

Payback in Judges

By E.J. Dionne Jr.

You have to hand it to President Bush and his judge-pickers.

They understand the power of the judiciary to shape American political life for years to come. They brazenly use their executive authority to fill the courts with their allies. Then they attack, attack and attack again when opposition senators dare invoke their own constitutional power to slow a juggernaut whose purpose is to remake the world according to the specifications of Justice Antonin Scalia.

To make clear who is in charge, Bush took two circuit court nominees rejected by the Senate Judiciary Committee last year, when it was in Democratic hands, and sent them right back.

The renominations of Justice Priscilla Owen of the Texas Supreme Court and, especially, of Judge Charles W. Pickering Sr. of Mississippi caused consternation and even a bit of shock. Pickering had been the personal choice of former Senate Republican leader Trent Lott, who was pushed out of his job after his tribute to Strom Thurmond's 1948 segregationist presidential candidacy. Pickering was hurt by his handling of the sentencing in a cross-burning case and his past views on civil rights.

Republicans argue that the cross-burning issue was invoked unfairly, because Pickering was simply seeking equity in the sentencing of the case's three defendants. But Pickering's tendency to use court opinions for disquisitions on public issues suggested a less than judicial temperament.

Politically, the renominations were shrewd. By sending Pickering up again, Bush signaled to his Southern backers that he was willing to stand up for a Mississippian against Senate liberals, despite Lott's defenestration. And the energy the Pickering and Owen battles will soak up may allow other ideological nominees to slip through.

The real issue here involves not the personal characteristics of nominees -- there are plenty of smart conservatives on Bush's list -- but a political struggle to create an increasingly activist conservative bench. "They realized that if they took over the one unelected part of the government, they could govern for a generation," says Sen. Charles E. Schumer, a New York Democrat.

A liberal fantasy? On the contrary, the ever-candid Clint Bolick, a former Reagan Justice Department official and conservative activist, told The Post this week that "everyone on the right agreed in 2000 that judicial nominations were the single most important reason to be for Bush." The worst-kept secret in Washington: Judicial appointments are the tribute Bush pays to his political base.

Moreover, conservatives are increasingly willing to use federal judicial power to achieve political ends. Forget Florida 2000 and consider a redistricting controversy in Mississippi last year. It involved none other than Rep. Charles W. Pickering Jr., a Republican who is Judge Pickering's son.

Mississippi lost a congressional seat after the 2000 Census, and Pickering's district was merged with that of Rep. Ronnie

Shows, a Democrat. A state judge drew district lines favoring Shows. A federal three-judge panel, all Republican appointees, then drew a plan favoring Pickering. The judges said they would impose their plan if the Bush Justice Department did not quickly clear the state plan for civil rights purposes. By dragging its feet, the Justice Department sealed Shows's fate. The final blow came from none other than Justice Scalia -- a friend of the Pickering family who presided over the younger Pickering's first swearing-in as a congressman. Scalia ruled to allow the Republican judges to impose their map. Pickering beat Shows this fall.

Or consider the ruling of Judge John D. Bates in December declaring that Congress's General Accounting Office -- and thus the public -- had no right to learn the specifics about meetings between Vice President Cheney's famous energy task force and various energy executives and lobbyists. The same John Bates, an appointee of the current president, was an attorney for Ken Starr's Whitewater investigation and pushed hard (and successfully) for the release of various White House documents related to Hillary Rodham Clinton's activities.

"When that guy was working for Ken Starr, he wanted to go open the dresser drawers of the White House," said Sen. Patrick Leahy of Vermont, the ranking Democrat on the Judiciary Committee. "I guess it's a lot different when it's a Republican vice president." Such suspicions of partisanship in the judiciary are corrosive because, unfortunately, they are now plausible.

Judicial appointments are not like patronage jobs in the Commerce Department. Judges sit for life. A president who says he wants a more decorous process won't get it if he refuses to acknowledge that the road to depoliticizing the judiciary will be paved by consultation on appointments. Playing partisan politics and calling it high principle won't work anymore.