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The Nation: Here Come the Judges; First the Senate, Now the Courts of Appeals

By Neil A. Lewis

DEMOCRATS and Republicans may argue over whether voters provided a mandate for President Bush to further shift the ideological balance of the nation's courts in a conservative direction when they elected a Republican majority in the Senate. But both sides agree that such a change is exactly what is about to happen.

The most profound and early changes are likely to occur in the 13 federal appeals courts, the level just below the Supreme Court, where 25 of the 179 seats are now vacant. Because the Supreme Court has been deciding ever-fewer cases each year, the rulings from the appeals courts -- also known as circuit courts -- are increasingly the last word on many contentious cases, like those involving environmental rules and federalism.

Republican appointees now hold the majority in seven of the 13 courts, Democrats on two. Four are roughly balanced, but not for long.

Beginning early next year, the Senate Judiciary Committee will be humming. Senator Orrin G. Hatch, the Utah Republican who will regain the chairman's spot, promises that President Bush's nominees will receive quick consideration.

In an interview, Mr. Hatch appeared to dismiss the notion that Democrats might still be able to block Mr. Bush's nominees under the "blue slip" policy of polling senators from the nominees' home states. When the committee was in Democratic hands, Mr. Bush's nominees were sometimes blocked if a senator withheld consent by delivering a negative blue slip.

"Negative blue slips will be given substantial consideration," he said. "But they will not be dispositive unless there wasn't consultation" between the White House and the senator. Translation: the White House will inform a Democratic senator that it intends to nominate someone from his or her home state, but the Judiciary Committee can ignore the senator's objections.

"I'm going to get those courts filled," Mr. Hatch said, adding that a priority would be to win the confirmations of Charles W. Pickering Sr. and Priscilla R. Owen to the United States Court of Appeals for the Fifth Circuit based in New Orleans. Both candidates were rejected by the committee when it was under Democratic control.

Still seething, Republicans are not prepared to show any mercy now.

"There is no interest in compromise," lamented a senior Democratic Senate aide. Said a senior Republican counterpart: "We pretty much don't need to compromise."

A White House official said that given the harsh feelings, the president will not be greatly bothered if his nominees are confirmed with only a bare majority.

There is much at stake. The District of Columbia Circuit, for example, is widely regarded as second in importance to the Supreme Court, handling important regulatory matters as well as most of the big scandals of the last few decades, from Watergate to Iran-contra. The Second Circuit, which is based in New York, decides many important business issues. And the Ninth Circuit, which covers California and eight other Western states, has had a rich diet of environmental cases.

Most cases that come before the appeals courts are decided by three-judge panels, so an increase in the proportion of Republican appointees means a greater likelihood of a panel with a conservative bent. Here are some anticipated changes:

D.C. Circuit

There are eight active judges in the D.C. Circuit, four of whom were appointed by Republican presidents and four by Democratic presidents. There are four vacancies. Mr. Bush has nominated Miguel Estrada and John Roberts, experienced Washington lawyers whose nominations have been delayed by Democrats. The change of power in the Senate is expected to end the delays.

The White House has also thought about nominating another conservative Washington lawyer, Peter D. Keisler, a Maryland resident who is a former president of the Federalist Society, an organization of conservative lawyers. He was once proposed for the Fourth Circuit, but the White House did not press the nomination after Senator Paul S. Sarbanes, a Maryland Democrat, complained that Mr. Keisler was not a member of the Maryland bar.

Fourth Circuit

Based in Richmond, Va., this appeals court, which covers Maryland, Virginia, West Virginia and the Carolinas, is already heavily weighted with conservatives and, with three vacancies, will likely become more so. Terrence W. Boyle, a federal trial court judge in North Carolina and a former aide to Senator Jesse Helms, the North Carolina Republican who is retiring, will almost certainly be confirmed. His nomination had been held up by his other home state senator, John Edwards, a Democrat.

The White House may also revive the notion of nominating Brett Kavanaugh, a White House lawyer. Mr. Kavanaugh was never nominated because Democrats found him unpalatable; he was a principal author of the Starr report, which argued that President Clinton deserved to be impeached.

Sixth Circuit

On the appeals court based in Cincinnati, which handles cases from Ohio, Michigan, Kentucky and Tennessee, the two Democratic senators from Michigan, Carl M. Levin and Debbie Stabenow, used their blue slips to block confirmation of two Bush nominees: Jeffrey S. Sutton, an Ohio lawyer who has been a leading litigator in challenging Congress's authority to impose rules on the states, and Deborah L. Cook, an Ohio Supreme Court justice. With seven of the circuit's 16 seats vacant, the confirmation of the two nominees will be a priority.

"I'm going to be fair and diligent," Mr. Hatch said of what will happen next year. "But I think the lesson of this election is that the people don't want the Senate to unnecessarily interfere with the president's judicial selections."