Taking a Hard Right

Why all of us—including the President—should be paying more attention to the conservative capture of the lower courts

BY AMY WALDMAN

They were no longer called "black" and "white," but well into the seventies Mississippi's universities were still separate and unequal. With creative admissions standards and disingenuous funding criteria, the state had perpetuated a system of higher education that segregated in practice if not in name. Historically black universities remained black and meagerly resourced, while their white counterparts grew fat with libraries and land grants. When a group of black Mississippians finally brought suit claiming as much, their case seemed irrefutable.

Irrefutable, but also irrelevant—at least according to the Fifth U.S. Circuit Court of Appeals, which heard the case in 1990. The court conceded some segregation and inequity in the system, but ruled that because Mississippi no longer officially discriminated, the state couldn't be forced to change course. So egregious was the unequal treatment, however, that the Rehnquist Supreme Court—hardly a bastion of liberalism—overruled the Fifth Circuit in an eight-to-one decision calling the state's higher education system "constitutionally suspect."

The lower court's decision was reversed, but its poignancy was undiminished, for the Fifth Circuit had once been at the vanguard of racial justice. It played a pivotal role in expanding civil rights in its jurisdiction, the heart of the Old South, by enforcing desegregation in the wake of *Brown v. Board of Education.* In the face of uncloaked public hostility, the court's judges exhibited extraordinary courage and became the stuff of judicial legend—powerful symbols of federal courts' ability to ensure that right prevailed for those without political might on their side.

The Fifth's move from the principled left to the extreme right, from deliberately expansive to determinedly narrow readings of the Constitution, has been dramatic—but hardly unique. Similar, if subtler, shifts have taken place across most of America's lower courts, where the seeds of the conservative judicial revolution have come to fruition. "It's been remarkable," says Richard Epstein, one of the country's leading conservative legal academics, of the lower courts. "There has been a fundamental change in the law."

Yet while the rightward shift of the Supreme Court has provoked endless liberal handwringing,

the greater transformation below has garnered little attention. "The lower courts just carry out the decisions of the Supreme Court," explains Senator Paul Simon, a longtime member of the Judiciary Committee. "I voted against Clarence Thomas to be the head of the [Equal Employment Opportunity Commission]. When I heard he might be considered for the Supreme Court, I said I would vote against him for that. But I voted for him for the Court of Appeals."

Such ignorance of the importance of federal appellate courts is astounding. For most Americans, the 12 appeals courts are, literally, the courts of last resort—only 94 of the thousands of cases decided there were heard by the Supreme Court during the last term. Appeals court judges set precedents and case law for their regions—which means most of the laws affecting us. Creative or persuasive argumentation by appellate court judges is often adopted by the Supreme Court as well. Whether sanctioning discrimination or curbing environmental regulations, decisions by both appeals and district court judges have real, ongoing consequences.

That the lower courts are crucial is something that, like Simon, President Clinton often seems to underappreciate. The "activist president" has been been erratic in filling seats and cautious in his choices—particularly in comparison to the Republicans who preceded him. And now that Republicans control the Senate and Orrin Hatch the Judiciary Committee, President Clinton has even less opportunity to leave his mark on the courts.

The Real Revolution

Clinton could take a lesson in priorities from Ronald Reagan. When Reagan came into office, Democrats outnumbered Republicans on the federal bench by a three-to-two ratio. As California's governor, Reagan had battled the liberal Ninth Circuit, and he well understood the importance of the lower courts. His administration made changing them a top priority.

The Reaganites put the judge-picking process into overdrive. In the past, presidents had selected judges by getting one nominee from a home-state senator, and then running a routine background check. The Reagan team demanded choices from senators until they found nominees they liked and supplemented the search by combing the country's law schools for conservative ideologues. Administration officials sought to gauge the ideological purity of potential nominees, poring over their writings and quizzing them on their judicial philosophy. All told, Reagan filled 375 seats in eight years.

There was more to the Reagan strategy than sheer numbers, though. Reagan and Attorney General Edwin Meese sought young judges who would be on the courts for decades to come. More importantly, they sought jurists—primarily academics—who would not just deliver votes, but could also influence their colleagues. "We systematically reviewed judges for their philosophy," says Bruce Fein, a Meese deputy in the Justice Department. "Not just whether they would vote right, but whether they would persuade other judges."

It's a testament to that strategy's success that a handful of conservative firebrands on the lower courts—Richard Posner and Frank Easterbrook on the Seventh U.S. Circuit Court of Appeals; Alex Kozinski on the Ninth; Ralph Winter on the Second; J. Harvie Wilkinson III on the Fourth; Laurence Silberman and Stephen Williams on the D.C. Circuit—have an influence that far exceeds their numbers. Their opinions are cited regularly by other circuits and by the Supreme Court. Sending clerks to the Court is another way judges influence justices—since the clerks do the research and help write the Court's opinions, they can cite the brilliant decisions (that they also helped write) of the lower court judges they once worked for. In just the last three years, these seven appellate judges sent the Supreme Court 26 of its 108 clerks. These judicial powerhouses also write, teach, and are often quoted by the press. "If you have five to eight people like this, that's enough," Fein says. "Five people ran the Bolshevik revolution for the first few years."

After Reagan, Bush continued to appoint conservatives, and between them they put 120 appeals and 442 district judges on the courts—more than 60 percent of the federal judiciary. Certainly, the Reagan-Bush appointees are not a monolith, but over the years they have

guided the courts in several identifiable directions: showing a deference to government authority to infringe on civil liberties, and a devotion to protecting the rights, liberties, and pocketbooks of business and property owners—often at the expense of individuals or the environment.

Take the January decision by the 11th U.S. Circuit Court of Appeals upholding the U.S. government's right to deny Cuban refugees at Guantanamo Bay military base access to lawyers. You might not find that unreasonable. But then the court went further, ruling that aliens in U.S. custody have no constitutionally guaranteed rights at all—which means U.S. officials could legally beat, starve, or indefinitely detain aliens. Similarly severe curtailments of rights—such as denying death row defendants who were represented by incompetents the right to appeal—have become commonplace in the decisions of Reagan-Bush appointees.

Thanks to the Reagan revolution in the federal judiciary, there's a good chance that the tobacco companies will get off the hook—again.

In 1992, the District of Columbia federal appellate court rejected a public interest group's claim that, under the Freedom of Information Act, the Nuclear Regulatory Commission (NRC) should make public records of previous and potential hazards at the country's nuclear power plants. That means that if you live down the road from say, Three Mile Island, you can't find out if they're leaking radiation downwind or if there's a Homer Simpson at the controls who might cause a meltdown. Nor can you find out whether the NRC is doing anything to clean up or prevent such disasters.

A 17-year-old precedent had said that such information could be kept confidential only if releasing it would either hurt the industry competitively or affect the government's ability to obtain such information in the future. Neither was true in this case. But out of deference to the government, and concern for the industry, Judge James Buckley conveniently tiptoed around the precedent in writing for the majority. Conservatives cite the return of judicial restraint—fidelity to precedent or original intent—as their main success in taking back the courts. But often, as Buckley demonstrated, conservatives restrain themselves only when it suits their position.

Because it hears many challenges to agency regulations and government officials, Buckley's D.C. Circuit is considered second only to the Supreme Court in power. Reagan and Bush prioritized it accordingly, appointing to the court such ideologues as Antonin Scalia, Robert Bork, and Clarence Thomas. In the seventies, the D.C. Circuit had vigorously enforced a stream of new environmental laws like the Clean Air Act. But since the eighties, the court has been far more inclined to provide relief to businesses that are fighting such regulations.

Consider the case of *Sweet Home Chapter of Communities for a Greater Oregon v. Bruce Babbitt, Secretary of the Interior*. A group of plaintiffs from forest products industries sued Babbitt over the Endangered Species Act, arguing that the act, which says humans may not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect an endangered species," did not preclude destruction of an endangered species' habitat. Judge Stephen Williams agreed, arguing that destroying a habitat was not "harm," but rather "the withholding of the benefits of a habitat that is beneficial to a species." That to withhold the benefits of a habitat from a species generally harms that species—and indeed could eliminate it—didn't concern Williams as much as the possibility of the government interfering with the exploitation of private property.

Again, the decision was too radical even for the Supreme Court, which reversed it. But on the lower courts, it was business as usual. Other decisions have limited access to the courts for plaintiffs seeking redress from business. Several opinions on the Seventh Circuit, for example, have made it harder for investors who have lost money to bring securities fraud lawsuits. In one case Judge Easterbrook threw out a fraud suit against accountants on the grounds that accountants' reputations are based on honesty, and therefore it would be irrational for them to join in fraud. Greed, unfortunately, is not always so rational.

A recent Seventh Circuit ruling by Judge Posner in a class-action suit shows the creativity Reagan and Bush appointees often muster to

protect corporate bottom lines. In March, Posner ruled that 10,000 hemophiliacs suing four drug companies for improperly screening blood products for the HIV virus could not sue as a class. His reason? Extrapolating from the maximum possible award a jury might give—he settled on $25 billion—he speculated that a class action lawsuit could do "irreparable harm" to the pharmaceutical companies by bankrupting them. Even the drug companies hadn't raised that argument in challenging the suit. *American Lawyer* called the decision a "triumph of conservative judicial activism."

Posner's decision quickly reverberated beyond the Seventh Circuit. Tobacco stocks soared the day after his decision—because America's seven largest tobacco companies are facing a class action lawsuit of their own, the largest in the nation's history. A district court judge in New Orleans had certified earlier this year that up to 90 million current and former smokers could sue cigarette manufacturers in *Castano v. American Tobacco*, and for once the plaintiffs were armed with the legal talent and resources to prove that cigarette manufacturers have for years known about and manipulated the addictiveness of cigarettes. The cigarette manufacturers finally were facing the grim prospect of being held accountable for more than 400,000 annual smoking-related deaths.

But four months after Posner's decision, the Fifth Circuit agreed to hear the tobacco companies' argument that smokers shouldn't be able to sue as a class, either. Since the Fifth Circuit also has taken a skeptical stance on claims against business, it's likely they'll reject the suit. And Posner's precedent will be added ammunition for the tobacco companies, particularly since he is considered the most influential lower court judge in the country today. "This [decision] ... does us good on several levels," said Dan Donohue, an R.J. Reynolds Tobacco lawyer, "and we intend to cite it." *Castano*, then, is most likely dead in the water. Thanks to the Reagan revolution, tobacco companies may be off the hook—again.

Wanted: Liberal Firebrands

With conservatives leaving such a deep imprint on the law, the election of President Clinton offered hope that the pendulum might swing back. For only the second time in 24 years, a Democrat would make judicial appointments, and Bush had left Clinton more than 100 openings to fill. Besides, President Carter had taken an active interest in the courts, filling 262 seats. Now, with Clinton in the driver's seat, the hope was that liberal Posners and Easterbrooks would be appointed to challenge conservatives on the dominant issues of the day.

Whereas Reagan's criteria were ideology, intellect, and persuasiveness, however, Clinton's criteria are competence and diversity. To be sure, it is commendable that more than 60 percent of his appointees are women and minorities, more than any president in history, and that he has picked the highest proportion of judges rated "well-qualified" by the American Bar Association since they began evaluating judges in 1948. And the Clinton appointees also have far more real world experience—a record number were in public service—than the Reagan superstars did, which gives them an awareness of the human consequences of law where academics may see only theory.

But with a few exceptions—such as his former Yale professor Guido Calabresi—Clinton's appointees have been able lawyers, not top legal minds. They are mainly centrists, and seem unlikely to offer a well-articulated, cohesive liberal legal vision to counter groundbreaking conservative rulings. And then there's Clinton's sluggish pace. He filled only 28 seats his first year, picked up speed to fill 101 the next, but is back down to only 26 so far this year. Despite their claims to the contrary, judge-picking is not a White House priority: How else to explain the lack of nominees for 38 of the 63 seats currently empty?

No matter what, of course, the Clinton appointees will be a minority. More of his appointments, in fact, have replaced Kennedy, Johnson, and Carter judges than Reagan and Bush appointees. But a minority can still exert influence—by writing compelling dissents, by making the arguments for the other end of the spectrum, and sometimes by persuading more conservative colleagues to join them. "You need the debate to continue, or it becomes one-sided," says Stephen Reinhardt, a liberal judge on the Ninth U.S. Circuit Court of Appeals.

As Clinton dallies, he misses more chances to neutralize the Reagan legacy. On Reinhardt's Ninth Circuit, for example, there are 28 seats: 15 are Republicans, nine are Democrats, and four are empty. That means Clinton could bring the ratio almost parallel, if he acted—yet one of the

seats has been empty since George Bush was president. Similarly, Abner Mikva's seat on the critically important D.C. Circuit, which he vacated last year to become White House counsel, is still unfilled.

And Clinton's moment of opportunity is passing. With Republicans controlling the Senate, and Orrin Hatch in the catbird seat, Clinton will have a tough time winning confirmation for prominent liberals—or many judges at all. Hatch is keeping the Reagan flame on the judiciary alight, vowing in a recent interview that he would not "allow radicals to be on the courts." In response, Clinton has chosen to avoid fights and defer to the conservatives. If Orrin Hatch objects, as he did to Peter Edelman's nomination to the D.C. Circuit Court of Appeals, liberal nominees are dropped. When Hatch signaled that one district court nominee was unconfirmable because of his record of representing plaintiffs in police brutality cases, the nomination was withdrawn.

But because Hatch wants to maintain the dignity of his chairmanship, he'll allow some centrist nominees through, at a tightly controlled pace, until he shuts the process down in advance of next year's presidential election. For now, that means one hearing per month, with four or five district nominees and only one circuit judge. At that rate, Clinton will be lucky to get 25 more nominees through this year, and probably even fewer next year. The larger the backlog at the Judiciary Committee, however, the more pressure on Hatch to pick up the pace: Clinton ought to be making as many nominations as possible, as quickly as possible.

But a few more centrist Clinton nominees won't eliminate the imbalance on the court. That requires more strongminded, brilliant, liberal jurists. Orrin Hatch isn't going to let them on the courts—his job is to keep them off. And so a judiciary that is supposed to be above politics must be won in the political arena—by electing Democrats to both the White House and Senate. If nothing else, this should move you to the polls next year: To make sure that well into the next century voices on the courts argue eloquently that discrimination is not legally sanctionable, that government's authority is not absolute, and that business often needs vigilant restraint, you need to elect politicians who believe the same. And then they need to act. □

The Three Faces of Newt

Newt's book is alternately frightening, sensible, and just plain loony—much like the man himself

BY MATTHEW MILLER

To Renew America
Newt Gingrich, *HarperCollins, $24*

Test your understanding of the Republican revolution. Newt Gingrich is: (a) an original thinker-politician, whose fear for America's sagging trajectory prompts him to offer fresh solutions that go beyond politics as usual; (b) a manipulative propagandist, whose benign facade masks a ruthless hunger for power that he'll use for God-knows-what if we don't stop him; or (c) a jargon-loving management consultant in disguise, whose bromides and futurist visions get loonier with each new one he spews.

If you said "all of the above," maybe you've already read *To Renew America*, in which the traits that make Gingrich both fascinating and scary are on neon display. *Renew* is a breezy screed that purports to explain the source of Gingrich's ambitions, his diagnosis of what ails us, and his inventory of cures. There's plenty to question or dismiss here. Yet for liberals, the only thing that should be as troubling as Newt's agenda is their own illiberal refusal to admit there might be a sincere or worthy thought in his head.

After an opening reflection on his formative years (where we're told, among other things, that at age 14 the future speaker consecrated his life to "understanding what it takes for a free people to survive and to helping my country and the cause of freedom"), the book speaks in successive chapters to "the six challenges" Gingrich sees facing the country. These are, in his words, "Reasserting and Renewing American Civilization"; "America and the Third Wave Revolution"; "Creating American Jobs in the World Market"; "Replacing the Welfare State with an Opportunity Society"; "Balancing the Budget and Saving Social Security and Medicare"; and "Decentralizing Power." There's little new here if you've heard his spiel before.

Gingrich also offers a mini-memoir of the Contract With America, from inception to execution in the new Congress's first 100 days. The last 100 pages of the book consist of 17 bite-sized chapters in which Gingrich offers short takes on subjects ranging from Rush Limbaugh to the flat tax.

As with most Gingrich utterances, the book is bursting with ideas—some sensible, some inflammatory, others daffy. Among the sensible: Gingrich wants prisoners to work and study in prison, not lift weights and channel surf. He'd expand the Earning by Learning program he helped pilot in Georgia, which gives poor kids a dollar for each book they read and has created scores of ghetto bibliophiles. He also points persuasively to the religious spirit at the heart of American tradition, quoting Ben Franklin's quiet appeal for divine aid when the Founders nearly faltered.

Then Gingrich's brain burps. He predicts that honeymoons in space will be the rage by 2020 and that bold new merchandising can renew America's status as a premiere shopping destina-

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