TIPS & TRENDS

Environment in Exile? Prospects for the Federal Judiciary in the Second Bush Administration

The president proposes and Congress disposes. But judges decide what it all means.

Judicial appointments could enable President George W. Bush to stamp his philosophical imprint onto the nation's environmental policies well into the twenty-first century.

By appointing federal judges who support curbs on the federal government's regulatory reach, the president may be able to effect, through judicial interpretation, dramatic departures in environmental policy that would be more difficult to accomplish through legislation.[1]

Good News, Bad News

For those who believe in minimizing the federal government's power to change societal mores, that is good news. "Many problems that we experience as a country have come about because we've had unelected judges legislating from the bench. And that needs to be corrected. . . . We're very excited about that possibility of turning the judiciary in a more conservative direction," said conservative activist Richard Viguerie after the November 2004 election.[2]

For those who fear what they regard as a dangerous loosening of environmental standards and the depletion of natural resources, this is bad news. "President Bush's judicial nominees not only fall short on protecting our precious environment, they have worked to advance the powerful corporate and special interests that have wreaked havoc on our planet," stated Nan Aron, president of the liberal Alliance for Justice, in April 2004.[3]

The Power of Judges

The power of the courts to change the nation's direction flows from the judiciary's status as a co-equal branch of the federal government.

Judges don't pass bills or adopt executive orders. Nevertheless, they shape the law by interpreting the meaning of constitutional and statutory language. For that reason, federal judges can extend a president's legacy for a generation after the chief executive who appointed them has walked out of the Oval Office for the last time.

Judges can preside over their courtrooms for decades. The United States Constitution's writers provided for unlimited terms of office in order to minimize political interference with the courts. Once nominated by the president and confirmed by the Senate, federal judges can stay on the bench for life, as long as they maintain, in the Constitution's words, "good behavior."[4]

Take a look at the U.S. Supreme Court, for example. The most junior member, Justice Stephen G. Breyer, has been on the high court bench for nearly 11 years. Ailing Chief Justice William Rehnquist, a 33-year court veteran, has outlasted six presidents.[5]

Jim DiPeso

© 2005 Wiley Periodicals, Inc.
Published online in Wiley InterScience (www.interscience.wiley.com).
DOI: 10.1002/tqem.20053

Filling Vacancies—Lots of Them

With age or illness catching up to many of the Supreme Court's justices, observers believe President Bush may have a chance to appoint up to four new justices during his second term.[6]

The nine-member Supreme Court is the capstone of the federal judiciary. But presidents fill vacancies throughout the judicial branch, including 94 district courts, which is the final stop for most federal cases, and 12 appeals court circuits, where most appealed cases are resolved.[7] Since Bush took office in 2001, he has filled 201 vacancies on district and appeals court benches.[8]

Judicial Philosophies

The outcome of those cases depends, in part, on the philosophy judges follow in applying the law—an issue of considerable interest to the presidents who nominate them and the senators who must consent to their appointment.

A common staple of Republican campaign messages in 2004 was opposition to "activist judges" who are said to impute meanings to the law that plainly do not exist.

After winning re-election, President Bush said he would nominate judges who stick to "strict interpretation of the law."[9] A common staple of Republican campaign messages in 2004 was opposition to "activist judges" who are said to impute meanings to the law that plainly do not exist.[10]

Or do they? One person's "interpretation" is another person's "activism." Both liberal and conservative judges have been accused of inappropriate activism—i.e., stretching legal interpretation to impose policies driven by ideological agendas.

Where does "strict interpretation" end and "judicial activism" begin? Legal scholars debate the matter endlessly. At their heart, however, disputes over "strict interpretation" and judicial "activism" are disputes over what the law ought to say. And disputes over what the law ought to say are really disputes about how society should be organized and governed.

"Strict Interpretation" and "Originalism"

So, back to President Bush's judicial appointments. What does he mean by "strict interpretation"?

Bush's admiration of Supreme Court Justice Antonin Scalia is revealing. Justice Scalia subscribes to the doctrine of "originalism," also known as "Constitution in exile."

Originalism holds that when interpreting the Constitution, judges should follow the meaning of the document's words as they were understood at the time the Constitution was adopted, even if subsequent case law says otherwise.[11]

"Originalists" argue that their philosophy prevents judges from circumventing elected legislative bodies, the proper forum for deciding public policy questions.

In criticizing "originalism," many legal scholars, such as Judge Richard Posner of the U.S. 7th Circuit Court of Appeals, point out that the Constitution's general language opens the door to varying interpretations, especially in the light of changing circumstances.

As a result, he says, judges need to be pragmatic. Writes Posner, "A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences."[12]

Commerce Clause Cases

Esoteric legal debates aside, judges sympathetic to "originalism" are more likely to favor circumscribed interpretations of the Constitution's interstate commerce clause, from which many of the nation's environmental statutes derive their authority.

In 2001, for example, the Supreme Court ruled that the U.S. Army Corps of Engineers

lacked authority under the federal Clean Water Act to regulate development of isolated bodies of water that happened to be frequented by migratory birds. The court ruled that the water bodies' potential utility as bird habitat does not provide a close enough connection, or "nexus," to interstate commerce.[13]

If "originalism" were to take hold as the dominant judicial philosophy of the federal courts, the implications for environmental policy could be profound, says Jeffrey Rosen, associate professor at the George Washington University School of Law and legal affairs editor of *The New Republic*. Writing before the 2004 election, Rosen stated:

> If Bush wins, his aides seem determined to select justices who would resurrect what they call "the Constitution in Exile," reimposing meaningful limits on federal power that could strike at the core of the regulatory state for the first time since the New Deal. These justices could change the shape of laws governing the environment, workplace health and safety, antidiscrimination, and civil rights, making it difficult for the federal government to address problems for which the public demands a national response.[14]

Other Legal Issues of Environmental Significance

In addition to the commerce clause, other legal issues where environmental concerns come into play at the federal level include regulatory "takings" of private property and the concept of "standing" (that is, a person's or organization's eligibility to file litigation).[15]

In 1994, for example, the Federal Circuit Court of Appeals ruled against the U.S. Army Corps of Engineers' denial of a Clean Water Act permit to mine limestone within a Florida wetland. On remand, the U.S. Court of Claims ruled in 1999 that the federal government should pay compensation to the landowner, given that the Clean Water Act had not been enacted when Florida Rock Industries purchased the land.[16]

Battles over Bush Appointees

Conservation organizations worry that a few more Bush appointees on the Supreme Court will lead to a much narrower interpretation of commerce clause authority for environmental laws, as well as expanded scope for successful takings claims that would weaken the federal government's ability to regulate activities on private property.[17]

The implications of originalist judges paring back the federal government's regulatory reach led to a number of bruising political battles over judicial nominations during Bush's first term. Ten of his nominees were rejected in Senate votes. Three examples include:

If "originalism" were to take hold as the dominant judicial philosophy of the federal courts, the implications for environmental policy could be profound.

- William G. Myers—In July 2004, the Senate failed to break a filibuster blocking a floor vote on Myers's nomination to the U.S. 9th Circuit Court of Appeals.[18] In explaining her vote to uphold the filibuster, Senator Maria Cantwell, D-Washington, described Myers's views on the commerce clause as "troubling." She stated, "In the face of decades of established law, Mr. Myers has argued for a more limited interpretation of this key portion of the Constitution, which underpins much of federal environmental law. Rhetoric is one thing; radically reinterpreting the Constitution is another."[19]
- Janice Rogers Brown—In November 2003, the Senate failed to end debate over Brown's nomination to the D.C. Circuit Court of Appeals, which has appellate jurisdiction over cases in-

volving the Environmental Protection Agency and other regulatory agencies.[20] In a letter to the Senate, 48 land use–planning and conservation organizations characterized her views on property rights as "the outermost fringes of constitutional interpretation."[21]

- Priscilla Owen—Owen's nomination to the U.S. 5th Circuit Court of Appeals was rejected by the Senate Judiciary Committee in 2002. President Bush submitted Owen's name again in 2003, but the nomination was filibustered.[22] In comments to the Judiciary Committee, Senator Patrick Leahy, D-Vermont, pointed out that Owen was frequently taken to task by her fellow Texas Supreme Court justices for misapplying the law.[23]

Litigants are well aware of competing judicial philosophies, and on which side of the doctrinal fence specific judges have planted themselves.

After the November 2004 election, Senate Majority Leader Bill Frist, R-Tennessee, warned that he would push for rule changes to stop filibusters of judicial nominations.[24] Frist spoke to the Federalist Society, an influential organization of lawyers, law professors, and judges favoring the originalist doctrine.[25]

In December 2004, Bush announced plans to renominate 20 judges to district and appeals court benches, including Myers, Brown, and Owen.[26]

Judge Shopping

Litigants are well aware of competing judicial philosophies, and on which side of the doctrinal fence specific judges have planted themselves. They know some judges will be more sympathetic to their causes than others. Hence, the practice of "judge shopping."

Early in 2004, for example, attorneys for conservationists and for the U.S. Bureau of Land Management (BLM) argued over the venue for federal litigation involving coalbed methane drilling in the Powder River Basin. Conservationists pressed for a Montana courtroom. The BLM pushed for Wyoming.

The lawyers debated which location would be more convenient, but the subtext of their dispute involved the nature of the appeals court that ultimately would hear the case: the 9th Circuit, thought to be more "liberal" and sympathetic to environmental concerns, or the 10th Circuit, thought to be more "conservative" and sympathetic to commodity production on federal lands. Montana lies within the 9th Circuit, while Wyoming is within the purview of the 10th Circuit.[27]

Congressional Republicans have fought for years to break up the 9th Circuit. In October 2004, the House passed legislation to divide the area covered by the 9th Circuit into three separate circuits, but the amendment did not pass the Senate.[28]

Arguments for and against breakup are couched as matters of judicial quality. Proponents say that the 9th, which covers nine Western states populated by nearly 60 million people, is too large to be managed efficiently.[29] Opponents counter that breaking up the circuit would result in inconsistent decisions regarding public lands law.[30]

Driving such arguments are underlying policy disputes about numerous issues, including natural resources management.

Unpredictable Judges, Unexpected Decisions

Judges, however, are no more monolithic in applying the laws than members of Congress are in writing them.

In 2001, the U.S. Supreme Court unanimously reversed the D.C. Circuit Court of Appeals and upheld the ambient air quality standards for ozone and particulate pollution that EPA had adopted in 1997. Justice Scalia, the originalist par

excellence, wrote the court's opinion in this closely watched case.[31]

Last year, two judges appointed by Republican Presidents Ronald Reagan and George H. W. Bush upheld the application of laws that protect public lands.

On April 19, 2004, U.S. District Judge Terrence Boyle, a Reagan appointee and the current President Bush's nominee for a seat on the 4th Circuit Court of Appeals, imposed an injunction blocking construction of a naval aviator training field near the Pocosin Lakes National Wildlife Refuge in North Carolina. Judge Boyle found that conservationists and nearby farmers had raised substantial questions about the Navy's compliance with the National Environmental Policy Act.[32]

On the same day, 2,000 miles to the west, Judge Dee Benson ruled that in 1996, President Bill Clinton had properly exercised presidential authority under the Antiquities Act in establishing the 1.9 million-acre Grand Staircase-Escalante National Monument in Utah. Benson was appointed by the elder George Bush.[33]

Federal judges do not always conform to the expectations of the presidents and senators who hand them their robes. New issues can emerge in unpredictable ways because the society in which the law is grounded has a habit of changing in unanticipated ways.

A Turning Point?

Nevertheless, if enough federal judges sympathetic to the "Constitution in exile" theory of interpretation are appointed, a broad legal effort to remove the federal government from the environmental policy business cannot be ruled out.

David Strauss, who teaches constitutional law at the University of Chicago, wrote before the November 2004 election:

> The theory of the Constitution in exile is arrogant and unfounded. It would override decades of precedent, and invalidate important and widely supported legislation, on the basis of some Republican lawyers' and judges' claims to unique access to what the framers of the Constitution believed. But if Bush wins in November, this may well be the future of American constitutional law.[34]

National environmental policies aiming to decrease air and water pollution, reduce waste, and sustainably manage natural resources can no longer be taken for granted.

Notes

1. Rosen, J. (2004, November 8). Supreme mistake. The New Republic, http://www.tnr.com/

2. National Public Radio. (2004, November 10). What to expect from the conservative agenda, http://www.npr.org/templates/story/story.php?storyId=4162182

3. Alliance for Justice. (2004, April 21). President Bush accosts Earth Day by nominating anti-environmental individuals to federal courts. Press release.

4. United States Constitution, http://www.house.gov/Constitution/Constitution.html

5. United States Supreme Court. Members of the Supreme Court (1789 to present), http://www.supremecourtus.gov/about/members.pdf

6. Mears, B. (2004, October 21). Election could tip balance of Supreme Court. Cable News Network, http://www.cnn.com/2004/ALLPOLITICS/10/20/election.scotus/

7. United States Courts, http://www.uscourts.gov/

8. Savage, D. G. (2004, November 4). Courts are poised to take a hard right turn. Los Angeles Times, http://www.latimes.com/

9. Cable News Network. (2004, November 4). Rehnquist more likely to retire with Bush victory, http://www.cnn.com/2004/LAW/11/04/bush.rehnquist.ap/

10. Republican Party. (2004, August 31). 2004 Republican Party platform: A safer world and a more hopeful America.

11. Stassen, A. (2004, November 17). Scalia defends his legal theory. The Michigan Daily, http://www.michigandaily.com/vnews/display.v/ART/2004/11/17/419b38de95be3

12. Posner, R. A. (1995). Judge Richard A. Posner on originalism and pragmatism: Excerpts from "What Am I? A Potted Plant?" http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/interp.html

13. Natural Resources Defense Council. (2001, July). Hostile environment: How activist judges threaten our air, water, and land.

14. See note 1.

15. See note 13.

16. Id.

17. Earthjustice. Federal judges: Environmental safeguards in the balance, http://www.earthjustice.org/policy/judicial/judges.html

18. Earthjustice. Judging the environment: Examining lifetime federal judicial nominations, http://www.earthjustice.org/policy/judicial/nominees/index.html

19. Congressional Record. (2004, July 20). Statement of Senator Maria Cantwell. U.S. Senate Executive Session, p. S8455.

20. See note 18.

21. American Planning Association, et al. (2003, November 13). Letter to United States Senate Re: Environmental opposition to Justice Janice Rogers Brown's nomination to a lifetime seat on the U.S. Court of Appeals for the District of Columbia Circuit.

22. See note 18.

23. Leahy, P. (2003, March 27). Senate Judiciary Committee, Statement of the Honorable Patrick Leahy, United States Senator, Vermont, http://judiciary.senate.gov/member_statement.cfm?id=679&wit_id=50

24. Frist, B. (2004, November 12). Frist addresses Federalist Society's 2004 national convention, http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech_id=121&Month=11&Year=2004

25. Garbus, M. (2003, March 1). A hostile takeover: How the Federalist Society is capturing the federal courts. The American Prospect, http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=6729

26. Fletcher, M. A., & Dewar, H. (2004, December 24). Bush will renominate 20 judges. Washington Post, http://www.washingtonpost.com/wp-dyn/articles/A22384-2004Dec23.html?referrer=email

27. Ring, R. (2004, February 16). Tipping the scales. High Country News, http://www.headwatersnews.org/HCN.judges.html

28. Simpson, M. (2004, October 5). Simpson wins House passage of Ninth Circuit split. Press release.

29. Id.

30. Defenders of Wildlife, et al. (2004, October 5). Letter to U.S. House of Representatives: Oppose Simpson Amendment to S. 878—Floor vote today.

31. Whitman v. American Trucking Association. (2001, February 27). Opinion of the U.S. Supreme Court, http://laws.findlaw.com/us/000/99-1257.html

32. Judge: Not so fast. (2004, April 21). Charlotte Observer, http://www.charlotte.com/mld/observer/2004/04/21/news/8480289.htm

33. Spangler, D. K., & Roche, L. R. (2004, April 20). Judge upholds grand staircase. Deseret Morning News, http://deseretnews.com/dn/view/0,1249,595057385,00.html

34. Strauss, D. (2004, September/October). Kerry's even keel. Legal Affairs, http://www.legalaffairs.org/issues/September-October-2004/feature_strauss_sepoct04.html

Jim DiPeso is policy director for REP America. He can be contacted at dipeso@repamerica.org. For more information about REP America, visit their Web site at http://www.repamerica.org.