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## **Copying Issue Raises Hurdle for Bush Pick**

By [ADAM LIPTAK](#)

[WASHINGTON](#) — As chief counsel to the Senate Judiciary Committee, Michael E. O'Neill helped steer the [Supreme Court](#) nominations of [John G. Roberts Jr.](#) and [Samuel A. Alito Jr.](#) through the confirmation process. An expert on judicial nominations, Mr. O'Neill later spoke with pride to a legal magazine about helping place "some difficult federal judicial nominees" onto the lower federal courts.

The shoe is now on the other foot. President Bush nominated Mr. O'Neill to be a judge on the Federal District Court here last month, and there are signs that his nomination might be a difficult one as well.

Last year, a peer-reviewed legal journal, the Supreme Court Economic Review, issued a retraction of an article by Mr. O'Neill in 2004. "Substantial portions" of the article, the editors wrote, were "appropriated without attribution" from a book review by another law professor. In addition, at least four articles by Mr. O'Neill in other publications contain passages that appear to have been lifted from other scholars' works without quotation marks or attribution.

Long passages in the 2004 article are virtually identical to the book review, which was published in 2000 in the Virginia Law Review and was written by Anne C. Dailey, a law professor at the [University of Connecticut](#).

For instance, Professor Dailey wrote: "Bounded rationality is not a refutation of the rational actor model; to the contrary, it attempts to fine-tune the model to take account of predictable cognitive limitations and biases. Despite occasional references to irrationality in the literature, there is nothing in fact irrational about bounded rationality."

Four years later, Mr. O'Neill wrote this, without quotation marks or attribution to Professor Dailey: "Bounded rationality is not a refutation of the rational actor model; to the contrary, it seeks to recalibrate the neoclassical model to take account of predictable cognitive limitations and biases. Despite occasional references to irrationality in the literature, there is nothing especially irrational about bounded rationality."

In an interview on Thursday in the dining room of his home in Chevy Chase, Md., Mr. O'Neill was contrite about the duplications, blaming "a poor work method." He said he often mingled research materials and his own work in a single computer file. "I didn't keep appropriate track of things," he said. "I frankly did a poor and negligent job."

Mr. O'Neill, a boyish 46-year-old who wore jeans and a wrinkled blue button-down shirt, said he had never knowingly passed off other scholars' statements as his own. "So much of it is sort of dry and straightforward stuff," he said. "To me, it all sounds generic and plain. I didn't catch it."

Deborah L. Rhode, an authority on legal ethics at Stanford, said the retraction by the Supreme Court Economic Review was "extremely unusual" and amounted to "a textbook case of conduct that casts doubt on someone's fitness for judicial office."

"That's a serious form of misconduct in an academic career," Ms. Rhode said. "I would think it would be viewed equally seriously in a judicial career. In my judgment, that would be disqualifying."

In an interview, Senator [Arlen Specter](#), the Pennsylvania Republican who was chairman of the Judiciary Committee until last year, said he had known for some time about the questions concerning Mr. O'Neill's scholarship.

"I heard him out on it and put it in the balance of everything else I knew about him," Mr. Specter said. "I believe he is an excellent prospect for the district court."

"He was my chief counsel and staff director at a very difficult time," Mr. Specter continued, referring to the nominations of Chief Justice Roberts and Justice Alito, the withdrawn Supreme Court nomination of [Harriet E. Miers](#) and a host of legal issues, including civil rights, bankruptcy and asbestos litigation.

Mr. Specter said Mr. O'Neill's nomination "has been thoroughly vetted on a number of levels," including by the [Federal Bureau of Investigation](#) and the White House. "I was told it went to the president," he said.

Emily A. Lawrimore, a White House spokeswoman, said Mr. O'Neill had been "completely forthcoming" from the start of the vetting process and had "expressed remorse for his actions."

"He was highly recommended to President Bush," Ms. Lawrimore said of Mr. O'Neill, "and the president is confident he will make an excellent judge."

Friends and colleagues describe Mr. O'Neill as a creative, fair and exceptionally able lawyer. He is a graduate of [Brigham Young University](#) and Yale Law School, and he served as a law clerk to Justice [Clarence Thomas](#) on the Supreme Court and Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit. He is working on a master's degree in writing fiction.

The flawed 2004 article was not an isolated incident. Passages in the other articles by Mr. O'Neill, now an associate professor at George Mason University School of Law, also bear striking similarities to other scholars' work.

Shown a copy of a 2000 article by Mr. O'Neill in the Brigham Young University Law Review, Gerald M. Caplan, a former Justice Department official and former dean of the McGeorge School of Law in Sacramento, said it included a verbatim reproduction of a passage from a 1985 article he wrote in the Vanderbilt Law Review. Mr. O'Neill did not quote or cite Professor Caplan.

"Well, he's got me word for word," Professor Caplan said.

"And there is some evidence that it's not innocent or inadvertent," he added, referring to the nature and extent of the duplication.

"It shows him to disadvantage," Professor Caplan said. "If I were on the Judiciary Committee, I would want to know more."

Similarly, parts of a 2000 article by Mr. O'Neill in the George Mason Law Review bear a striking similarity to a 1997 article in the Michigan Law Review by Neal Kumar Katyal.

Professor Katyal, of the [Georgetown University](#) Law Center, said he knew Mr. O'Neill and admired him.

"Mike is an innovative thinker and has always had integrity in my many dealings with him," Professor Katyal said. "I can't imagine that he would intentionally copy this banal point from my article."

Daniel D. Polsby, an editor of the Supreme Court Economic Review and the dean of the George Mason School of Law, said he had learned about the similarities to the book review in a letter from its author, Professor Dailey. (Professor Dailey declined to comment.)

"It was my opinion at the time that this was negligent behavior," Dean Polsby said, "and he was duly chastised. The idea of O'Neill committing a theft is just impossible. It's just impossible."

But the law school and Mr. O'Neill agreed that the lack of attribution in the article would have serious consequences for him as a law professor. "By agreement, by a handshake," Dean Polsby said, "he stepped away from tenure and will reapply for it."

Mr. O'Neill said the law school's investigation concluded that his conduct had not been willful.

"The range of possible sanctions was a hug and a cookie to firing you," he said. "They felt like it was a significant mistake on my part. They didn't think it was intentional."

Asked how he would have viewed a judicial nominee like himself in his old job on the Judiciary Committee, Mr. O'Neill answered elliptically.

"I've tried to have a decent reputation with people," he said. "It's certainly my fault. You'd like to be not just defined by the mistakes that you make in life."