

Daily Journal

Daily Journal

November 7, 2002

Article

Wins Put GOP In Control of Judicial Picks Officials Consider Renominations of Owen, Pickering

By James Gordon Meek

Los Angeles Daily Journal Staff Writer

WASHINGTON -- A historic sweep in this week's midterm election had Republicans rejoicing Wednesday over their new control of the confirmation process for federal judges picked by President Bush -- and Bush officials considering whether to renominate two judges previously rejected by the Senate Judiciary Committee.

The slow pace of judicial confirmations in the Senate and the defeat of Charles W. Pickering and Priscilla Owen, Bush's most controversial appellate court choices, were constant fuel for GOP leaders and the president on the campaign trail.

"Even in a Democrat-controlled Senate, there were enough Democrats to confirm the president's judges, but the process was used to keep them bottled up and killed in [the Judiciary] Committee," White House Press Secretary Ari Fleischer said Wednesday. "I think those days may be over." In a series of interviews leading up to the Nov. 5 election, Republicans outlined their plans for a Senate majority, while liberal activists forecast their strategies to derail controversial nominees for the federal bench if the GOP took control of Congress.

Bush administration sources promised to use a Republican majority in the Senate to ram through the president's judicial nominations, including renominating Pickering and Owen for the 5th U.S. Circuit Court of Appeals.

Of greater national significance, the party's historic victory also increases the likelihood that a conservative member of the Supreme Court could decide to step down before 2004 and be replaced by a Bush nominee.

For liberals, the Republicans' ambitions on judicial selection loom as a major threat to the environment, women's issues and civil rights. Though liberal judicial activists will still have the ear of committee Democrats, they acknowledge it will be tough to thwart conservative nominees, including Los Angeles Judge Carolyn Kuhl, tapped by Bush for a seat on the 9th Circuit.

"Our goal would be to share information about nominees to the broadest range of individuals to inspire a groundswell of opposition to bad nominees," Nan Aron, the influential leader of the liberal Alliance For Justice, said earlier this month when questioned about a Republican Senate.

Beyond grass-roots activism, liberals have been strategizing how best to block controversial nominees in the Senate. Among the techniques being advocated are the use of the blue slip process and the "F word" -- the filibusters that can be used to delay conservative justices from taking over bench slots.

A filibuster can block legislation or other activity in the Senate until the opposition can rally 60 members to vote for cloture, or an end to debate on a measure.

Right now, Republicans hold the majority, with 51 members to the Democrats' 46. Two senators are independents, and one race in Louisiana will be decided by a runoff next month.

While a filibuster wouldn't kill a nomination automatically, it can stall it long enough to lead to a defeat.

"I can certainly foresee that ... as a parliamentary option," said Ralph Neas, the president of the liberal nonprofit People For the American Way.

Neas' group, along with the Alliance For Justice and other special-interest organizations, successfully opposed the nominations of Pickering and Owen in bitter defeats for the president.

Filibustering a federal or Supreme Court nominee would be an option of "last resort, but not something that should be taken off the table," Neas said.

But a powerful Republican on the Judiciary Committee warned against using the tactic.

"I don't think either side ever wants to get into a position where they're filibustering nominees for the judiciary," Sen. Orrin Hatch, R-Utah, the committee's ranking member and soon-to-be chairman, said recently. "Our side threatened filibusters in the Clinton years, and I stopped it. I really raised Cain about it."

Hatch said "real animosity" has arisen between the two sides over the past year, and filibusters would aggravate the situation.

"We've reached a point where there is tremendous bitterness," he said.

A senior Bush administration official familiar with the nominations process echoed Hatch's sentiment.

"If the Democrats filibuster nominees, they will reap the whirlwind, both in terms of future Republican filibusters of their nominees and in terms of the likely countermeasures they would provoke in the here and now," said the source, who requested anonymity.

Sen. Dianne Feinstein, D-Calif., a prominent member of the committee, was "circumspect" about using such a procedural block, saying she preferred "to work across the aisle."

"Sitting on the committee and being able to cast my vote would most likely be sufficient for me, as opposed to going the filibuster route," Feinstein said in a conference call Wednesday with reporters. "But I would reserve that for extraordinary circumstances."

Feinstein gave a thumbs-down to Owen in a party-line committee vote, but she avoided commenting on the potential renomination of the Texas Supreme Court justice, whom liberals see as anti-abortion and whose confirmation hearing was presided over by the pro-choice Feinstein.

Owen is also a friend of Bush's. Her renomination would be an unprecedented show of support for someone whom the committee voted down.

"I think it's likely that the Democrats are going to filibuster Owen," said Sheldon Goldman, a University of Massachusetts, Amherst, political science professor.

Pickering could also re-emerge as a candidate for a 5th Circuit opening if his friend, Minority Leader Trent Lott, R-Miss., wants it to happen.

With the Republican takeover of the Senate, Lott will become its majority leader. Republican sources said that, if Bush renominated Pickering, however, it would be grudgingly, since he was never a favorite of the president.

Only a few judicial nominations have ever been filibustered, according to Goldman, author of the book "Picking Federal Judges."

When the GOP won control of the Senate during President Reagan's administration, Sen. Edward M. Kennedy, D-Mass., filibustered J. Harvey Wilkinson, who was nominated for the 4th Circuit. Wilkinson was confirmed 58-39 in August 1984.

Supreme Court Justice Abe Fortas was nominated by President Johnson in 1968 to be elevated to chief justice but was blocked by Republicans, who were in the minority, with the help of conservative Southern Democrats. When cloture votes failed, Fortas withdrew his nomination. He resigned from the bench a year later.

"It has to be very sparingly used," Goldman said of filibustering. "The Democrats don't want to be put in the position of being called obstructionist."

Leonard A. Leo, a top official at the conservative Federalist Society who has the ear of top Republicans, said Democrats could get away with a filibuster only if they are strongly backed by the public.

"If Ralph Neas can get the Democrats to engage in that level of thermonuclear war, then he has an enormous amount of political power," Leo said. "That's the neutron bomb."

But one former senator, Connie Mack, R-Fla., said a lawmaker's political capital also could be enhanced if the filibuster results in victory.

Still, Feinstein and others may be understandably reluctant to block a nominee on the floor of the Senate.

"It is kind of an extreme measure, and it does hold consequences for those who block a nomination," Mack said. "The next time the Senate changes hands -- human nature being what it is -- it would then be an accepted standard procedure that, if you don't like a nominee's ideology, then you filibuster."

Alternatively, it could fire up the political enemies of senators who support the block.

"You could very well cause them to campaign against you with much more vigor, with a higher likelihood of their being able to defeat you," Mack said.

Additionally, a loss on the Senate floor could harm judicial activists like Neas and Aron, if they are the strongest proponents of the filibuster.

"If you try to stage a filibuster and you lose, your credibility is wasted as an interest group," Leo said. "You're toast. The bottom line is [senators] are never going to listen to you again."

While control of the Senate goes immediately to the GOP in an anticipated lame-duck session of Congress -- guaranteed by the defeat of Sen. Jean Carnahan, D-Mo., who was appointed after her husband's death in 2000 -- action on new judicial nominations is not expected until next year.

A floor vote could come soon, however, on 17 nominations approved by the committee, including Northern District of California nominee Jeffrey White and a Central District nominee, Los Angeles Superior Court Judge Gary Klausner.

For Bush, a Republican-controlled Senate next year will mean far fewer headaches in the Senate Judiciary Committee, since the committee is unlikely to wait for the American Bar Association's peer reviews before scheduling confirmation hearings and votes.

Since Sen. Jim Jeffords, I-Vt., quit the GOP in May 2001 and tilted the balance of power back to the Democrats, the fights over judicial nominations have had little effect on District Court hopefuls. Even the one nominee rated "unqualified" by the ABA was approved unanimously.

Those facing the most scrutiny have been circuit court nominees. In addition to the rejections of Pickering and Owen, 11 circuit nominees have not had hearings, five have had hearings but not been voted on by the committee, and 14 have been confirmed by the full Senate.

Just before the election Tuesday, Senate Judiciary Committee Chairman Patrick J. Leahy, D-Vt., said Bush needs to acknowledge that Senate Democrats rapidly approved most of his federal court nominees.

"[T]he time is overdue for the White House to reciprocate with good-faith efforts of its own, especially when it comes to the basic steps of consultation that have been routine for earlier presidents but not for this president," Leahy said.

But Leahy may no longer have the power to sway his fellow committee Democrats with such rhetoric, said one Republican.

"Once the dam is broken, I don't think you'll have a solid alliance of Democrats against these judges, because there's no power play anymore,"

Sen. Charles Grassley, R-Iowa, said after a recent hearing. "They can't succeed."

Many liberal activists assume that another procedural option of resistance will be the "blue slip" tradition in the Senate, by which nominees get hearings and votes only if they have the support of their home-state senators.

"The time-honored tradition of requiring consent from home-state senators would still be in place as a limit on appointment of extreme nominees from states who have senators that have not been consulted and do not agree with appointments," Glenn Sugameli, senior legislative counsel at EarthJustice Legal Defense Fund, said.

But Republicans may be plotting to get rid of that system, which some see as unnecessary for appellate-court judges, who do not answer merely to one state but rather to many within a circuit.

In California, Sen. Barbara Boxer, a Democrat, has withheld blue slips on controversial nominees such as Carolyn Kuhl. Her colleague, Feinstein, thinks all nominees should get their day before the Judiciary Committee.

One system unlikely to be affected by the Senate flip, according to Bush administration sources, is the bipartisan judicial selection committee in California. The committee was set up by Boxer, Feinstein and the White House during early 2001, when the GOP controlled the Senate.

Feinstein said the committee conceivably could be altered if the Senate adopts Bush's recent proposal to set time limits on confirmation hearings and votes, but the committee's founder said he doubts that will have much of an impact.

"We certainly will attempt to meet the president's time frame," said Gerald L. Parsky, Bush's political representative in the state. "A lot will depend on how many applications we get."

Another tradition likely to be preserved is the one that provides a floor vote by the full Senate to nominees to the U.S. Supreme Court, whether or not they have won the backing of the committee. That means activists will have to convince a majority of senators that a controversial Bush nominee shouldn't be sworn in as a new justice.

"We need some Republicans, no matter what," Aron said.

For Aron, the doyenne of liberal judicial activism, the stakes are highest for filling Supreme Court vacancies.

Justices decide issues that "involve the whole country, not just people in one circuit," she said.

And how Bush fills any such seats likely will affect the 2004 presidential contest.

"Every Republican candidate for the presidency knows one sure way to appeal to the extremist base is to give them judges they want," Aron said.

Bush's father, the 41st president, nominated Clarence Thomas at the end of what he hoped would be his first term, but it didn't get him re-elected. Nor did voting for Thomas help Democrats who served on the Judiciary Committee; some were voted out of office in part because of the Thomas confirmation.

Any floor fight over nominations that liberals fear would produce a "Scalia or Thomas majority" on the high court won't be easy, Aron conceded.

"This is about the most uphill battle you can fight," she said. "When push comes to shove, senators don't like to say no."

Thomas Jipping, a leading conservative judicial activist at Concerned Women for America who advises the White House, said Aron and her cohorts have spent the past year "softening up" the Senate for the coming Supreme Court battle by fighting against Pickering and Owen.

"They're getting these people used to voting no," Jipping said. "They're conditioning them to say, 'This isn't so bad,' so when it comes to a Supreme Court nominee, they're more willing to do it than they would be otherwise. That's what this is all about."