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A FIRST TERM ASSESSMENT

THE IDEOLOGY OF BARACK OBAMA'S DISTRICT COURT APPOINTEES



The authors analyze the decisional patterns of the federal district judges appointed by President Obama since 2009. Among other things, they find that while the Obama cohort is somewhat more liberal than the appointees of recent GOP presidents, still it is not as liberal as many of his critics have argued. Indeed the Obama trial judges appear to be deciding cases as moderate, mainstream Democrats.

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What is the ideological direction of the judges whom President Barack Obama has appointed during his four-and-a-half years in office? There is no doubt that his appointees to the U.S. Supreme Court, Justices Sonia Sotomayor and Elena Kagan, are establishing themselves as moderately liberal jurists. However, less empirical information has been available about the voting patterns of his appointees to the lower federal judiciary. Until now, virtually all of the information about the decisional patterns of the Obama cohort has

been anecdotal in nature.

Some critics of the president, who are typically Republicans, have suggested that Obama's judicial appointees are extreme liberals who are hostile to the interests of private property and to those who wish to be free of most forms of governmental restraint, and that the jurists are slavishly following the wishes of those who comprise the Democratic electorate—that is, racial minorities, gays, labor union members, and so on.¹ For example, in his run for the Republican nomination, Texas Gov-

ernor Rick Perry promised that, if elected, he would appoint only U.S. Supreme Court and federal judges who will "reject the idea [that] our Founding Fathers inserted a right to gay marriage into our Constitution."²

1. See, for example, a comment by Sen. Orrin Hatch (R-Utah) as quoted by Thomas Burr and Matt Canham, *Hatch: Sotomayor 'Extremely Liberal,' Though He and Bennett Voted for Her in 1998*, The Salt Lake Tribune, May 26, 2009, available at http://www.sltrib.com/news/ci_12450905.

2. Will Weissert, *Perry Signs Pledge on Anti-Gay Marriage Amendment*, Associated Press, available at <http://news.yahoo.com/perry-signs-pledge-anti-gay-marriage-amendment-161046437.html>.

And former House Speaker Newt Gingrich said in December 2011 that as president he would abolish whole courts in order to be rid of judges whose decisions he feels are out of step with the country. Gingrich also suggested that "the president could send federal law enforcement authorities to arrest judges who make controversial rulings in order to compel them to justify their decisions before congressional hearings."³ While no one would contend that the views of these two Republicans are characteristic of all members of the GOP, still it is probably fair to say that most Republicans regard Obama's jurists as too liberal and as far out of center from America's political mainstream.

Democrats, on the other hand, seem satisfied with the Obama appointees to the bench, although the president is often criticized for being slow to make judicial appointments and for not giving greater priority to nominating those with stronger liberal credentials. As Philip Rucker noted in *The Washington Post*, "During Obama's first term, judicial nominations often fell by the wayside in the face of the economic crisis and other policy priorities at the White House. Many liberal allies complained that the president did little to champion nominees once they were named."⁴

So which side is correct—conservatives who contend that Obama's appointees are leading the charge down the proverbial "slippery slopes of socialism" or their Democratic counterparts who seem to regard

the Obama cohort as slowly trudging down an ideological path that is moderately left of center? This article seeks to shed light on this matter by addressing two basic questions: What should we have anticipated of the Obama administration's potential to have an ideological impact on the federal courts? What do the empirical data tell us about the way the Obama cohort has been deciding cases during the past four and a half years?

Judicial scholars have identified four general factors that determine whether chief executives can obtain a judiciary that is sympathetic to their political values and attitudes: 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.⁵

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 the commitment to doing 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 those same factors as important for trial and appellate judges. Other presidents may discount ideologically based appointments; they 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 a candidate's loyalty to the president ahead of the candidate's overall political orientation. On the other hand, Ronald Reagan, Lyndon Johnson, and George W. Bush are examples of presidents who took great pains to select judges who shared their ideolo-

logical beliefs. What do we know about Barack Obama's resolve in making ideologically based judicial appointments?

When Obama first campaigned for the presidency, he placed a lot of emphasis on the word "change," although he was short on the specifics of that vague term. Change might suggest that the new president would seek to chart a very different course than his predecessor and that Obama would wish to appoint an unabashedly liberal judiciary to counterbalance George W. Bush's staunchly conservative approach. However, President Obama's nominees so far have not generated universal antipathy from all persons of a right-leaning persuasion. For example, White House Counsel Kathryn Ruemmler observed that there has been "very, very little substantive opposition to any of the president's judicial nominees."⁶ She pointed to the case of Robert E. Bacharach, a U.S. trial judge from Oklahoma whom Obama had selected for a seat on the U.S. Court of Appeals for the Tenth Circuit. Bacharach's home-state senators, James Inhofe and Tom Coburn, both Republicans, supported him. "I like the guy," Inhofe told a local reporter. "I told him that it's not very often the White House and I agree on anything."⁷ (Still, Senate Republicans filibustered the nomination, giving no specific reason other than a vow to block all of Obama's appellate court nominees because 2012 was a presidential election year.)

Somewhat similar dynamics occurred regarding Obama's Supreme Court nominations. In May 2009, the president selected Sonia Sotomayor as his first Supreme Court nominee to fill the vacancy that occurred when Justice David Souter announced he would retire from the bench. Sotomayor, who was initially selected for a federal judgeship by President George H. W. Bush, was the first Hispanic nominated to the Supreme Court and would become only the third woman to serve there. Although Sotomayor was widely recognized as a loyal Democrat, a review of her judicial and legal record

3. Amy Gardner and Matt Delong, *Newt Gingrich's Assault on 'Activist Judges' Draws Criticism, Even from Right*, *The Washington Post*, Dec. 17, 2011, available at http://articles.washingtonpost.com/2011-12-17/politics/35286817_1_activist-judges-bad-judges-newt-gingrich.

4. Philip Rucker, *Obama Pushing to Diversify Federal Judiciary Amid GOP Delays*, *The Washington Post*, Mar. 3, 2013, available at www.washingtonpost.com/politics/obama-pushing-to-diversify-federal-judiciaryamid-gop-delays/2013/03/03/16f7d206-7aab-11e2-9a75-dab0201670da_print.html.

5. For a summary of this literature, see Robert A. Carp, Ronald Stidham, and Kenneth L. Manning, *JUDICIAL PROCESS IN AMERICA*, Chapter 7 (Washington, D.C.: CQ Press 2014).

6. *Supra* n. 3.

7. *Supra* n. 4.

turned up no real instances of liberal ideological extremism. Nevertheless, many Republicans criticized Sotomayor for comments she had made in some past speeches about a “wise Latina” being better able to reach a conclusion “than a white male who hadn’t lived that life.”⁸ These attacks yielded little political fruit for the GOP, however. Given Sotomayor’s solid qualifications and her ethically irreproachable background, Republicans were unable to mount a serious challenge to her nomination, and she was confirmed easily.⁹

About nine months later President Obama was presented with a second Supreme Court opening with the retirement of Justice John Paul Stevens. And again the president chose to downplay ideology and nominate a mainstream candidate for this High Court office. As one seasoned commentator quipped, “President Obama’s announcement of Elena Kagan was perfectly boring—and that’s what makes her such a bold choice.”¹⁰ This commentator then added: “Nominating Kagan...required some courage. Obama defied those populists who said he should reach beyond the Eastern elite for somebody with more ‘real world’ experience. He defied liberal interest groups—his own base—that favored a more ideological liberal....Instead, he chose brain over bio, sending to the Senate neither a compelling American story nor a liberal warrior but a superbly skilled, non-ideological builder of bridges.”¹¹ On August 5, 2010, the Senate confirmed Kagan’s appointment by a vote of 63-37.

Let’s return to the original question: Does the evidence suggest that President Obama is trying to move the Courts’ center of gravity in a liberal direction? To be sure, Obama’s judges have indicated clear tendencies to be more liberal than those appointed by Republican presidents, and in that way the answer appears to be “yes.” However, Obama’s judiciary is certainly well within the mainstream of U.S. political thought. There is little evidence for the proposition that Obama has sought to appoint rigid ideologues to the bench.

In fact, the indication is that the Obama administration has generally tried to avoid acrimonious political battles by appointing mainstream Democrats and eschewing nominees with especially controversial pasts. Furthermore, the elevation of Sotomayor to become the first Latin American to serve on the Supreme Court and the nomination of Kagan to increase the number of women on the Court suggest that the Obama administration may be following in the footsteps of George W. Bush and Bill Clinton in seeking to increase the diversity of the judiciary. As White House Counsel Kathryn Ruemmler put it, “Diversity in and of itself is a thing that is strengthening the judicial system. It enhances the bench and the performance of the bench and the quality of the discussion...to have different perspectives, different life experiences, different professional experiences, coming from a different station in life, if you will.”¹² But as George W. Bush demonstrated via his diverse judicial appointments, a commitment to diversity is not synonymous with a commitment to making strong ideologically based liberal 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, 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. Research has shown that federal judicial posts tend to be created during periods when one political party exercises outsized control in Washington, D.C.¹³ Thus the number of vacancies that a president can fill—which is a function of politics, fate, and the size of judicial workloads—is another variable that helps determine a chief executive’s impact on the composition of the federal judiciary.

The Clinton administration provides a good case in point. President George H. W. Bush left his successor, President Bill Clinton, with a whopping 100 lower court vacancies—14 percent of the total. However, although Clinton inherited a large number of unfilled judicial slots, his Republican Congresses were loath to enact any type of omnibus judgeship bill that would have enhanced his capacity to pack the judiciary. As a result, Clinton was given an average number of vacancies to fill during the entire course of his two terms in office. When George W. Bush took the reins of power in early 2001, he was presented with 29 courts of appeals and 62 district court vacancies.

In contrast, when President Obama assumed office in 2009, he inherited 59 judicial vacancies—44 at the district court level and 15 in the courts of appeals. This number was not as large as that provided to

8. Carolina A. Miranda, *Just What Is a ‘Wise Latina,’ Anyway?*, Time, July 14, 2009, available at <http://content.time.com/time/politics/article/0,8599,1910403,00.html>.

9. Fox News, *Senate Confirms Sotomayor to U.S. Supreme Court*, Aug. 6, 2009.

10. Dana Milbank, *In Kagan, Obama Picks a Nominee, Not a Fight*, The Washington Post, May 11, 2010, at A-2.

11. *Supra* n. 9. Also, for an excellent discussion of President Obama’s quest for diversity on the federal bench, see Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, *Obama’s judiciary at midterm: the confirmation drama continues*, 94 JUDICATURE 262-304 (2011).

12. *Supra* n. 3.

13. Jon R. Bond, *The Politics of Court Structure: The Addition of New Federal Judges*, 2 LAW POL. Q. 182, 183, 187 (1980).

his two predecessors, but 59 open judicial positions did give Obama the opportunity to make a good start in filling the bench with judges who shared his philosophy.

Despite this initial opportunity for the president, the Obama White House has been slow to fill many judicial vacancies and has been subjected to much criticism for this lack of enthusiasm and activity. Two court watchers at *The Washington Post* noted in 2011, "Federal judges have been retiring at a rate of one per week this year, driving up vacancies that have nearly doubled since President Obama took office. The departures are increasing workloads dramatically and delaying trials in some of the nation's courts." And later they observed, "Since Obama took office, federal judicial vacancies have risen steadily as dozens of judges have left without being replaced by presidential nominees." What's more, the languid pace of selecting judges could not all be blamed on the hectic, early days of a new administration facing many daunting challenges. The slow rate of nominations continued into Obama's second term. On April 10, 2013, *The New York Times* observed that "Mr. Obama has been slow to nominate judges to fill the vacancies on the [D.C. Court of Appeals]."¹⁴ The newspaper noted that, at that time, the D.C. Court of Appeals held four vacant judicial positions out of a total of 11 and that Obama had only nominated two people since 2009 to fill the seats. Between extraordinary Republican delaying tactics, unusually slow White House nominations

and a dysfunctional Senate confirmation system, there seems to now be a "perfect storm" with regards to delay in filling judicial vacancies.¹⁵

In 2012, the final year of Obama's first term, the president faced particularly stiff opposition from Republicans who sought to block his judicial nominations by invoking the so-called "Thurmond Rule." This informal Senate tradition, which emerged during the 1960s, dictates that senators will generally not approve lifetime appointments during the final months of a lame-duck president's term of office. Republicans blocked some of President Obama's nominees in July 2012 by invoking the Thurmond Rule. This was some four months before Election Day and almost seven months before the end of Obama's first term in office. In doing so, Republicans effectively ground the judicial nomination process to a halt for much of 2012. By May 1, 2013, there were 84 vacant seats out of 874 on the federal district and appellate courts, continuing one of the longest periods of high-vacancy rates in modern times.

What about the possibility of Congress passing a new omnibus judge 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 President Carter's ideological impact on the judiciary? Unfortunately for President Obama, he has had no such luck. Measures were introduced in Congress between 2009 and early 2013 to create a few new emergency judicial positions. But between the budget-cutting mentality that prevailed in Congress and the bitter political divisions that characterized the times, Congress has shown no indication that it would offer the president an omnibus judges bill that would serve to increase his impact on the federal judiciary.¹⁶ Republicans in the Senate have been loath to approve Obama's nominees to fill existing judicial positions; the idea that the president would be given a significant number of additional new judicial slots to fill is, at this point,

inconceivable given the intense partisanship that prevails in the current political environment.

So what are we to conclude about this second predictor of whether President Obama 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. However, due to extraordinary obstructionism by Republicans in the Senate and a slow nomination process by the president's team, the Obama administration was on pace to install a below-average number of judges on the bench. Through his first term, Obama appointed some 171 lifetime lower court judges. This number is not small, but it would place him significantly below the 205 judges appointed by his predecessor, George W. Bush, during his first term in office. (By May 1, 2013, Obama's lower court appointees numbered 185.) It does mean, however, that after one term in office about one in five federal judges bear the Obama stamp—a factor of some significance. *The New York Times* stated it succinctly when it noted in August 2012 that "President Obama is set to end his [first] term with dozens fewer lower court appointments than both Presidents Bill Clinton and George W. Bush achieved in their first four years, and probably with less of a lasting ideological imprint on the judiciary than many liberals had hoped for and conservatives had feared."¹⁷ Since Obama won a second term, his final influence, of course, will be much greater. But at this point the data suggest that at least in terms of sheer numbers, Obama's ultimate imprint on the federal bench may turn out to be slightly more limited than that of other recent two-term presidents.

The President's Political Clout

Another factor determining whether the president can get a sympathetic federal judiciary is the scope and

14. Jeremy W. Peters, *Easy Hearing for Obama's Choice for Court*, N.Y. Times, Apr. 11, 2013, at A-14.

15. Jerry Markon and Shailagh Murry, *Federal Judicial Vacancies Reaching Crisis Point*, *The Washington Post*, Feb. 8, 2011, available at www.washingtonpost.com/national/vacancies-on-federal-bench-hit-crisispoint/2011/02/07/ABzpkZF_story.html.

16. Gary Martin, *Law and Disorder: Vacancies, Backlogs Plague Federal Judiciary as Partisan Tied Cause Delays in Filling Emergency Openings across the Nation*, *Houston Chronicle*, Mar. 3, 2013, at A-33.

17. Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. Times, Aug. 12, 2012, available at <http://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html>.

degree of presidential skill in overcoming any political obstacles. The key stumbling block is often the U.S. Senate. If the Senate is controlled by the president's political party, the White House will find it much easier to secure confirmation than if opposition forces are in control, but this is hardly a given: Even though the Republicans were firmly in control of the Senate in 2006, the George W. Bush White House was obliged to negotiate a three-judge nomination deal with the two Democratic senators from Michigan, Carl Levin and Debbie Stabenow, in order to obtain confirmation of some of Bush's judges.¹⁸ More expected is the case in which the opposition is in power in the Senate and presidents have little choice but to engage in a sort of political horse-trading to get their nominees approved. For example, in the summer of 1999 President Clinton found it expedient to make a deal with Sen. Orrin Hatch (R-Utah) to nominate Ted Stewart, a conservative Utah Republican who was backed by Hatch but vigorously opposed by liberals and environmental groups, in order to ensure smooth sailing for at least 10 of Clinton's judicial nominations that had been blocked in the Senate.¹⁹

What about President Obama's political clout? Although the president was elected by a clear electoral majority in 2008—and reelected by a decisive margin in 2012—his “glory days” have been limited. The high approval numbers given to the president during his early days in office have fallen closer to the 50 percent level and have hovered around that point for the past four years. (As of May 1, 2013, the President's approval rating stood at 51 percent.)²⁰

It is true that President Obama was able to get a number of pieces of legislation passed during his first two years in office, including his landmark health care reform law, but this was arguably due just as much to skillfulness by the Democratic leadership in Congress and a clear willingness by Obama to compromise over key points as it was to sheer political clout. Furthermore,



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the Obama legislative agenda ground to a virtual halt after the 2010 elections, when Republicans made big gains and recaptured control of the House of Representatives.

In terms of Obama's success vis-à-vis the Senate judicial confirmation process, the president has had some modest success. As Goldman, Slotnick, and Schiavoni observed, “It is a fair generalization to note that the Senate Judiciary Committee facets of the processes...offered, at least on the surface, a picture of relative calm. The Committee did its job, with the greatest obstruction and delay of Obama nominees occurring at the floor stages of confirmation. Behind such a generalization are layers of nuance that shaped both committee and floor activity and, at times, the lack thereof.”²¹ These scholars further noted that this “surface cooperation” was somewhat deceptive: “It would be a vast overstatement to suggest that the minority members of the committee simply ‘went along’ with the administration's picks. To the contrary, there was a pattern of regularized and systematic opposition that had an impact on the processing of virtually all Obama nominees, but that impact could be seen, in most instances, in processing delay, not definitive and resolute obstruction save for a handful of...nominees.”²² This “delaying action” on the part of the opponents to Obama's judicial appointees can be seen by examining the amount of time his nominees were required to wait before getting a vote on the Senate floor compared with that of

his predecessors. Clinton nominees had to wait an average of 30 days for a floor vote, and it took 54 days under the administration of George W. Bush. By contrast, Obama's nominees are taking a whopping 139 days before they are voted on.²³

What about the president's success in obtaining Senate confirmation for his judicial nominees? Here there has been quite a bit of success, some notable failures, and plenty of continual delays. Republicans have used a variety of tactics to slow floor action in the Senate. For example, there have been constant refusals of unanimous consent to floor votes on nominations; extensive use of holds on nominees by individual senators; utilization of the threat of filibusters; and the necessity for cloture votes to bring a nominee to the floor.²⁴ In

18. Sam Hananel, *Judicial Nomination Held Up over Same-Sex Ceremony*, Detroit Free Press, Oct. 6, 2006, available at http://www.sddt.com/News/article.cfm?SourceCode=200610061h#UqX_mRDuJE.

19. Neil A. Lewis, *Clinton Critic Is Key to Deal to End Tie-up on Judgeships*, N.Y. Times, July 3, 1999, available at <http://www.nytimes.com/1999/07/03/us/clinton-critic-is-key-to-deal-to-end-tie-up-on-judgeships.html>.

20. Rasmussen Reports, *Daily Presidential Tracking Poll*, available at http://www.rasmussenreports.com/public_content/politics/obama_administration/daily_presidential_tracking_poll.

21. Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 280 (2011).

22. *Supra* n. 18.

23. Matt Viser, *As Obama, Senate Collide, Courts Caught Short*, The Boston Globe, Mar. 10, 2013, available at <http://www.bostonglobe.com/news/nation/2013/03/10/obama-senate-collide-gridlock-hits-federal-courts/zQVtUmOS-ol9sHre7OuX3MP/story.html>.

24. *Supra* n. 18, at 287.

April 2013, Senate Judiciary Committee Chairman Patrick Leahy laid much of the blame for the delays in Senate confirmation at the feet of Republican senators. He noted that "of the 35 judicial emergency vacancies, 24 are in states with Republican senators. In fact, close to half of all judicial emergency vacancies are in just three states, each of which is represented by two Republican senators."²⁵ The effect of this slow pace of confirmation is seen when one compares President Obama's judicial confirmation success with that of his predecessor, George W. Bush. As of April 4 of their fifth year in office, 85 percent of President Obama's appointees to district courts had been approved by the Senate, whereas at this same time for President Bush, the Senate had approved 96 percent of his nominees to U.S. trial courts.²⁶

The Obama administration has had some high-profile judicial nominees blocked outright by Republican filibusters. Goodwin Liu, who was tapped in 2010 for a seat on the Ninth Circuit Court of Appeals, withdrew his name after Senate Republicans opposed a vote on his confirmation in 2011. Denied a place on the federal bench, Liu was subsequently named by Governor Jerry Brown to fill a position on the California State Supreme Court. In 2013, a similar parliamentary fate in the U.S. Senate befell Caitlin Halligan, who was selected by President Obama to fill a vacancy on the D.C. Court of Appeals. Halligan withdrew her name from consideration after the Senate GOP twice blocked her nomination from coming up for a vote. Both Liu and Halligan were considered to be very accomplished and qualified nominees but were opposed by Republicans who argued that the nominees were too ideological.

So what is one to conclude about the impact of the president's political clout in terms of his success in

shaping the judiciary with his court appointments? Though the president has seen a moderate but stable level of support by the American public, he has been able to appoint a significant number of lower court judges, along with two well-regarded Supreme Court justices, though this has come at the expense of significant delay. Thus, if the Obama cohort is voting in a generally liberal direction on most issues, this third variable—the president's political clout—should lend some weight to the president's capacity to make an ideological impact on the judiciary.

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 philosophical orientations of the current 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 take office. If the existing judiciary already reflects the president's political and legal orientations, the impact of the new judicial appointees will be immediate and substantial. However, if the new chief executive faces a trial and appellate judiciary whose values are radically different from his own, the impact of the president's 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 risk being overruled by a higher court. That reality may limit the capacity of a new set of judges to go their own way—at least in the short term.

Consider, for example, President Reagan's impact on the judicial branch. By the end of his second term, he had appointed an unprecedented 368 lifetime lower court federal judges to courts of general

jurisdiction, 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 and Gerald R. Ford's conservative appointments. Although Jimmy Carter's liberal appointees were still serving on trial and appellate court benches, Reagan found a good many conservative judges from Nixon and Ford on the bench when he took office. Thus, he had a major role in shaping the entire federal judiciary in his own conservative image for some time to come. George H. W. Bush's judges had a much easier time making their impact felt, because they entered a judicial realm wherein well over half of the judges already possessed conservative Republican values.

On the other hand, President Clinton's impact on the judiciary was slower in manifesting itself; his judicial nominees entered an arena in which appointees of GOP presidents with strong conservative orientations held more than 75 percent of the trial and appellate court judgeships. When George W. Bush entered the White House, Democratic presidents had appointed 51 percent of the federal judges. At the end of his eight years in office, roughly 60 percent of lower federal judges bore the Republican label. Thus, when Obama assumed office, the judiciary was clearly dominated by those who did not share his mainstream Democratic values.

What is the scorecard in the spring of 2013 as Obama continues in his fifth year of presidency? Of the 793 active judges sitting on the bench as of May 1, 2013, Democrats had appointed 389 compared to the 404 appointed by Republicans. This is an almost perfect 50/50 split between the two parties. If Obama holds with past practice and continues to appoint judges who are selected overwhelmingly from the ranks of Democrats, by the time he concludes his second term in office we would anticipate that a majority (though not an overwhelming one) of the judges on the federal bench would have been appointed by Democrats.

25. Mitch McConnell, *Senate GOP Has Treated Obama's Judicial Nominees 'Very Fairly'*, Huff Post, Apr. 17, 2013, available at http://www.huffingtonpost.com/2013/04/09/obamas-judicial-nominees_n_3046778.html.

26. *Supra* n. 22.

This is a fact of significant consequence; it means that the climate that the Obama judges are entering is one that is receptive to them and that they stand to have a modest but real ideological impact.

Sources and Definitions

Let us now turn to a quantitative analysis of the decision making by Obama judges. Before we examine the data we have collected, we need to say a word about the data's source and offer working definitions of the terms *conservative* and *liberal*. The data on trial courts were taken from a database consisting of more than 105,000 opinions published in the *Federal Supplement* from 1933 through early 2012. Included in this overall data set were 403 decisions handed down by judges appointed by President Obama.²⁷ Only cases that easily fit into one of 30 case types and that 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. Excluded were cases involving matters that do not exhibit a clear ideological dimension such as patent cases, 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 tended to take a broadening position; that is, they sought to extend those freedoms in their rulings. By contrast, *conservative* judges preferred to limit such rights. For example, in a case in which a governmental agency wanted to prevent a controversial person from speaking in a public park or at a state university, liberal judges would be more inclined than their conservative counterparts to uphold the right of the would-be speaker. Or, in a case concerning affirmative action in public higher education, a liberal judge would be more likely to take the side 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. In general, liberal judges are 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 10 of the most recent presidents—five Democrats and five Republicans. The data indicate that 49 percent of the decisions of the Obama jurists have been decided in a liberal direction. These numbers indicate that Obama's cohort is roughly in the middle of those appointees of recent Democratic presidents Kennedy, Johnson, Carter, and Clinton, which were respectively 40, 52, 51, and 44 percent. The data also tell us that the Obama contingent is distinctly more liberal than the appointees of the five most recent GOP administrations of Nixon, Ford, Reagan, Bush, and W. Bush, which were respectively 38, 42, 36, 36, and 36 percent.

Let us turn up our examining microscope a notch and compare the voting patterns of Obama's jurists with those of other modern presidents on the three composite variables of criminal justice, civil rights and liberties, and labor and economic regulation. The first column in Table 1 provides data on judges' voting on criminal justice issues, such as

habeas corpus, motions made before and during a criminal trial, and forfeiture of property in a criminal case. In this realm, the voting record of the Obama team, at 34 percent liberal, puts him about midway between the 25 percent score of the Kennedy cohort and the 38 percent score of the Clinton appointees. And it also demonstrates that on this variable the Obama judges are somewhat more liberal than any of the appointees of the five most recent Republican presidents, who varied from a high of 33 percent (Ford) to a low of 25 (Reagan).

The second column in Table 1 contains data on the dimension of civil rights and liberties; that is, it examines judges' decisions on issues such as abortion, freedom of speech, the right to privacy, discrimination against racial minorities, and so on. In this realm, 42 percent of the Obama cohort's decisions have been liberal in nature. As with criminal justice cases, this percentage is roughly halfway in between the cohorts of the four most recent Democratic presidents Kennedy (43), Johnson (58), Carter (50), and Clinton (41).

In our third column in Table 1, we present data on the judges' decisional patterns in the area of labor and economic regulation. (A typical case might be a dispute between a labor union and 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, 69 percent of the decisions of the Obama appointees have been on the liberal side—the most liberal score in this realm of

27. These rulings were handed down in three key issue areas: civil liberties and rights, criminal justice, and labor and economic regulation. Though we coded only district court rulings, prior research suggests that the behavior of jurists at this level is comparable to that 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, and Lisa Richey-Tracy, *The voting behavior of judges appointed by President Bush*, 76 JUDICATURE 298-302 (1993).

any recent president. The numbers for Kennedy, Johnson, Carter, and Clinton are 63, 63, 60, and 55 percent, respectively. As we would anticipate, these scores are much lower than the GOP presidents' numbers: Nixon (48), Ford (52), Reagan (49), Bush (50), and W. Bush (50).

This unusually high liberalism score for the Obama cohort in the labor and economic regulation realm is noteworthy. Could this be a reflection of the difficult economic times that the nation has experienced during "the great recession?" Or could it provide evidence of a concerted effort on the part of Obama's appointment team to select judges who are particularly inclined to support the interests of consumers, employees, and labor unions? At this point, we can only note the phenomenon rather than provide a cogent explanation for it. In any case, these numbers must be reckoned as countering suggestions by the political left that Obama may be too cozy with wealthy business interests.²⁸ He may or may not be, but our data suggest that, at least at this point, his judges clearly are not. It would be useful to offer a word of caution about reading too much into this data. In many ways, this study is a "first look" at the Obama judges. The number of cases under study here is still relatively small, and as time provides a greater number of observations, the data could shift. Still, this is a finding of real interest.

Traditional v. Non-traditional

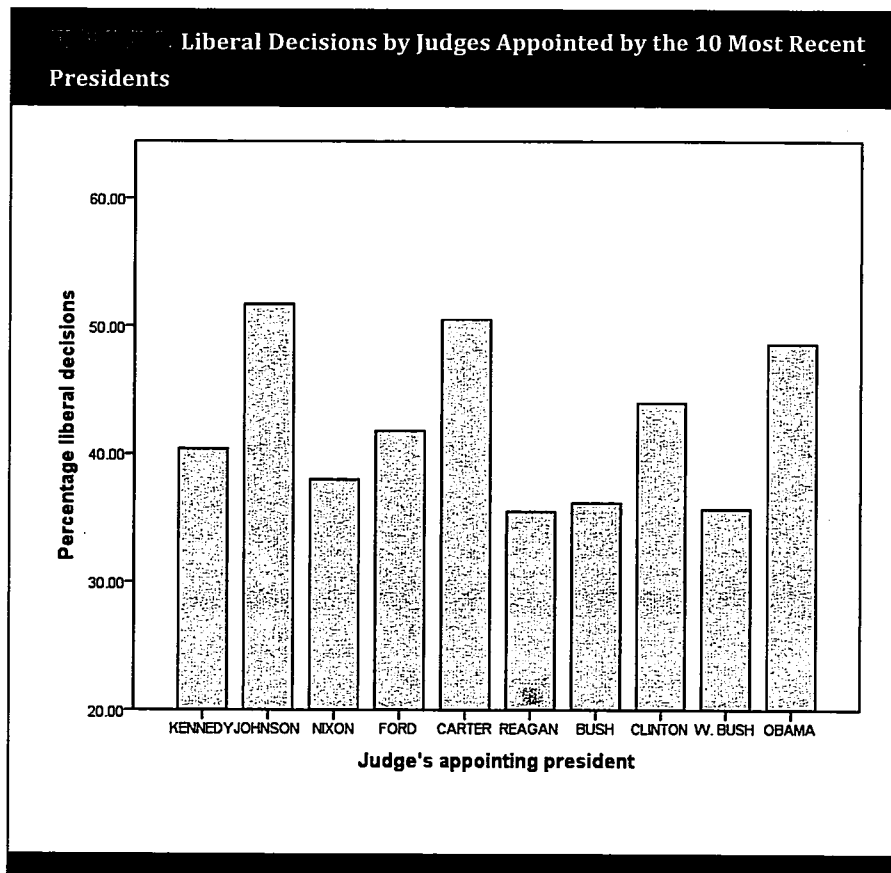
In previous research, we have compared the decisional patterns of presidents' so-called "non-tradi-

28. Peter Baker, *On the Left, Seeing Obama Giving Away Too Much, Again*, N.Y. Times, Jan. 1, 2013, available at <http://www.nytimes.com/2013/01/02/us/politics/some-liberals-say-obama-squandered-his-tax-leverage.html>.

29. 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).

30. See Robert A. Carp, Kenneth L. Manning, and Ronald Stidham, *Right on: the decision-making behavior of George W. Bush's judicial appointees*, 92 JUDICATURE 312-319 (2009).

31. 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).



tional" appointees (i.e. women and minorities) with those of their white male judges. Such analyses seemed warranted for two reasons. First, conventional wisdom suggested 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).²⁹ This is because members of historically underrepresented groups often have been subjected to racial and gender discrimination by law and also in the workplace in terms of equal pay for equal work and promotions. Second, we investigated this pattern because recent presidents have appointed non-traditional judges in record numbers, thus making the presence of these jurists worthy of heightened analysis.

This past research on the differences between traditional and non-traditional judges appointed by Clinton and W. Bush did not find statistically significant distinctions. There were scant differences

between W. Bush's traditional and non-traditional cohorts: 32 percent of his traditional judges handed down liberal decisions while 33 percent of his non-traditional jurists did so.³⁰ Among Clinton jurists, the data indicated a liberalism rate of 46 percent for women and minority judges versus 42 percent for his white male appointees.³¹ This difference was not, however, statistically significant. The differences among the Obama cohort are similar to the Clinton findings. Obama's white male appointees rendered liberal decisions 45 percent of the time, whereas 52 percent of his female or minority judges did so. But just as was found among Clinton jurists, the difference here is not statistically significant at the 0.05 level. Thus, any distinctions observed at this point may be simply due to random data variation. A majority of Obama's overall judicial cohort have been non-traditional judges, and it may eventually be found that these judges are slightly more liberal than their white male

Percentage of Liberal Decisions in Three Case Types by Judges Appointed by the 10 Most Recent Presidents

Appointing President	Criminal Justice	Civil liberties & Rights	Economic & Labor Regulation	All Cases
Kennedy	24.9	43.0	63.3	40.4
Johnson	36.9	57.6	62.8	51.7
Nixon	26.9	37.8	48.3	38.0
Ford	32.6	38.8	51.8	41.8
Carter	37.8	50.1	60.4	50.5
Reagan	25.1	32.6	48.8	35.5
Bush	26.5	33.0	49.8	36.2
Clinton	38.2	41.3	54.5	44.0
W. Bush	29.6	30.8	50.2	35.7
Obama	34.2	41.5	68.8	48.6

Percentage of Liberal Decisions by White Men and Women/ Minority Judges Appointed by Barack Obama*

	% liberal decisions (n)	% conservative decisions (n)
White Men	44.9 (79)	55.1 (97)
Minority/Women	51.5 (117)	48.5 (110)

* Odds ratio = 1.31; Chi square = 1.76 (p = .110)

which data are available (i.e., since 1932). One cannot make a similar claim about the ideological disposition of Obama's judges on the left side of the political spectrum. Yes, the Obama appointees are liberal, but they are not setting new ideological records. As such, the judges appointed by President Obama are well within the mainstream of American political ideology. As Obama serves out the remainder of his second term and fills more vacancies on the federal bench, there is every reason to believe that this trend will continue. ★

colleagues. At this point the data do not support such a conclusion.

Conclusions

This article has explored the ideological influence that President Barack Obama is having on the decision making patterns of the federal trial courts. Our estimation is that despite the delays and slowdowns in the appointment process itself,³² the president is still making a noticeable impact on the ideological orientation of the federal judiciary, particularly in the realm of labor and economic regulation. As one would expect, the Obama team is clearly more liberal than the judges selected by any of the five most recent Republican presidents. Obama's overall liberalism score of 49 percent indicates that his

appointees appear to be mainstream Democrats—not as liberal as Lyndon Johnson's cohort of 52 percent, but a bit more to the left than Bill Clinton's cohort at 44 percent.

However, the data on the Obama judges do not support the contention that his jurists are ideological extremists. Perhaps in the realm of labor and economic regulation one could find data to support such a suggestion, and even then the early nature of this research cautions that we should hesitate before jumping to a definitive conclusion on this matter. Overall, the data clearly show that Obama's judges are not for the left what the George W. Bush judges were for the right. The jurists appointed by George W. Bush were the most conservative cohorts for

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32. For the most recent discussion of these delays and slowdowns, see Gerald F. Seib, *Open Judgeships Show D.C. Dysfunction*, Wall Street Journal, May 14, 2013, available at <http://online.wsj.com/article/SB10001424127887324031404578480930038777020.html>.