

Full court press: The furor over judicial appointments

From the Editors in the [May 17, 2005](#) issue

After listening to James Dobson and his evangelical Christian colleagues talk about controlling the federal judiciary through the Republican majority in Congress—to the extent of punishing judges and defunding courts—one can't help recalling events in 1930s Germany. The National Socialists removed judges who didn't go along with the party program. Law became what the party said it was.

Dobson, speaking on his radio show in April, imagined political change proceeding this way: “The troublesome Ninth Circuit Court of Appeals in San Francisco could be abolished and then staffed by different judges immediately.” He complained that “Congress has not had the political gumption to take any such action.” House Majority Leader Tom DeLay has encouraged such views: “We set up the courts. We can unset the courts. We have the power of the purse.”

Dobson seems not to realize that an independent judiciary is essential to the rule of law. As one prominent jurist explains: “If we are to be a nation of laws and not of men, judges must be impartial referees. . . . By insulating judges from external retaliation and from internal temptations of ambition [by life appointment and irreducible salary], the framers hoped that the judiciary would be free of pressure not only from the government but also from the people.” These words are not from the left-wing fringe; they belong to archconservative Supreme Court Justice Clarence Thomas.

Dobson and friends organized a “Justice Sunday” rally on April 24 to put pressure on senators who have blocked President Bush's judicial appointments. These senators, the evangelicals say, are filibustering against “people of faith.”

This claim is a classic bit of demagoguery. Democrats have blocked only ten of Bush's 205 picks for federal courts. Their opposition to the nominees has nothing to do with religious beliefs and everything to do with judicial qualifications. (Some have poor ratings from bar associations; some have had a large number of their

judgments overturned on appeal; some seem to lack a judicial temperament.)

One's right to the free exercise of religion does not translate into the right to government office. Cathy Young, in the *Boston Globe*, offers a useful thought experiment: "Let's say that a Democratic president had nominated to the federal bench a judge known for passionate, Christian-based hostility to capital punishment. Would it be 'anti-Christian' for Republicans to oppose the nomination?" Obviously not.

The furor over judicial appointments is a rehearsal for the looming battle over the next Supreme Court vacancy, in which views on abortion in particular will loom large. Dobson and many others expect that battle to be "World War III."

But it need not be. If he wishes, Bush can find a conservative justice—someone like Michael McConnell, for example, who has written for this magazine—who is publicly critical of the legal reasoning behind *Roe v. Wade* but whose judicial record is so impressive and whose legal writing is so thoughtful that it would be hard for Democrats to find plausible reasons to oppose him.

Of course, the problem with sharp legal minds is that one cannot predict exactly how they will vote on any given case. It depends on the nature of the case and the aspect of the law in question. That's why we have judges.