded lobbying effort to secure such a nomination.

But an even more key Republican constituency—big business—appears less than enthused about such a nominee. It sees an ideologically driven court as a source of social instability as well as a less than reliable guarantor of fundamental profit interests.

Like the Democrats, influential corporate and financial sectors aligned with the Republican Party also see O’Connor as a good model for the future nominee. As Bloomberg news agency noted in a July 5 piece, O’Connor “was the most business-friendly justice on the nine member court. She voted to cut punitive damages, curb class action lawsuits and enforce arbitration agreements against consumers.”

The article added, “In business cases that divided the court over the past six terms, Scalia and Thomas opposed the views of the US Chamber of Commerce twice as often as O’Connor did.”

The “pragmatist” O’Connor habitually tailored her judgments to suit the immediate needs of big business. Scalia and Thomas, on the other hand, found in several cases that there was nothing in the Constitution suggesting that punitive damage awards could be so high as to violate the right to due process.

The court is expected to hear punitive damage cases involving billions of dollars in potential losses for Philip Morris, Exxon-Mobil, Ford, Wyeth and many other corporations in the next few years, the Bloomberg article stated.

The corporate elite also sees its interests threatened by aspects of the social agenda promoted by the fundamentalist right. This emerged clearly on the issue of affirmative action. O’Connor drafted the key 2003 decision upholding the University of Michigan Law School’s practice of considering the race of applicants.

Noting that major corporations and the military had backed the university’s policy, she wrote, “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”

This legal argument boiled down to maintaining affirmative action because it constituted a necessary tool for legitimizing the monopolization of political power and vast accumulation of wealth by America’s ruling financial oligarchy.

Thus, the upcoming appointment to the Supreme Court holds political dangers for the Bush administration. The nomination process has the potential of upsetting the Republican Party’s unstable political alliance between the corporate elite—whose interests it defends—and the religious right, which provides a key base of support for its reactionary policies.



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