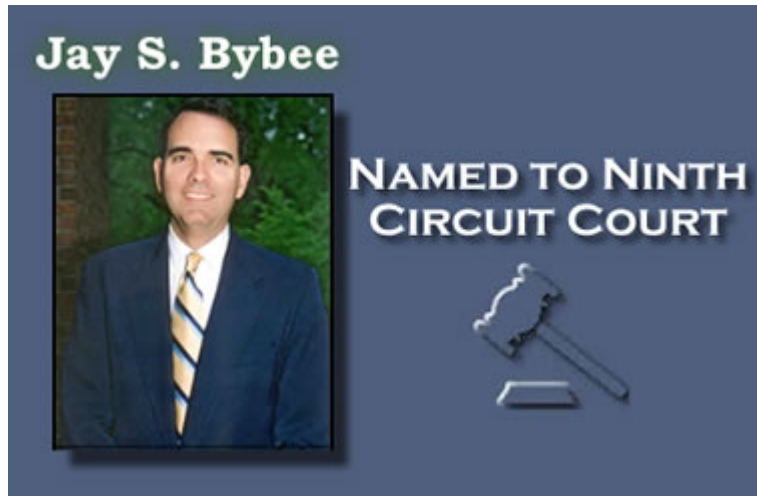


People

Jay S. Bybee Named to Ninth Circuit Court

By [Page Johnson](#) · July 8, 2003

PEOPLE



By Page Johnson

On the day the U.S. Senate confirmed Jay S. Bybee's nomination to the Ninth Circuit Court of Appeals, the largest appellate court in the country, this new judge went home to celebrate in his usual unaffected way-by helping his kids with their homework and washing the dishes. This ability to balance priorities in his personal life is a reflection of the balance and perspective that Bybee brings to the law, which leads friends, colleagues and law school students to respect him for his fair-mindedness, scholarship, and decency.

Sworn in last March by Supreme Court Justice Sandra Day O'Connor, Bybee is a legal scholar who is rapidly becoming "one of the finest constitutional lawyers in America," according to Judge Lloyd D. George of the U.S. District Court of Nevada. "No matter where you stand politically," George said, "Jay is universally respected for his intellect, honesty, and ability to articulate the issues, plus he is not a compromiser of principles."

During Bybee's confirmation process, Sen. Harry Reid (D-Nevada), Sen. John Ensign (R-Nevada), Sen. Orrin Hatch (R-Utah), Sen. Larry Craig (R-Idaho), and Sen. Charles Schumer (D-New York) spoke publicly on his behalf. At the William S. Boyd School of Law at the University of Nevada at Las Vegas where Bybee was a founding member of the faculty, Dean Richard Morgan called him a "nice, humble, and decent human being, who was also a highly intelligent and accomplished lawyer and teacher." Morgan added that "in a world of big egos and attitudes, Bybee was a breath of fresh air."

As a member of the Ninth Circuit, most famous recently for its rejection of the term "under God" in the Pledge of Allegiance, Bybee will be one of 28 active judges who handle appellate cases from the states of Arizona, California, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, and Guam. Judges at this level review the rulings of district judges, and cases from this court may be appealed to the United States Supreme Court. Historically, the ninth circuit has been controversial because of its decisions and size-35 million people in California alone are under its jurisdiction. In recent years, a number of its decisions were reversed by the Supreme Court.

A Family Man

To this influential court comes a husband and father of four, an eagle scout, a returned missionary of the Church of Jesus Christ of Latter-day Saints, and a legal scholar who has been on the fast track since he was a Hinckley scholar at Brigham Young University. Bybee's distinguished career already spans academic, private, and governmental arenas, and his legal analyses on such topics as the First Amendment, Separation of Powers, and Federalism have appeared in top law reviews and journals throughout the U.S. Generally considered a conservative, he is tenacious in his pursuit of careful and precise legal analysis.

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Judge Bybee with his family and John Ashcroft in November 2001 when he was sworn in as Assistant Attorney General for the Office of Legal Counsel.

For the past two years, Bybee has been Assistant Attorney General for the Office of Legal Counsel at the Department of Justice. Since he is a Nevada appointee to the Ninth Circuit, he and his wife Dianna Greer Bybee and their four children, Scott (15), David (13), Alyssa (11), and Ryan (9), are in the process of relocating from their home in the Vienna Ward, Oakton Virginia Stake, to their former home in the Sunridge Ward, Henderson, Nevada Anthem Stake. Sister Bybee, the daughter of Harvey and Nada Greer of Fair Oaks, California, is also a graduate of BYU. The couple met at the National Archives in Washington, D.C. at a showing of the film, "Mr. Smith Goes to Washington," and were married in the Oakland Temple in 1986. She has worked for a public relations firm in Nevada and recently taught family and consumer sciences at Yorktown High School in Arlington, Virginia.

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Jay Bybee on the U.S. Capitol steps with his family
left to right: Ryan, Judge Bybee, his wife Dianna, Scott, Alyssa, David

Bybee attributes much of interest in the law to family influence. His grandfather George Hickman was an attorney and city judge in Albany, California, and his parents, Scott and Joan Bybee instilled in each of their children a respect for the laws of the land. Raised in Las Vegas, Nevada, and Louisville, Kentucky, Bybee said his parents encouraged academic excellence with family discussions and games. All four siblings, Jay, David, Karen, and Lynn served missions and married spouses who served missions. Bybee served in the Chile, Santiago Mission from 1973-75 and his wife served in the Paraguay, Asuncion Mission from 1980-81.

An Attorney and Professor

After graduating magna cum laude from Brigham Young University in 1977 and cum laude from BYU's J. Reuben Clark Law School in 1980, Judge Bybee clerked for the Honorable Donald Russell of the U.S. Court of Appeals for the Fourth Circuit. He was an associate in the office of Sidley & Austin before joining the Department of Justice in 1984, where he worked in the Office of Legal Policy and the Civil Division. From 1989-91, he served at the White House under President George Bush as Associate Counsel to the President.

Drawn to academia because he enjoys teaching and wanted to devote more time to writing, Judge Bybee served for the next 10 years as professor of law at two different law schools: the Paul M. Hebert Law Center at Louisiana State University (1991-98) and the William S. Boyd School of Law at the University of Nevada, Las Vegas (1999-2001). At both schools, he taught constitutional law, administrative law, and civil procedure.

"I love teaching" he said, "because I always learn more than the students. When I prepare for a class, I research more than I can actually use, so the process ensures that I continually learn something new."

He made such an impact on his students at UNLV that they voted him Professor of the Year in 2000. But Bybee himself was influenced by legal role models in his own life. As a student at BYU during the period that Elder Dallin Oaks was university president, Bybee read Oaks' academic writings. "He's such a tremendous scholar as well as a straight shooter," Bybee said. "And so was Rex Lee, who was dean of the BYU Law School when I was a law student. He had an enormous influence on me because he was so articulate and faithful, as well as being a great advocate and lawyer."

In 2001, Bybee took a leave of absence from UNLV to accept the position as Assistant Attorney General in Washington, D.C., where he has provided President George W. Bush with legal counsel and also reviewed pending legislation for constitutionality.

A Constitutional Scholar

The Constitution is the bedrock of Bybee's professional life, and one of the hallmarks of his career has been articulate and thought-provoking constitutional scholarship. He became interested in the Constitution as a child when a teacher taught him that "the people are truly in charge, that this is a government of the people, not a government of the leaders."

Bybee said that unlike the common law, the Constitution is a written document and the text must be consulted. His analysis of the Constitution is that it provides two things. First it provides a process to create laws, with rules about how to make additional rules. An example is that although the Constitution says nothing about the environment per se, it nevertheless provides a process for creating rules about the environment. Second, the Constitution provides some actual rules, as it does with the First Amendment.

Regarding the law itself, Bybee said he appreciates the role of law in a society which must ask the fundamental question, "How are we going to conduct ourselves?" He explained that there is a system of rules and standards in the law as well as in our personal lives. In his own home, for example, a standard is, "Be nice," and a rule to encourage that is, "Don't hit." He also pointed out that standards are always harder to enforce because it is difficult to define exactly what the standard is. "How do you define *honesty*," he asked, "and who is applying the definition?"

As a law professor, Bybee taught new students that the law may not be as certain as they had hoped, emphasizing that there are limits to what the law can do. As a judge, he is sensitive to the fact that he has transitioned from the realm of theory into practice, "where there are many details to account for, and where subordinate issues and details must be weighed." Regardless of his opinions about a specific law, Bybee said, "I will enforce a law even if I wouldn't have voted for the law itself had I been a legislator, and I will apply the law unless it crosses the contours of the Constitution."

An Old Testament Scholar

It's no surprise that Bybee's interest in the rule of law extends to a study of ancient law, notably in Old Testament times. As the Gospel Doctrine teacher in his ward, he saw parallels in the way people interpreted and applied ancient law to the way many individuals do so today.

"People in the Old Testament were absolutely devoted to the law of Moses and required exact obedience to it," he explained. "Their main concern was that they not find themselves on the wrong side of the law, and they spent their lives trying to bring themselves and each other into conformity with it. While we should admire their zeal to follow the rule of law, we nevertheless have to recognize that without understanding the spirit or purpose of the law, there aren't enough rules in the world to make a person be good."

Bybee believes that society would function better if people demonstrated an attitude of reconciliation rather than revenge. He said some lawyers become entrenched, and instead of finding common ground and shared values between contending parties, such lawyers tend to "litigate to the death." Bybee has witnessed the effect on those individuals and families who fight over everything and become estranged.

"We need to be more willing to compromise and work through disputes with good will," he suggested, "and although there are specific matters that judges must handle, there are also many disputes and misunderstandings that can be handled out of the courts. In the fifth chapter of Matthew it says that before a man can offer gifts to God, he must first 'be reconciled to his brother.'" Bybee referred to respected Biblical scholar Hugh Nibley who says the word *reconcile* comes from the Latin, meaning *to be seated with, or to be invited back to the table*. Bybee said this analogy of an erring person being welcomed back into full fellowship applies not only to the atonement but also to people who have disagreements.

"What a great image that is," he said, "of everyone being brought back to the table, included once more in an intimate setting among friends." He said both parties in a dispute, the offended as well and the offender, need more compassion as they work towards resolution.

Confirmation Hearings

Such thoughtful consideration of the purposes and limits of law coupled with his professional credentials and affable personality helped propel Bybee's name to the recommended list of potential judges for the Ninth Circuit. Among those in the legal and political community who voiced their respect for Bybee's approach to the law during his confirmation process were both Nevada Senators—Sen. Reid, a democrat, and Sen. Ensign, a Republican.

But navigating the gauntlet from nomination to confirmation to the actual swearing in was a "daunting, even bewildering process," said Bybee. Although President Bush had originally nominated Bybee to the court in May 2002, the Senate did not confirm him until March 2003.

"The process itself has a lot of stops and starts," he pointed out. "Plus, there is anxiety over who will support you, and then there are the unknowns." He explained that the tension that now exists between the Republicans and Democrats over judicial appointments makes it a difficult situation for everyone. During Bybee's Senate Judiciary Hearing, Sen. Hatch noted that 14 of the 24 active judges on the Ninth Circuit, including 14 of the last 15 confirmed, were appointed by President Bill Clinton.

A particular problem during the nomination process is that the nominee is "in limbo," Bybee said. Nominees who work for private law firms, for example, may be reluctant to initiate any new work because it can take weeks, months, or even years before they know whether they will actually be appointed. In addition, clients worry about entrusting their cases to an attorney who may not be able to follow through to completion.

Bybee's own confirmation process began when Judge Procter Hug of the Ninth Circuit took senior status. After discussions with Republican leaders, Sen. Ensign recommended Judge Bybee to President Bush, and a full FBI background check ensued that included a security clearance, credit and police reports, and interviews with neighbors and co-workers. At the same time, The White House and the Department of Justice scrutinized the nominee's academic and judicial writings, especially those involving high profile or controversial issues. Once

Bybee passed these hurdles, the President formally submitted his nomination to the Senate, which referred it to the Senate Judiciary Committee under the leadership of Sen. Hatch. Here also Bybee was subjected to a background check.

At the same time, the American Bar Association conducted a full review of its own, assessing the judicial competence and judgment of the nominee. After reviewing Bybee's conduct in court and determining his standing in the legal community, the ABA issued a report to the White House and Senate, concluding that Bybee was "well qualified" for the job.

One complication in the process was that all presidential nominations expire at the end of each Congress. For Bybee, who was nominated in May 2002, this meant his nomination was "returned without action" in December 2002, and he had to be re-nominated in January 2003.

Finally on February 5, 2003, Bybee and four candidates for district court positions appeared before the Senate Judiciary Committee at a 9:00 a.m. public hearing. Since each hearing is unique with no way to precisely predict its duration or direction, the nominees were told to prepare for a lengthy day of interrogation. Sen. Hatch introduced Bybee with high praise and referred to a comment by William Marshall, a University of North Carolina law professor and former Deputy White House Counsel under President Clinton: "The combination of his (Bybee's) analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the federal judiciary. He understands the rule of law and he will follow it completely."

Coincidentally, however, the hearing was scheduled on the same day that Secretary of Defense Colin Powell testified before the United Nations about Iraq, so the interviewers were often called away from the room. What originally loomed as a long day of questioning was over by noon. Those senators who did not have a chance to query Bybee during the hearing submitted written questions to him about cases he had worked on, his opinion on specific rulings, and people he admired. His responses became part of the public record.

By a 12-6 vote (10 Republications and 2 Democrats for, 6 Democrats against), the Senate Judiciary Committee recommended Bybee's nomination to the full Senate. The deliberation on the Senate floor was scheduled for March 13, but Bybee only learned about it the night before. "I sat in my office at the Justice Department the next day and watched it on C-Span," Bybee recalled.

During the proceedings, Sen. Reid spoke about Bybee's extensive writings which are often on controversial subjects, and Sen. Ensign called Bybee "a leader and a gentleman" that he expected to "consistently and carefully consider the arguments on both sides of a legal question with an open mind." Sen. Craig of Idaho remarked on the unique bipartisan support for the candidate, made possible he said, by the "uniqueness" of Bybee himself.

Following the 74-19 Senate confirmation vote, Sen. Ensign remarked that "the fact that Jay Bybee was confirmed during one of the most contentious periods in the history of the United States Senate in terms of judicial nominees is a credit to his experience and integrity." Reid added that Bybee's nomination demonstrates "how the process can work when both sides of the aisle work together."

The President issued a commission to Bybee on March 21 and Justice O'Connor administered the oath of office at the Supreme Court on March 28.

A New Challenge

Now as the Bybee family moves back West, they look forward to going home, but are also nostalgic about their years in the Washington area. "After ten years away, the chance to return (to Washington) has been a wonderful opportunity for our family," Sister Bybee said. "We have family and dear friends here and its such an exhilarating place to be!" But she added that "Las Vegas was also a great place for our family, so we're happy to be returning."

Bybee says he is honored by his new judicial appointment, but feels the tremendous responsibility of his new position. "Talk is cheap," he says. "There's a difference between the theoretical discussion of the law and its practice. I take very seriously the fact that I have people's economic interests, liberty, and very lives in my hands."

And what kind of judge will he be? Only half in jest, Judge Bybee adds, "I would like my headstone to read, 'He always tried to do the right thing.'"

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