

Hatch becoming something of a judge maker

By Jonathan Groner

WASHINGTON - There's no such thing as a sure ticket to the bench, but Senate Judiciary Committee aide Lawrence Block was following a well-worn path when he waltzed through a perfunctory hearing before his own committee on Aug. 1.

Assuming that Block is approved by the Senate, no fewer than four former legal aides to Sen. Orrin Hatch, R-Utah, will be serving as federal judges- all of them on two specialized courts located in a single building just down the street from the White House.

Randall Rader, a Hatch Judiciary Committee aide in the 1980s, has been a judge on the Federal Circuit U.S. Court of Appeals since 1990. Sharon Prost, who worked for Hatch throughout the 1990s, joined that same court last year.

On the U.S. Court of Federal Claims, Block, who has been a senior Judiciary Committee counsel for the Utah senator since 1994, would join Chief Judge Edward Damich. Damich was Hatch's counsel on intellectual property issues from 1995 until ascending to the bench in 1998. Of course, Hatch is not the only committee leader whose staffers have landed on the federal bench. Most notably, Supreme Court Justice Stephen Breyer is a former counsel to Sen. Edward Kennedy, D-Mass., and former Judiciary Committee Chairman Sen. Strom Thurmond, R-S.C., has two former aides sitting as federal judges.

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But no other senator has as many, or as concentrated a group, as Hatch, ho has served on the Judiciary Committee for 26 years, chairing the panel rom 1995 until the Senate passed into Democratic control last year.

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Hatch gets credit on Capitol Hill and in legal circles for his clout, and ew observers doubt the background and ability of the four Judiciary Committee counsel.

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"It's a savvy member who realizes the importance of having his staffers laced in key positions in all three branches of government," says a former Judiciary staffer now practicing law in D.C.

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Taking Exception

But some liberal advocates say it's no accident that so many former Hatch staffers are finding their way to these courts.

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The Federal Circuit and Court of Claims are two of the handful of federal courts whose jurisdictions are not based on geography, so most lawmakers do not try to reward home-state supporters from the legal community with patronage appointments.

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Perhaps more significant, the courts handle many types of cases in which people or companies sue the federal government, most notably litigation involving alleged "takings" of private property.

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Many conservatives want to expand the takings concept to require compensation for losses in property values that result from environmental regulations. The Court of Claims and the Federal Circuit are often the battlegrounds in the takings wars, liberals point out.

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"Senator Hatch has been a leader in the radical property rights movement," says Glenn Sugameli, senior legislative counsel at the environmental organization Earthjustice. "He understands that increased taxpayer liability for takings will result in less environmental protection. The use of the takings clause to reduce environmental regulation is what's really at issue here."

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Sugameli contends that after the administration of President Ronald Reagan, aided by Hatch, failed to get Congress to pass legislation broadening takings protections, Hatch "became a major proponent in the Senate of putting his aides on the courts" in order to change the law.

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Sugameli says in 12 years on the appeals court, Judge Rader has lined up "on the extreme wing of the Federal Circuit when it comes to takings cases."

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Sugameli points to the 1996 en banc decision in *Preseault v. United States*, in which the court sided with property owners who claimed the federal government had improperly converted an abandoned railroad right of way to a hiking and biking trail without compensating them. Rader wrote a separate concurring opinion emphasizing that a taking had taken place.

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Sugameli also notes that last year, in *Commonwealth Edison Co. v. United States*, Rader joined two other judges in dissenting from an en banc ruling that found no taking where the government imposed cleanup costs on a private utility.

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Rader declines to comment.

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Judge Prost has not been on the court long enough to have created a judicial record on the takings issue, Sugameli says.

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Earthjustice and dozens of other environmental organizations have spoken out against the Block nomination on takings grounds.

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"Court of Federal Claims judges have already issued extreme takings rulings that undermine environmental and other important safeguards," Sugameli and Douglas Kendall of Community Rights Counsel wrote in a position paper last month. "There is every reason to believe Mr. Block ... will augment the court's radical, anti-environmental leanings."

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Earthjustice asserts that if Block is confirmed, "Hatch proteges will control 15 percent of the total Court of Federal Claims and Federal Circuit bench."

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At his Aug. 1 confirmation hearing, Block said that as a sitting judge he would not to try change the law. He fielded few antagonistic questions from Democrats on the committee.

Hatch's View

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Sen. Hatch flatly rejects the charge that he is trying to change the law by changing the composition of the courts.

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"The accusation that anyone has attempted to 'pack' those courts is a highly partisan, politically motivated attack that has no basis in reality," Hatch says in an exchange of e-mail with Recorder affiliate Legal Times. "The suggestion that I would be part of such a manipulation is extremely offensive to me, and it demonstrates a complete lack of understanding concerning my view of the judiciary."

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Hatch supporters point out that Clinton appointees still make up the substantial majority of the 12 active claims court judges - and that the presence of two former Hatch staffers on the 12-member appeals court hardly constitutes dominance.

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Hatch adds that each of his aides "is an exceptional lawyer who had all the qualifications for the bench independent of their service on the staff of the Senate Judiciary Committee.

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"I have supported and defended dozens and dozens of judicial nominees during my 26 years in the Senate," Hatch adds, "and I found it particularly compelling in these four instances because I had close personal knowledge of their skills, abilities and temperament."

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Whether Hatch is actively trying to steer the courts in a particular direction, observers suggest he is making the most of a long-standing senatorial prerogative.

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"This is simply an indication of the amount of influence that Senator Hatch can wield over nominations," says Michael Gerhardt, a professor at William and Mary School of Law who studies

judicial politics and has consulted for Democrats in the past. "It's a case study of how a particular senator can redirect or influence a particular court through the nominations process."

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Gerhardt says, though, that since the qualifications of the Hatch aides named to the bench are not in dispute, committee Democrats have chosen not to engage in battle. Indeed, even when questions arose last year about the district court appointment of David Bunning - the son of Sen. Jim Bunning, R-Ky. - the nomination sped through the Senate.

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"No one is going to fight against a powerful senator," says Gerhardt. "So you win a little goodwill with Senator Hatch on these, and everyone is happy."

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Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst who has also studied the nominations process, says there is "nothing unusual or wrong about patronage-driven appointments, as long as the people are qualified. It's quite reasonable for a senator to want to reward a competent, loyal staff aide with a judicial position."

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Jeffrey Robinson, a former aide to Sen. Joseph Biden Jr., D-Del., on the Judiciary Committee, points out the Federal Circuit and the Court of Claims "don't raise the same level of attention" as other judicial posts.

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"Putting someone on the Court of Claims is not like putting someone on the District Court, and putting someone on the Federal Circuit is not like putting someone on the D.C. Circuit," says Robinson, now a partner at D.C.'s Baach, Robinson & Lewis. "Maybe it shouldn't be different, but it is."

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Robinson adds that the Judiciary Committee "is a natural destination for people who are interested in intellectual property issues [a specialty of the Federal Circuit] and in public service."

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Hatch is certainly not the only senator whose aides have gone on to key positions on the federal bench. In 1988, Paul Michel, administrative assistant to Sen. Arlen Specter, R-Pa., became a Federal Circuit judge.

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U.S. District Judge Dennis Shedd, a former top aide to Sen. Thurmond whose nomination for the Richmond-based Fourth Circuit is pending, would join another former Thurmond aide, William Wilkins Jr., on that court.

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Says Hatch: "There are numerous former Capitol Hill staffers who are presently sitting federal judges. ... For example, former Eighth Circuit Chief Judge Richard Arnold was a legislative assistant to former [Democratic] Arkansas Senator Dale Bumpers. ... And the former chief judge of the Court of Claims, Lawrence Baskir, worked for two different senators, Sam Ervin [D-N.C.] and Bill Bradley [D-N.J]."

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Hatch contends that serving as a judiciary staff aide is an excellent qualification for the bench.

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"The Senate Judiciary Committee attracts some of the most talented lawyers in the country - people who would be qualified for the bench independent of their service on the committee. ... Since the business of being a judge consists largely of interpreting laws and the intent of Congress, the experience of writing laws is quite instructive," Hatch says.

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Jonathan Groner is editor at large at Legal Times, an American Lawyer Media affiliate in Washington, D.C.