

Federal Judgeships and the Gender vs. Ideology Debate

with reporting by **Jessica DuLong**

The name “Carolyn Kuhl” might not mean much to the average person, but in policy circles, it’s become synonymous with a simmering controversy over who best represents women in the judiciary. Currently a trial judge on the Superior Court of California in Los Angeles County, Kuhl was nominated to the Ninth Circuit Court of Appeals on June 22, 2001. Two years ago, Kuhl ruled that it was not an invasion of privacy to permit a drug company salesman to sit in on a breast cancer patient’s medical examination in which she was nude from the waist up. The California appeals court overruled, noting that “no decisional authority” supported denying relief for such “highly offensive conduct.”

Kuhl’s advocacy of a total ban on abortion rights while working in the Reagan Justice Department has earned her the opposition of such activist groups as the National Abortion Rights Action League, People for the American Way, and the National Organization for Women. Yet her supporters include Los Angeles civil rights lawyer Leo Terrell

and Vilma S. Martinez, former director of the Mexican American Legal Defense and Education Fund, who describe her as fair, hard working, thoughtful, and impartial. The American Bar Association has rated her as “well qualified” in a divided ruling characteristic of the polarization surrounding Kuhl’s nomination.

Should women’s groups be supporting her nomination in the interests of putting more women on the bench? Not to do so is hypocrisy, conservatives argue. “Given their professed desire for a judiciary that ‘looks like America,’ diversity activists should have applauded President George W. Bush’s first group of judicial nominations, announced [in May 2001],” wrote Jennifer C. Braceras, an appointee to the U.S. Commission on Civil Rights, in an op-ed for the *Boston Globe*. “Most diversity activists care about the race and gender of federal appointees only when these factors serve as proxies for left-wing politics,” added Braceras, who is also Senior Fellow for Legal Policy at the Independent Women’s Forum, a con-

servative group based in Arlington, Virginia.

Diversity has never been the exclusive criterion for judicial selection, liberal activists respond. “At the end of the day there are concerns that are larger than gender, such as positions they’re likely to take when they have the power of a circuit judge,” notes Isabelle Katz Pinzler, special counsel and director of the Project on Federalism of the NOW Legal Defense and Education Fund in New York. According to Pinzler, the selection of judges should focus on a commitment to equal opportunity as well as diversity.

At the same time, the diversity issue has not gone away, emphasizes Marcia Greenberger of the National Women’s Law Center in Washington, D.C. “It’s important that there is a mix of people at the table when important decisions are being made.”

According to numbers compiled by the American Bar Association, about one-fifth (19.8 percent) of the federal judiciary is female, which includes eight minority circuit court judges and 33 minority district court

judges. That's up from 7 percent in 1988, reflecting the Clinton administration's aggressive policy of conferring 29 percent of its nominations to women, according to an analysis by the Alliance for Justice, a coalition of left organizations headquartered in Washington, D.C.

By comparison, about 23 percent of the Bush administration's nominees are women, and 2 percent are minority women. Out of 88 nominated for judgeships, a total of 45 have been confirmed, including 13 women.

Of those awaiting confirmation along with Kuhl, seven are women: Reena Raggi (Second Circuit, nominated May 1, 2002), Priscilla Owen (Fifth Circuit, nominated May 9, 2001), Deborah Cook (Sixth Circuit, nominated May 9, 2001), Julia Smith Gibbons (Sixth Circuit, nominated October 9, 2001), Susan Bieke Neilson (Sixth Circuit, nominated November 8, 2001), Joy Flowers Conti (Western District of Pennsylvania, nominated January 23, 2002), and Amy St. Eve (Northern District of Illinois, nominated May 23, 2002).

Not surprisingly, Cook, Kuhl, and Owen, the three most embattled female candidates, were still awaiting hearings as of press time. Sen. Barbara Boxer (D-Calif.) has indicated she will look carefully at Kuhl's nomination but has not said she will oppose it. In the meantime, conservatives are excoriating Senate Democrats for keeping eight nominees dangling for over a year. "The Senate's failure to discharge its constitutional duty to provide advice and consent on judicial nominees is simply unacceptable," noted the IWF's Braceras in a prepared statement. "If Senate Democrats want to ensure that women—and indeed all Americans—have access to justice, they must stop playing politics with the confirmation process and confirm or dispose of the president's nominees at once."

As Sen. Patrick Leahy (D-Vt.) and other Democrats have taken pains to point out, the delays experienced by

Cook, Kuhl, and Owen are not unprecedented. It took the Senate 21 months during the Clinton administration to confirm the nomination of Margaret Morrow, who now sits on the Ninth Circuit. Hilda Tagle waited 32 months to be confirmed as a district court judge for the Southern district of Texas. Ann Aiken's nomination to the district court in Oregon was held in abeyance for 26 months. Margaret McKeown, also of the Ninth Circuit, waited a full two years before being confirmed by a vote of 80 to 11.

The Politics of Abortion

Besides sharing the distinction of having their nominations languish, Cook, Kuhl, and Owen are all active in the conservative Federalist Society, and all have the support of pro-life groups. All three were in private practice before going on the bench, although Kuhl spent five years in public service as a policy architect and assistant solicitor general in the Reagan Justice Department.

Cook is notable for blazing trails as the first female partner at Roderick, Linton, Akron's oldest firm. Before being elected to the Supreme Court of Ohio in 1994, she served as judge on the Ohio Court of Appeals from 1991 to 1994. She has been active in professional and community organizations that include the Women's Network of Northern Ohio, a mentoring and leadership group, which named her its woman of the year in 1991. A graduate of the University of Akron's undergraduate and law schools, she was rated "qualified" by the American Bar Association.

On the bench, Cook ruled against recognizing the wrongful-life action of a child born with spinal bifida but dissented with a decision that extended Ohio's child abuse statute to fetuses. She also dissented from a decision that overturned Ohio's tort reform statute and wrote a 1996 majority opinion affirming a medical school's right to deny admis-

sion to a blind person.

Justice Owen was first elected to the Texas Supreme Court in 1994 after 17 years as a commercial litigator at Andrews & Kurth, LLP. Owen earned her undergraduate and law degrees at Baylor University and has been rated "well qualified" by the American Bar Association. On Texas's highest court, she currently serves as liaison to the Texas Legal Services for the Poor Special Committee and the Supreme Court Advisory Committee on Court-Annexed Mediations.

Viewed as solidly conservative, Owen has ruled that at-will employment in Texas does not imply a duty of fair dealing and has upheld the right of schools to suspend male students on the basis of hair length, rejecting the argument that differential policies violate equal protection.

Her rulings on abortion, however, are the primary reason for the vigorous opposition to her nomination by pro-choice advocates. She has ruled on six occasions against the rights of teens to bypass parental authority to obtain abortions. In one instance, she dissented from granting an expedited ruling to a teen in her 15th week of pregnancy.

As state supreme court justices, both Owen and Cook have well-defined "paper trails" from which to discern their positions as judges. Such is not the case with Kuhl, a Los Angeles superior court judge since 1995, who, as a trial judge, has published fewer opinions. Prior to her appointment to the Superior Court, she was a partner at the Los Angeles firm of Munger, Tolles & Olson, where her practice emphasized civil business litigation. A graduate of Princeton University and Duke University Law School, she clerked for Justice Anthony Kennedy while he served on the Ninth Circuit.

Kuhl has been criticized by liberal groups for dismissing a motion for attorneys fees brought by a litigant who challenged a SLAPP suit. The appel-

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"No one is going to hire you because of the type of furniture you have," Larkin says. "You have to shape your career to fit your life and not your life to fit your career."

For Larkin, retaining clients is a matter of nurturing and constant contact. "It involves being very aware of what their needs are and what they're thinking about over the next few years."

A New Day

Despite her financial woes, Reece decided to turn down the job at the large firm and weather the economic storm.

"I like the independence, the

freedom," says Reece. "I like choosing the clients I wanted to deal with. So, even if I made less money, I still wanted to work for myself."

Fortunately, things have rebounded for Reece, and she has more business than she can handle. She now has a line of credit she uses sparingly, something that she had been hesitant to do before. She has cut back on small claims matters or cases where she doesn't have enough time to prepare to do a really good job.

"I did a lot of reflecting on how I could make clients happier," she says. "I found ways I could improve. I had a lot of time to think about them."

Today Reece does more listening

and tries to return all clients' calls within 24 hours. She communicates more with her clients about their cases and explains each step of the legal process in writing. She has hired a part-time secretary to help her with administrative work.

Reece thinks about how, less than a year ago, she was ready to close her doors. She still doesn't know how she got through that difficult time, but it taught her invaluable lessons. "Every year isn't going to be perfect," Reece says, "so don't give up!"

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late court reversed, describing her ruling "a nullification of an important part of California anti-SLAPP legislation." She also has come under fire by NARAL for advocating the outright reversal of *Roe* in a government brief she co-authored in *Thornburgh v. American College of Obstetricians and Gynecologists*. While in private practice, she wrote an amicus brief on behalf of the American Academy of Medical Ethics in which she argued that prohibiting doctors who receive federal funds from discussing abortion did not violate First Amendment guarantees of free speech.

The Role of Ideology

Despite a campaign promise to deliver strict constructionist judges, the White House insists its nominees are not marching in lockstep. According to White House spokesperson Mercy Viana:

"President Bush seeks men and women who meet the highest standards of legal training, temperament, and judgment. These are highly qualified, diverse individuals who bring experience and skills to the bench. The president is committed to nominating individuals with a diversity of perspectives and ideas."

That in itself seems to acknowledge that ideology matters, but many conservatives insist ideological considerations have no place in selecting qualified judges. By instituting an "ideological litmus test," the Senate will force nominees to "give a political IOU as the price for confirmation," according to John Nowacki, director of legal policy at the Free Congress Foundation, a conservative think tank. "When you politicize a judiciary, you compromise its independence," he says.

Not only is evaluation of ideology improper, it's also impossible, argues Barbara Comstock, director of public affairs for the Justice Department. "One hundred senators would have to guess and agree on how each nominee would vote on every conceivable case that might come before them in order to maintain the current 'balance.'"

If that's so, one would expect the Senate Republicans to have cast a blind eye to the ideologies of Clinton's judicial nominees. Not so: Morrow was termed a "liberal activist" by then Sen. John Ashcroft (R-Mo.), who was instrumental in delaying her vote for confirmation. Sonia Sotomayor, elevated to the Second

Circuit after 16 months of waiting, was described by Senate opponents as "an advocate of radical change."

Instead of pretending that ideology is an illegitimate concern, the Senate needs to come clean, said Sen. Charles Schumer (D-N.Y.). "Legitimate considerations of ideological beliefs seem to have been driven underground. It's not that we don't consider ideology; we just don't talk about it openly," he explained. He urged the Senate to own up to the significant yet behind-the-scenes role ideology plays in the confirmation process.

Frustrated conservatives and defensive liberals can agree on one thing, however: The presence of women on the federal bench is moving beyond tokenism and into numbers commensurate with their participation in the legal profession.

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