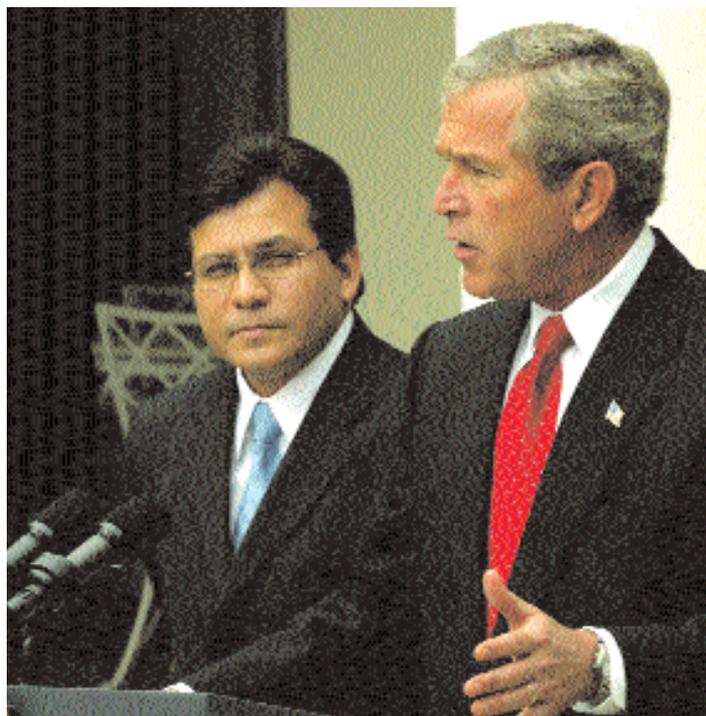


# THE DECISION-MAKING BEHAVIOR OF GEORGE W. BUSH'S JUDICIAL APPOINTEES

An analysis of overall voting patterns indicates that President Bush's judges are among the most conservative on record

by **ROBERT A. CARP,**  
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**President George W. Bush with White House Counsel Alberto Gonzalez, chair of his Judicial Selection Committee.**



**W**hat is the ideological direction of the judges whom President George W. Bush has appointed to the bench during his first term? Until now we have had no quantitative, empirical data to respond to this query. Critics of the President, often liberal Democrats, have suggested that Bush's judicial appointees are ultra-conservatives who are hostile to the interests of racial minorities, women, the environment, personal privacy, and so on. "Right-wing extremists" is often the catch word of those who have opposed the President's judicial appointments, as echoed in this high ranking Democratic staff member's appraisal of the 2002 elections on the future content of the federal judiciary:

I...believe that the outcome of this election will have very serious consequences because of the powers of the majority....I think it will be the most successful court packing we have ever seen....I begin[this year] with a great sense of foreboding and a sense that much of what the most extreme elements in the White House want to achieve will be achieved within the next two years.<sup>1</sup>

President Bush and his supporters clearly have a very different view of the men and women whom he is selecting for federal judicial posts. Former Assistant Attorney

General Viet Dinh conceded that the administration was eschewing candidates who might appear to be "judicial activists," but he asserted that

We are extremely clear in following the President's mandate that we should not, and do not and can not employ any [political-ideological] litmus test on any one particular issue, because in doing so we would be guilty of politicizing the judiciary and that is as detrimental as if we were unable to identify men and women who would follow the law rather than legislate from the bench.<sup>2</sup>

This article seeks to shed some light on whether or not the President is making ideologically based appointments and whether his judicial cohort is deciding cases in the manner anticipated by most court observers. It is organized around two basic questions: What might we expect of the Bush administration's potential to have an ideological impact on the federal courts? What do the empirical data tell us so far about the way that the Bush cohort has been deciding cases during the four years of his presidency?

1. As quoted in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, *W. Bush remaking the judiciary: Like father like son?* 86 JUDICATURE 282, 300 (2003).

2. *Id.* at 284.

DENNIS BRACK



# Far-right, Conservative, or Moderate?

STACEY CRAMP/LEGAL TIMES



President Bush's first 11 nominees to federal judgeships, announced on May 9, 2001.

## A sympathetic judiciary

Judicial scholars have identified four general factors that determine whether chief executives can obtain

3. For a summary of this literature, see Robert A. Carp, Ronald Stidham, and Kenneth L. Manning, *JUDICIAL PROCESS IN AMERICA*, 6th ed, Ch. 7. (Washington, D.C.: CQ Press, 2004).

a judiciary that is sympathetic to their political values and attitudes:<sup>3</sup> the degree of the president's commitment to making ideologically based appointments; the number of vacancies to be filled; the level of the chief executive's political clout; and the ideological climate into which

the new judicial appointees enter.

**Presidential support for ideologically based appointments.** One key aspect of the success of chief executives in appointing a federal judiciary that mirrors their own political beliefs is the depth of their commitment to do so. Some presidents may

be content merely to fill the federal bench with party loyalists and pay little attention to their nominees' specific ideologies. Some may consider ideological factors when appointing Supreme Court justices but may not regard them as important for trial and appellate judges. Other presidents may discount ideologically grounded appointments because they themselves tend to be non-ideological. Still others may place factors such as past political loyalty ahead of ideology in selecting judges.

For example, Harry Truman had strong political views, but when selecting judges he placed loyalty to himself ahead of the candidate's overall political orientation. On the other hand, Presidents Ronald Reagan and Lyndon Johnson are examples of presidents who had strong ideological beliefs on many issues and who took great pains to select judges who shared these beliefs.

What do we know about whether or not President George W. Bush is committed to making ideologically based judicial appointments? The evidence suggests that the President is indeed using ideology as a basis for his judicial nominations. Recall, for example, that just prior to the election of 2000 George W. Bush publicly expressed admiration for Justice Antonin Scalia, who is one of the most conservative members of the Supreme Court.<sup>4</sup> Justice Scalia usually interprets the Constitution as restraining congressional power to regulate commerce and seeks to limit the expansion of many Bill of Rights freedoms (generally conservative positions).

In May of 2001, after sending forth his first batch of judicial nominees, President Bush made it clear that his judges will adhere to his conservative judicial philosophy. "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench," he said.<sup>5</sup> And early in 2003, Bush's assistant attorney general said in an interview that "we want to ensure that the President's mandate to us that the men and women who are nominated by him

to be on the bench have his vision of the proper role of the judiciary. That is, a judiciary that will follow the law, not make the law...."<sup>6</sup>

Still, there is no solid evidence that Bush's nominees are being screened for their ideological purity to the same degree that judicial candidates were during Ronald Reagan's administration. Furthermore, diluting the ideological commitment to a slight degree is the fact that Bush may have some interest in increasing the number of women and minorities on the bench. The record indicates that W. Bush has so far appointed a larger percentage of women and minorities to the bench than did either his father or Ronald Reagan, although still fewer than did Clinton. Still, the evidence suggests that conservative ideology rather than "affirmative action" is the predominant motivating force behind the Bush judicial appointments.

**The number of vacancies to be filled.** A second element affecting the capacity of chief executives to establish a policy link between themselves and the judiciary is the number of appointments available to them. The more judges a president can select, the greater the potential of the White House to put its stamp on the judicial branch. For example, George Washington's influence on the Supreme Court was significant because he was able to nominate 10 individuals to the High Court. Jimmy Carter's was nil because no vacancies occurred during his term as president.

The number of appointment opportunities depends on several factors: how many judicial vacancies are inherited from the previous administration (Clinton, for example, was left with a whopping 100 district and trial court vacancies—14 percent of the total—by former president Bush), how many judges and justices die or resign during the president's term, how long the president serves, and whether Congress passes legislation that significantly increases the number of judgeships.

Historically, the last factor seems to have been the most important in

influencing the number of judgeships available, and politics in its most basic form permeates this process. A study of proposals for new-judges bills in 13 Congresses tested the following two hypotheses: (1) "proposals to add new federal judges are more likely to pass if the party controls the Presidency and Congress than if different parties are in power," and (2) "proposals to add new federal judges are more likely to pass during the first two years of the president's term than during the second two years." The author concluded that his "data support both hypotheses—proposals to add new judges are about five times more likely to pass if the same party controls the presidency and Congress than if different parties control, and about four times more likely to pass during the first two years of the President's term than during the second two years." He then noted that these findings serve "to remind us that not only is judicial selection a political process, but so is the creation of judicial posts."<sup>7</sup>

When George W. Bush assumed the presidency he inherited 82 vacancies, which was quite a sizable number by historic standards.<sup>8</sup> This was largely due to the bitter partisan politics that had occurred during the Clinton administration, causing many of his judicial nominees to go without Senate confirmation. A second factor in this equation is that the number of judges who die or who retire while on the bench is occurring at about the same rate under the Bush administration as it has for

4. Stuart Taylor, Jr., *The Supreme Question*, Newsweek, July 10, 2000, at 20.

5. Bennett Roth, *Bush Submits 11 Names for Federal Bench*, Houston Chronicle, May 10, 2001, at A1.

6. *Supra* n. 1, at 284.

7. Jon R. Bond, *The Politics of Court Structure: The Addition of New Federal Judges*, LAW AND POL. Q. 182, 183, 187 (1980).

8. However, many court observers argue that Bush's appointment opportunities in this realm may be more apparent than real. That is, many vacancies exist because President Clinton was stymied in his efforts to fill them toward the end of his term, and it may now be "pay back time" for the Democrats. For example, Michigan's Democratic senators have so far been successful in blocking the appointment of Republican judges for the Sixth Circuit Court of Appeals, despite the presence of nominees for these open positions.

previous chief executives: during Bush's first two years in office 71, judges left the trial and appellate court bench. If this rate continues throughout a full first term, it would mean that President Bush would appoint about 17 percent of active federal judges just through the normal process of attrition.

What about the possibility of Congress passing a new omnibus judges bill that would give the President the opportunity to pack the judiciary with men and women of like-minded values, a phenomenon that greatly enhanced President Kennedy's and

tion seems to be whether he will be re-elected in 2004. If he is, then approximately a third or more of all active federal judges will bear the W. Bush stamp, and that will be a substantial impact. If his re-election bid is not successful, then the effect of the Bush judges will be much more modest.

**The president's political clout.** Another factor is the scope and proficiency of presidential skill in overcoming political obstacles. One such stumbling block is the U.S. Senate. If the Senate is controlled by the president's party, the White House will

James Eastland of Mississippi, but only Johnson seems to have had the political adroitness to get most of his liberal nominees approved. Kennedy lacked this skill. Clinton, despite the President's considerable political acumen, was never able to parlay those skills into much clout with the conservative and often hostile Senate Judiciary Committee.

Finally, the president's personal popularity is another element in the political power formula. Chief executives who are well liked by the public and command the respect of opinion makers in the news media, the rank-and-file of their political party, and the leaders of the nation's major interest groups are much more likely to prevail over any forces that seek to thwart their judicial nominees.

In light of this "political clout" variable, how would we assess President Bush's capacity to make an ideological impact on the composition of the federal judiciary? Immediately after the 2000 election, the Senate was evenly divided between the two political parties, but with Vice President Dick Cheney available to break any tie vote the Republicans were in control of this chamber. In principle this would enhance President Bush's potential to obtain confirmation for judicial nominees of like-minded values.

But soon after the election a series of events occurred that greatly clouded this scenario. First, the Democrats regained control of the Senate when Vermont Senator Jim Jeffords unexpectedly left the Republican Party caucus. All legislative action came to a halt for several weeks as the struggle to reorganize the Senate became the major focus of attention. Equally important after Jeffords' defection, control of the Judiciary Committee went to the Democrats. The new committee chair, Senator Patrick Leahy, was in no frame of mind to become a rubber stamp for President Bush's judicial nominees. Then came the terrorist attacks on September 11, and public and legislative attention became riveted on matters of anti-

## THE PRESIDENT IS HAVING ABOUT AN AVERAGE SET OF OPPORTUNITIES TO MAKE AN IDEOLOGICAL IMPACT ON THE FEDERAL BENCH.

Carter's ideological impact on the judiciary? Unfortunately for President Bush, he has had no such luck. It is true that in 2001 the Judicial Conference of the United States recommended to Congress that it create 54 new district and appellate judgeships. It also called for "permanent authorization" of seven temporary district judgeships that had been previously established. However, the politically divided Congress was not too obliging. Congress refused to create any new appellate judgeships; it established only eight new district court judgeships; and it granted permanent authorization to only four temporary positions.<sup>9</sup>

So what is one to conclude about this second predictor of whether President Bush will potentially have a substantial impact on the ideological direction of the federal judiciary—the number of vacancies he can fill? The data suggest that in terms of pure numbers the President is having about an average set of opportunities to make an ideological impact on the federal bench. The real ques-

tion seems to be whether he will be re-elected in 2004. If he is, then approximately a third or more of all active federal judges will bear the W. Bush stamp, and that will be a substantial impact. If his re-election bid is not successful, then the effect of the Bush judges will be much more modest.

find it much easier to secure confirmation. Sometimes when the opposition is in power in the Senate, presidents are forced into a sort of political horse-trading to get their nominees approved. For example, in the summer of 1999 President Clinton was obliged to make a deal with the conservative chairman of the Senate Judiciary Committee, Orrin Hatch. To obtain smooth sailing for at least 10 of Clinton's judicial nominations that were blocked in the Senate, the President agreed to nominate for a federal judgeship a conservative Utah Republican, Ted Stewart, who was vigorously opposed by liberals and environmental groups.

The Senate Judiciary Committee is another roadblock preventing presidents who have the requisite will from placing their chosen men and women on the federal bench. Some presidents have been more adept than others at easing their candidates through the jagged rocks of the Judiciary Committee rapids. Both Presidents Kennedy and Johnson, for example, had to deal with the formidable committee chairman

9. Act of November 2, 2002; 116 Stat.1786.

terrorism legislation and national security.

At the end of President Bush's first two years in office, his scorecard indicated mixed results. On the down side, two of his nominees (Priscilla Owen and Charles Pickering) received negative votes from the Judiciary Committee, and the names of 28 other district and appellate court candidates were returned to the President without any action being taken by the committee. But the news was by no means all bad for the President. None of his judicial nominees was defeated on the floor of the Senate, and 99 individuals, presumably all staunch conservatives, were approved by the Judiciary Committee and the Senate.

More recently, two series of events have produced countervailing effects on the President's political clout in the Senate. On the positive side for President Bush, the Republicans regained control of the Senate in the midterm elections of 2002, and along with it control of the Judiciary Committee, now headed by Bush-friendly Senator Hatch. But on the negative side, his approval ratings by the voters have been slipping steadily. This is attributed to the public's perception that the nation may have been grossly misled on the reasons for going to war in Iraq and also the belief by many Americans that the rebuilding of Iraq is becoming much too costly both in terms of dollars and military casualties. Furthermore, the American economy has continued to be troubled with soaring deficits and relatively high unemployment. Indeed, by the summer of 2004 some opinion polls were suggesting that the President was running behind John Kerry in his bid for a second term.<sup>10</sup>

Although the decline in the President's popular support has not translated into any marked decline in the rate at which his judicial nominees are being approved, neither is there any evidence that the Judiciary Committee and the Senate are rushing to do the President's bidding. As of May 1, 2004, there were 48 vacancies on the district and appellate courts<sup>11</sup>—

not evidence that the President's judicial nominations are at a standstill, but neither does it suggest that the Senate and its Judiciary Committee are giving President Bush rapid action on his judicial nominations.

In the most recent session of Congress, Senate Democrats were successful in blocking a number of the President's appellate court nominations by the use of the filibuster. The Republicans, while having a bare majority in the Senate, did not have the votes necessary to cut off debate and end the filibusters. President Bush retaliated by the use of recess appointments on two occasions—actions that infuriated Democrats. In May of this year a deal of sorts was cut between the White House and the Senate. Under this agreement, the President agreed to no more recess appointments during the remainder of his current term ending January 20, 2005. "In return, Democrats, who had been holding up action on all of Bush's judicial choices since March to protest the recess appointments, agreed to allow votes on 25 mostly noncontroversial nominations to district and appeals posts over the next several weeks."<sup>12</sup>

**The judicial climate the new judges enter.** A final matter affects the capacity of chief executives to secure a federal judiciary that reflects their own political values: the current philosophical orientations of the sitting district and appellate court judges with whom the new appointees would interact. Because federal judges serve lifetime appointments during good behavior, presidents must accept the composition and value structure of the judiciary as it exists when they first take office.

If the existing judiciary already reflects the president's political and legal orientation, the impact of new judicial appointees will be immediate and substantial. However, if new chief executives face a trial and appellate judiciary whose values are radically different from their own, the impact of their subsequent judicial appointments will be weaker and slower to materialize. New judges must respect the controlling legal

precedents and the constitutional interpretations that prevail in the judiciary at the time they enter it, or they risk being overturned by a higher court. Such a reality may limit the capacity of a new set of judges to do their own thing—at least in the short run.

President Reagan's impact on the judicial branch continues to be substantial. By the end of his second term he had appointed an unprecedented 368 federal judges, 50 percent of those on the bench. When he entered the White House, the Supreme Court was already teetering to the right because of Richard Nixon's and Gerald R. Ford's conservative appointments. Although Carter's liberal appointees still had places on the trial and appellate court benches, Reagan found a good many conservative Nixon and Ford judges on the bench when he took office. Thus he has had a major role in shaping the entire federal judiciary in his own conservative image for some time to come. The Bush judges had a much easier time making their impact felt because they entered a judicial realm wherein well over half the judges already professed conservative Republican values.

However, President Clinton's impact on the judiciary has been slower to manifest itself because his judicial nominees entered an arena in which more than 75 percent of the trial and appellate court seats were held by judges appointed by GOP presidents with very conservative orientations. When George W. Bush entered the White House, 51 percent of the federal judges had been appointed by Democratic presidents.

How does this affect President Bush's potential for leaving his ideological mark on the composition of the judiciary? When the President first took office, the partisan back-

10. Poll: *Bush Losing Ground on Iraq*, Houston Chronicle, June 22, 2004, at+ A4.

11. *Judicial Boxscore*, THE THIRD BRANCH 8 (2004).

12. Helen Dewar, *President, Senate Reach Pact on Judicial Nominations*, Washington Post, May 19, 2004, at A21.

grounds of the judges were balanced with almost mathematical precision: 51 percent of the judges on the lower federal bench were appointed by Republican presidents; 49 percent by Democrats. In such a situation, even a slight tilt in one direction can give one party a controlling edge in the judicial decision-making process, and perhaps more importantly, in the composition of the policy-making appeals court panels.

Evidence for this phenomenon is already evident at the end of President Bush's three-and-a-half years in office. By the summer of 2004,

ber of new vacancies, although his clout in getting his nominees through a highly divided Senate, coupled with the President's declining popularity, is a negative factor. Finally, given the narrow balance of the judiciary at the beginning of the President's term between Republicans and Democrats, President Bush continues to be in a critical position to tilt the ideological balance in a decidedly more conservative vein.

### Sources and definitions

Before we examine the data we have collected, we need to say a word

servative" jurists, by contrast, would prefer to limit such rights. For example, in a case in which a government agency wanted to prevent a controversial person from speaking in a public park or at a state university, a liberal judge would be more inclined than a conservative to uphold the right of the would-be speech giver. Or in a case concerning affirmative action in public higher education, a liberal judge would be more likely to take the side of favoring special admissions for minority petitioners.

In the area of government regulation of the economy, liberal judges would probably uphold legislation that benefited working people or the economic underdog. Thus, if the secretary of labor sought an injunction against an employer for paying less than the minimum wage, a liberal judge would be more disposed to endorse the labor secretary's arguments, whereas a conservative judge would tend to side with business, especially big business.

Another broad category of cases often studied by judicial scholars is criminal justice. Liberal judges are, in general, more sympathetic to the motions made by criminal defendants. For instance, in a case in which the accused claimed to have been coerced by the government to make an illegal confession, liberal judges would be more likely than their conservative counterparts to agree that the government had acted improperly.

### What the data reveal

Figure 1 compares the total liberalism scores of the judicial cohorts appointed by eight of the most recent presidents, three Democrats and five Republicans. The data indicate that 36 percent of the decisions of the George W. Bush jurists have been decided in a liberal direction. These numbers are certainly more conservative than the liberal scores of Presidents Johnson, Carter, and Clinton, which were respectively 52, 52, and 45. Still, they can hardly be termed "extreme" since they are quite in line with the numbers of his GOP predecessors Nixon, Reagan,

## THE DATA INDICATE THAT 36 PERCENT OF THE DECISIONS OF THE GEORGE W. BUSH JURISTS HAVE BEEN DECIDED IN A LIBERAL DIRECTION.

Republican appointees control a solid majority of the 13 circuit courts in the country. Assuming a normal attrition rate for judges leaving the bench, it is likely that by the end of his first term in office all of the 13 circuits will have a majority of Republican judges. This will greatly enhance President Bush's potential for leaving a significant ideological mark on the composition of the federal judiciary.

In sum, the overall evidence suggests that President Bush should be able to continue to move the federal judiciary in a more conservative direction. He has indicated a clear desire to appoint more conservative jurists. He is filling an average num-

ber about its source, and offer some working definitions of the terms "conservative" and "liberal." The data on trial court decisions were taken from a database consisting of more than 70,000 opinions published in the *Federal Supplement* by more than 1,700 judges from 1933 through the spring of 2004. We coded 410 decisions handed down by judges appointed by President George W. Bush.<sup>13</sup> Only those cases that fit easily into one of 27 case types and contained a clear underlying liberal-conservative dimension were used. This included cases such as state and federal habeas corpus pleas, labor-management disputes, questions involving the right to privacy, and environmental protection cases, among others. Excluded were cases involving patents, admiralty disputes, and land condemnation hearings. The number of cases not selected was about the same as the number included.

In the realm of civil rights and civil liberties, "liberal" judges would generally take a broadening position; that is, they would seek in their rulings to extend these freedoms. "Con-

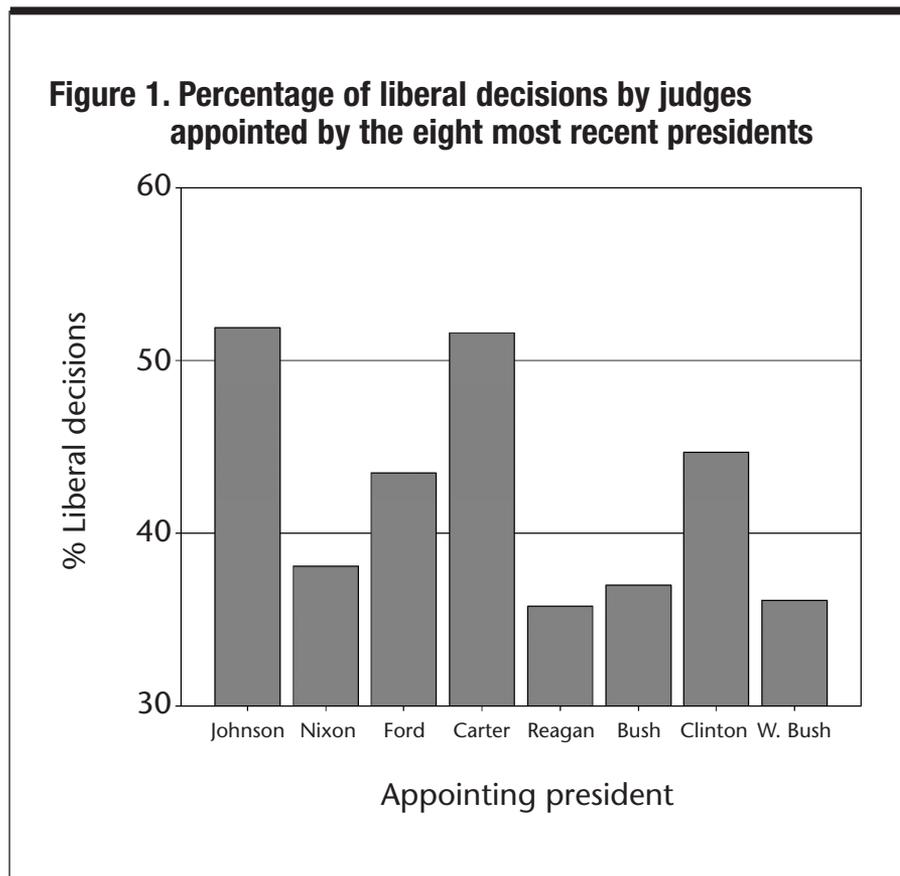
13. These rulings were handed down in three key issue areas: Civil liberties & rights n = 208; Criminal justice n = 84; Labor and economic regulation n = 118. Though we only coded district court rulings, prior research suggests that the behavior by jurists at this level of the judiciary is comparable to the behavior of judges appointed by the same president to the courts of appeals. See Ronald Stidham, Robert A. Carp, and Donald R. Songer, *The voting behavior of President Clinton's judicial appointees*, 80 JUDICATURE 16-20 (1996); and Robert A. Carp, Donald Songer, C.K. Rowland, Ronald Stidham, and Lisa Richey-Tracy, *The voting behavior of judges appointed by President Bush*, 76 JUDICATURE 298-302 (1993).

and Bush, Sr., which were respectively 38, 36, and 37. George W. Bush's appointees are very conservative, but at least in the aggregate they are no more conservative than recent Republican appointees.<sup>14</sup>

Let us turn up our examining microscope a notch and compare the voting patterns of Bush's jurists with that of other modern presidents on the three composite variables of civil rights and liberties, criminal justice, and labor and economic regulation. The first column in Table 1 focuses on the dimension of civil rights and liberties; that is, it examines judges' voting behavior on issues such as abortion, freedom of speech, the right to privacy, charges of racial minorities, and so on. It is here that we find the best evidence for some meaningful ideological screening by President Bush's judicial appointment staff. Only 28 percent of the Bush cohort voted on the liberal side of issues pertaining to Bill of Rights and civil rights matters, thus giving the President the lowest score of any modern chief executive. With this score President Bush's trial judges are some 14 points more conservative than the appointees of President Clinton, but they are also more right of center than the judges appointed by Presidents Nixon, Ford, Reagan, and Bush, Sr.

This should come as little surprise since the major controversies surrounding President Bush's judicial nominees have focused on their stances on issues such as affirmative action, gay rights, abortion, establishment of religion, and the right to privacy (all of which are included in our civil rights and liberties composite variable). Furthermore, the President's electoral base has clearly centered on these same issues, and there is considerable evidence to suggest that the President has sought to please and strengthen this base through his judicial appointments.

Few observers, friend or foe, have commented on Bush's nominees in terms of their possible effect on judicial issues pertaining to labor-management disputes, the power of the bureaucracy, or major curtailments



in the rights of routine criminal defendants.

In sum, the very areas in which we would expect meaningful ideological screening of judicial nominees, namely on civil rights and liberties issues, is the same realm in which that screening is manifesting itself in the decision making of the Bush cohort.

The second column in Table 1 provides data on judges' voting on criminal justice issues, such as habeas corpus pleas, motions made before and during a criminal trial, and forfeiture of property in a criminal case. In this realm the voting record of the Bush team seems somewhat more liberal than one might anticipate. Some 33 percent of his cohort's published decisions have favored the criminal defendant. This is certainly less than the number of 39 percent for President Clinton's judicial cohort, but it is noticeably higher than the averages for previous modern Republican presidents. (Only 25 percent of Reagan-cohort

decisions favored the criminal defendant, and only 30 percent of Bush Sr.'s judges' decisions were liberal in this realm.)

The comparatively high liberalism score for Bush's judges is something of an anomaly to us, and we can offer a possible explanation. Our numbers in this area are still rather small, which makes generalizations more tentative, but as more and more conservative Bush judges are appointed, the overall numbers may move in a more conservative direction. Indeed, as our "n" has been increasing over the past several months, the liberalism score of the Bush judges on

14. It might be argued that the relationship between appointing president and the voting patterns of his appointees would be comparatively weak for district judges because of the phenomenon of "senatorial courtesy," which in principle acts to restrict the president's appointing power. On the other hand one might argue that the appointment effects would be greater for circuit court appointments for which "senatorial courtesy" do not apply. However, the reality is that studies over the years have demonstrated that presidential effects at the district court level have been quite robust. For example, see Carp et al., *supra* n. 3, at 157-168 and 289-294.

**Table 1. Percentage of liberal decisions in three case types**

Appointing president	Civil liberties & rights	Criminal justice	Labor & economic regulation	All cases
Johnson	58.1	36.4	63.1	51.9
Nixon	37.9	26.9	48.5	38.1
Ford	40.3	34.9	52.5	43.5
Carter	51.3	38.4	61.3	51.6
Reagan	32.3	25.3	48.7	35.8
Bush	32.2	29.9	50.6	37.0
Clinton	42.1	39.0	54.3	44.7
W. Bush	27.9	33.3	52.5	36.1

criminal justice issues has been declining. This may indicate that the initial batch of Bush appointees were somewhat more moderate in this realm but that phenomenon is being mollified as more “typical” conservative Bush appointees come on line.

Table 1’s third column contains data on the judges’ voting pattern in the realm of labor and economic regulation. (A typical case might be that of a labor union versus a company, a worker alleging a violation of the Fair Labor Standards Act, or a petitioner challenging the right of a government regulator to circumscribe his activity.) On this composite variable 53 percent of the decisions of the Bush appointees have been on the liberal side. This puts the Bush team only one percentage point behind the score of 54 percent for Clinton’s judges and some 4 and 2 points more liberal than the decisions of Presidents Reagan and Bush, Sr., respectively. What are we to make of these findings?

First, there should be little surprise that the Bush cohort is not as dramatically conservative in the realm of labor and economic regulation as it is in the area of civil rights and liberties. In his campaign for the presidency, George Bush made no

serious calls for cutting back the power of organized labor unions or for a drastic curtailing of the power of the federal government and its regulators. During his presidency, there have been no major initiatives against organized labor, and furthermore the size of the federal government and its deficits have soared. Thus there would be little reason to predict that the Bush administration has been screening its judicial nominees for particularly conservative values when it comes to labor and economic issues.

Second, what is notable about the labor and economic regulation scores of all appointees in the past quarter century is how comparatively similar they are. This is part of a larger political-judicial phenomenon that we have discussed elsewhere: since the end of the New Deal, and particularly since the 1950s, the major political battles between the presidential candidates, in Congress, and within the Supreme Court have been over Bill of Rights and 14<sup>th</sup> Amendment issues, not over matters of labor and economic regulation.<sup>15</sup>

Moreover, in recent decades Congress has legislated, often with precision, in the areas of economic regulation and labor relations, and this has further restricted the discretion of judges in these fields.”<sup>16</sup> In sum, the serious political and judicial battles of recent decades have not been fought in the labor and economic arenas, and relatively clear guidelines provided by Congress and

the courts have eroded whatever wiggle room there might have been for Republicans to be inordinately conservative and Democrats to be correspondingly liberal. As a result, the moderate Bush-judges scores in Table 1 is just a manifestation of this overall phenomenon.

### Traditional v. non-traditional

One final subject of interest is to compare the decision-making patterns of Bush’s traditional (that is, white male) appointees with that of his non-traditional jurists (women and minorities). Such comparisons are increasingly meaningful because, as noted earlier, President Bush has appointed the largest number of women and minorities to the federal bench of any Republican president (as did Clinton for the Democrats). Conventional wisdom often suggests that women and minorities might be somewhat more liberal in their voting patterns than their white male counterparts (although evidence for this tends to be inconclusive).<sup>17</sup> This is because historically they have often been subjected to racial and gender discrimination by law and also in the workplace in terms of equal pay for equal work and promotions to managerial positions.

Table 2 provides some modest evidence for the above assertion: 35 percent of the overall decisions of Bush’s “traditional” judges have been in a liberal direction, whereas 38 percent of the rulings handed down by his female and minority jurists have been

15. See *id.* at 314-317.

16. *Id.* at 314.

17. See Robert A. Carp, Kenneth L. Manning, and Ronald Stidham, *President Clinton’s district judges: ‘Extreme liberals’ or just plain moderates?* 84 JUDICATURE 284-288 (2001); and Carp et al., *supra* n. 3, at 106-107.

liberal. However, we are cautious in our conclusions here because the differences are substantively not very great nor are they at levels of statistical significance that would allow us to have more confidence in the findings. We must await the accumulation of a larger number of decisions in our database before we can offer any conclusions about this phenomenon with greater certainty.

### The final imprint?

This article has explored the ideological impact that President George W. Bush has had so far in the decision-making patterns of the trial court judiciary. To perform this task, we sought to determine the degree to which he and his appointment team have possessed a strong commitment to make ideologically based appointments, the number of vacancies to be filled, the extent of the president's political clout, and the ideological climate into which his judicial cohort is entering.

Our estimation was that President Bush should be having a moderately strong impact on the ideological orientation of the federal judiciary, particularly in the realm of civil rights and liberties, since it is Bill of Rights and equality issues that have defined much of the President's domestic political and judicial agenda and it is in that same area that judges still have maximum room for honest differences (as opposed to the more settled area of labor and economic regulation). The quantitative data from our investigation lend support to these hypotheses.

First, in terms of overall voting patterns, President Bush's judges are among the most conservative on

**Table 2. Percentage of liberal decisions by traditional and non-traditional judges appointed by George W. Bush\***

	% liberal decisions (n)	% conservative decisions (n)
Traditional	34.7% (83)	65.3% (156)
Non-traditional	38.0% (65)	62.0% (106)

Odds ratio (a) = .868; Chi square = .466 (p = .281)

\*"Non-traditional" judges are women and/or members of an ethnic minority group. "Traditional" jurists are white males.

record for all modern administrations, being on a par with Ronald Reagan's judicial team. Furthermore, in the realm of civil rights and liberties the Bush jurists are clearly the most conservative on record, being a full 4 points more conservative than even the trial judges appointed by Presidents Reagan or Bush, Sr. Finally, in accordance with "conventional wisdom," President Bush's non-traditional jurists are deciding cases in a somewhat more liberal manner than the white males who have been selected for judicial service.

The record of the past four years suggests that, should George W. Bush win reelection to a second term, the final imprint that he may leave upon the judiciary after eight years would consist of a sharp turn to the right. On the other hand, should Senator John Kerry win in Novem-

ber, it is likely that his administration would pursue a different ideological direction, and the effect that George W. Bush may ultimately have could be limited. There is little question, therefore, that the election in November will have a significant impact upon the ideological direction of the federal judiciary for years to come. ☞

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