

PART IX

JUDICIAL
RELATIONS

CHAPTER 27

NOMINATING FEDERAL JUDGES AND JUSTICES

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WITHOUT a doubt, presidents have strong incentives to concern themselves with appointments to the federal bench. Some have used them to shore up electoral support for their party or themselves, such as Ronald Reagan's nomination of the first female justice, Sandra Day O'Connor. For other presidents—perhaps the majority—policy or ideological goals move to the fore. Abe Fortas, Lyndon Johnson's first appointment to the Court, may have been a long-time friend of the president's, but Fortas also was a New Deal liberal who shared Johnson's views on problems of race, poverty, and governmental actions to remedy them.

Equally without doubt is that in an unconstrained world, all the president's appointments to the federal courts would perfectly reflect his partisan or ideological (or even occasionally personal) goals. The president is not so unfettered, however (e.g., Moraski and Shipan 1999; Nemacheck 2007). While the Framers of the Constitution expected the new nation's chief executive to play a crucial role in naming federal judges—they did, after all, list the power of appointment in Article II, that is, among the president's powers—those same Framers gave the Senate an equally

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crucial role: the power to “consent” to the president’s choices. Because it is the Senate, not the president, which has the final say on nominees, that body can impose an effective restraint on presidents’ choices even if it does not completely control the selection of those candidates (see, e.g. Epstein et al. 2006; Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992).

In short, the president surely has objectives he would like to accomplish via appointments to the bench. But to achieve them he must act strategically, attending to the preferences and likely actions of the Senate, as well as certain norms Senators expect him to follow. If he does not, he runs the risk of seeing his candidates defeated, in which case he cannot accomplish his objectives, whatever they might be.

Both parts of this claim—the president’s goals and the constraints he confronts in attempting to achieve them—deserve some consideration. In what follows, we make use of the large extant literature to explore what we know and, importantly, what we do not know about both. We also consider what scholars have said about whether presidents ultimately achieve their goals; that is, we consider the question of whether presidents get what they want in their judicial appointments.

PRESIDENTIAL GOALS

Well before the departures of Chief Justice Rehnquist and Sandra Day O’Connor from the US Supreme Court, the George W. Bush administration was hard at work compiling a list of replacements. Possible candidates were mostly sitting judges—including the two Bush eventually appointed, Roberts and Alito, and several he did not, such as Michael Luttig and Edith Clement (Toobin 2007; Greenburg 2007).

If Bush’s predecessors are any indication, a range of actors contributed to his list. Certainly some, perhaps the vast majority, came from inside the executive branch—perhaps even from the president himself. Bill Clinton actively engaged in the process of generating candidates for the appointments that eventually went to Ginsburg and Breyer, as did Lyndon Johnson and Richard Nixon before him. By all indications, President G. W. Bush was no different (Goldman et al. 2007; Greenburg 2007).

Beyond the president and his advisers, trusted Senators, party leaders, and organized interests too play a role in recommending candidates. During the second Bush presidency no group was more involved than the Federalist Society, an organization devoted to counterbalancing what it decries as the “orthodox liberal” ideology that “dominates” the legal community. Of the George W. Bush administration’s first seventy nominees to the lower courts, twenty were “recommended directly” by this organization (Lewis, 2001). What is not clear, though, is whether the Society’s recommendations had an independent impact on the president’s selections, or whether it was simply putting forward the same names that inevitably would have appeared on the president’s list. More generally, the influence of organized

interests at this stage in the process is a rather unexplored area, deserving of far more scholarly attention.

In addition to groups, advisers, and party leaders, perhaps sitting justices or judges lobbied (or consulted with) the Bush administration. If so, this would not be without precedent. In the 1850s, the entire Supreme Court asked President Franklin Pierce to appoint John Campbell to the bench (Abraham 1999, 84). Over a century later, as John Dean (2001) tells it, Chief Justice Warren Burger (1969–86) “constantly supplied [the administration] with names” for “his” court. When Richard Nixon attempted to fill two vacancies in 1971, Burger suggested Hershel Friday, an Arkansas attorney who had a connection to Justice Harry Blackmun, a childhood friend of Burger’s. At the same time, Burger lobbied against the appointment of a woman—so much so that Nixon’s Attorney General, John Mitchell, dreaded telling Burger that Mildred Lillie, a California state judge, was on the president’s list. Though Nixon did not appoint Lillie, neither did he nominate Burger’s candidate, Friday. In fact, according to Dean, only Nixon and Mitchell knew that William H. Rehnquist would get the nod. All other advisers were kept out of the loop until the last possible moment.

But why choose Rehnquist, and not Friday, Lillie, or any of the other dozen or more prospective nominees Nixon considered? More generally, why do certain names and not others make initial lists, why will some candidates advance in the process to an even shorter list, and why will one ultimately rise above the pack?

According to Nemacheck (2007), Goldman (1997), and others who have addressed this question, the answer lies at least in part with the administration’s goals. Undoubtedly, judicial appointments can work to accomplish many aims, but, as we hinted at the outset, almost all fall under the rubric of politics. In some instances, politics has centered largely on partisan aims, with the idea being that the president attempts to exploit judicial appointments to advance his party’s interests or his own; in other cases, politics has been primarily about policy, or the notion that the president seeks to nominate judges and justices who share his political or ideological preferences.

Partisan and Electoral Goals

It seems odd to think that judicial appointments could help advance the president’s and his party’s ambitions, electoral or otherwise. After all, most Americans lack even a passing familiarity with courts and judges; in 2007 they could not, for example, name the Chief Justice even though he was appointed just two years earlier. Even more to the point, when asked before the 2004 presidential election, “What issue or problem . . . is most important for the next president to address?” fewer than 0.5 percent said “The Supreme Court.”¹ Of the lower courts, the North Carolina Senator

¹ Health Care Agenda for the New Congress Survey, Nov. 2004, accessed via Roper Center for Public Opinion Research, University of Connecticut.

Jesse Helms said it best: “You go out on the street of Raleigh, N.C., and ask 100 people, ‘Do you give a damn who is on the Fourth Circuit Court of Appeals?’ They’ll say, ‘What’s that?’ ” (Sontag 2003).

On the other hand, when judges or their decisions attract media attention, Americans are not only aware of the controversy but also may have strong opinions that they occasionally express in their ballots. The storm over George H. W. Bush’s nomination of Clarence Thomas in 1991 provides a case in point. As Overby et al. (1992) demonstrate, after initial public opinion polls indicated that blacks overwhelmingly believed Thomas when he said he had not sexually harassed Anita Hill, several Senators from states with large minority populations voted to confirm Thomas.

But some may have paid a price. Wyche Fowler of Georgia, for one, was defeated at least in part because pro-choice white women were unhappy with his support for the anti-Roe Thomas. Similarly, the Republican Arlen Specter (Pennsylvania) nearly lost his reelection bid, receiving only 49.1 percent of the vote in 1992, compared with 56.4 percent in his previous election in 1986. More generally, researchers tell us that across the United States, voters who disapproved of Thomas were 14 percent more likely to vote for the challenger than the incumbent. On the other hand, voters who disapproved of Thomas were 18.6 percent more likely to vote for their Senator if she or he failed to back Thomas (see Overby et al. 1992; Wolpert and Gimpel 1997). Whether reelection bids are helped or hurt by less controversial votes, though, has not been well established, and so is yet another area that would benefit from greater attention.

The link between judicial nominations and the president’s achievement of partisan goals also may be less direct and can play out in a multitude of ways. In making his appointments to the lower courts, Franklin D. Roosevelt often contemplated how they might help shore up approval for his policies among Democrats within the Senate (Goldman 1997, 41). The Eisenhower and Kennedy administrations used their appointment power somewhat differently. They tried to strengthen their respective parties, with both Ike and JFK occasionally supporting candidates proposed by competitors within their party.

Other presidents have placed a great deal of weight on geography at least in part to advance their or their party’s electoral objectives. Richard Nixon was nearly obsessed with making appointments that would help his 1972 reelection bid, and in particular, with enhancing the Republican Party’s appeal to Southerners by appointing a justice from that region. And Nixon was surely not the first, as Daniels (1978) and Freund (1988) have shown. Hoover’s failed nomination of John Parker of North Carolina, for example, was also perceived by Progressives and liberal Democrats as a Republican Southern Strategy.

Religion too was once part of an electoral calculus—such as when Dwight Eisenhower appointed the Catholic William J. Brennan Jr. (1946–90) to the Court to attract Catholic voters. That two Jewish and five Catholic (Alito, Kennedy, Roberts, Scalia, and Thomas) justices now sit on the Court, however, is telling. While the new Catholic majority on the Court has come under some scrutiny (see, e.g. Gerhardt

2006), as a general matter religion (and region) has taken a back seat to race, sex, and ethnicity as vehicles for furthering partisan goals. Though presidents serving in the 1950s and 1960s contemplated some of these factors, it was Jimmy Carter who emphasized them. When Carter took office, only eight women had ever served on a federal court. Owing almost exclusively to the 144 new judgeships created by the Democratic legislature during his tenure, Carter was able to appoint 40 women to the nation's trial (29) and appellate (11) courts. He also appointed 37 black judges—nearly double the number of all his predecessors combined. To some, Carter's commitment to diversifying the federal bench reflected a genuine concern on his part about human rights (Clark 2003). That may be true, but surely he believed that appointing women and blacks would do little to damage his standing with crucial Democratic constituencies.

In other cases, presidents have used the power of appointment to pay off prior political debts. In 1952 Earl Warren, then the governor of California, saw that his chances for obtaining the Republican presidential nomination were faltering, and so he threw his and his state's support to General Eisenhower rather than Eisenhower's rival, Senator Robert Taft of Ohio. One year later, Eisenhower nominated Governor Warren to replace Chief Justice Fred Vinson.

This much we know from the many detailed accounts and case studies of particular nominations. What we lack is more systematically developed and more generalized knowledge. For example, we know that in specific cases—most notably, Thomas—the president or his party can lose support over judicial nominees. But how typical is this? This seems an especially important question to raise because, at least in the case of Thomas, the appointment was probably something of an anomaly. Owing primarily to charges of sexual harassment, it was a highly visible confirmation battle for a seat on the nation's most visible tribunal, the US Supreme Court.

Likewise, can the president or his party actually score points via appointments? Certainly, many presidents (and commentators) seem to believe they can. Nixon's emphasis on the South, Ronald Reagan's commitment to appoint a woman to the Supreme Court, and Carter's attempt to diversify the bench provide obvious examples. The question we raise, and that we hope future scholars will address, is whether this is a rational strategy. That is, if presidents pursue it, do they succeed in building capital with crucial constituencies? This seems an especially important question to raise at a moment when the next president likely will be tempted to appoint Hispanics to the bench, but especially to the Supreme Court, on which no Latino has ever served.

Ideological Goals

Despite our lack of general knowledge about the efficacy of attempts to advance electoral or partisan goals through appointments, we know it is fairly common. But it is not the only political force at work; actually, according to many scholars,

candidates' ideologies or policy values may be even more important (e.g., Epstein and Segal 2005; Moraski and Shipan 1999; Nemacheck 2007).

If so, this is hardly a new motivation. Thomas Jefferson hoped to rid the judiciary of judges attached to a "Federalist" philosophy—in other words, virtually every jurist appointed by his predecessors, George Washington and John Adams. Richard Nixon may have talked about appointing strict constructionists to the bench, but what he meant were judges who would "not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs" (quoted in Dean 2001, 16). President George W. Bush was even more transparent, publicly equating ideology with particular approaches to constitutional interpretation. As he said at the first presidential debate in October 2000, "I don't believe in liberal, activist judges. I believe in strict constructionists. And those are the kind of judges I will appoint."

As many commentators have noted, the manifestations of this emphasis on ideology are easy enough to spot. At least since 1869, only 10 percent of all appointments to the federal bench have fallen outside the president's own political party (a rough indicator of ideology), and when cross-party appointments do occur they may well go to an ideological soul mate, such as when Nixon appointed the conservative Democrat Lewis Powell (see generally Barrow, Zuk, and Gryski, 1996). Bush II is no exception. Of his 252 appointments to the district and appellate courts (through 2006), 86 percent have gone to Republicans, and almost all of those proposed as possible contenders for a seat on the Supreme Court had a noticeable connection to the Republican Party (Goldman 1997).

By the same token, the majority of appointments to the federal courts have engaged in what Goldman (1997) calls "past party activism"—in other words, activities designed to advance their party's interest, such as campaigning, organizing, or fund raising. Goldman's data run back to the Roosevelt years but equally high—or even higher—levels might have existed in earlier years as well. Ulysses S. Grant may himself have been "bored" by politics, but his advisers made clear to the president that he "needed to pack the [Supreme] Court with Republican loyalists." As a result, Grant "resolved at the outset that a safe Republican record would be a basic requirement for nomination, to which he added geographic suitability." "Other qualifications," Henry Abraham reports, "appeared not to matter" (Abraham 1999, 95).

Why does such a high fraction of judicial seats go to activists? One answer is that service to prominent party members may be precisely why the candidate came to the administration's attention. Perhaps more importantly, though, service may reveal something about the candidate's ideological commitments. This is obviously crucial to presidents hoping to advance their agendas through the courts. Only by "minimizing uncertainty" over a candidate's sincere policy preferences can the president hope to realize such goals (Nemacheck 2007).

Along these lines, service to the party may help. But because partisanship does not always neatly translate into ideological compatibility, presidents and their advisers resort to other methods to learn about and thus reduce uncertainty over a candidate's preferences. The "litmus tests" employed during the Reagan years are legendary. But

ideological screening pre-dates that administration and, of course, has hardly been limited to conservatives. Skirmishes with anti-New Deal judges and justices prompted FDR to seek out nominees who shared his policy visions. Knowing that, those proposing names for FDR's consideration were unhesitant to stress their candidates' commitments to "liberalism" and "progressive" causes. "Active opponents of the New Deal," Goldman (1997, 33) writes, "were not seriously considered." And if a doubt existed, the Roosevelt administration scrutinized a candidate's background, in much the same way as successor administrations now do. Clearly, the goal here was precisely the same as it was during the Reagan years. FDR wanted to avoid "mistakes"—judges and justices who did not share his political vision.

The types of screening mechanisms used today—interviews, questionnaires, and analyses of the written record—are rather obvious manifestations of the president's interest in appointing judges and justices with the "right" values. But there are also the markers of age, race, and gender. Beginning with age, presidents dating back to the earliest days of the Republic have valued relative youth. John Jay was only 43 when George Washington nominated him to serve as the first Chief Justice of the United States. President John Adams's initial appointee, Bushrod Washington, was just 36. One hundred and fifty years later, Eisenhower named the 43-year-old Potter Stewart to the Supreme Court, and in 1962, Kennedy appointed Byron White, who at 44 was just a month younger than the president himself. Some commentators say the emphasis on youth reflects the president's interest in creating a legacy. That begs the question of what kind of legacy, however. In many instances the answer is an ideological one. When Franklin Roosevelt appointed his securities and exchange commissioner, the 40-year-old William O. Douglas, to the Supreme Court, the president knew precisely what he was doing. Roosevelt was attempting to establish allegiance to his economic policies for decades to come.

Race and gender too may be political markers. It seems unlikely that it was merely electoral concerns that drove Jimmy Carter (and Bill Clinton) to place emphasis on appointing blacks and women to the bench. Rather, they may have assumed that blacks and women would be liberal jurists.

Given the attention to learning about candidates' preferences through screening processes, how well does it work? Do some markers work better than others? Are race and gender as effective ideological screening? Overall, do presidents succeed in appointing judges and justices who share their ideological commitments and work to advance their policy goals? As we explain at the end of this chapter, scholars have generally answered both in the affirmative, though a few qualifications are in order. First, because most of the work along these lines has focused on the Supreme Court, we know far less about the lower courts. More research is needed before we can reach any firm conclusions. Second, even studies on the Supreme Court are now beginning to question the longevity of presidential legacies (see, e.g., Epstein et al. 2007). While it seems clear that presidents typically are successful in appointing justices who share their ideological commitments in the short term, by the end of their justices' first decades in service, the picture is far murkier.

CONSTRAINTS ON THE PRESIDENT

Based on our discussion of ideological goals, it would seem that presidents should simply locate the closest ideological surrogate and nominate him or her for a position on the bench. But even if they could do this with certainty, it is not always the most rational move. As we mentioned at the outset, the problem is that the president is hardly an unconstrained actor. Rather, in making nominations he must take into account the preferences and likely actions of Senators, along with various rules that structure their interaction.

When it comes to the lower courts, the vast majority of nominees (about four out of every five) are rather handily confirmed by the Senate—at least in part because presidents have adhered to norms within the Senate (see generally Gerhardt 2001, 2003). Most of these are intended to ensure that Senators from the state where the nominee will serve and who belong to the president's party (i.e., home-state Senators) have some role in filling vacancies on the lower federal bench (but especially in the district courts, which do not cross state lines). We think here of the norm of senatorial courtesy. Operative since the days of the Washington administration, courtesy holds that home-state Senators of the president's party can block a nomination without supplying a reason. Should a home-state Senator invoke courtesy, the nomination is usually doomed. Typically, Senators invoke courtesy through "blue slips," which are sheets of light blue paper that the Senate's Committee on the Judiciary sends to the home-state Senators, regardless of their party affiliation. The home-state Senators, in turn, decide whether to support the nomination. If one or both of the home-state Senators withhold their blue slips or otherwise object to the nomination, it is up to the Judiciary Committee's chair to decide whether to go forward with the nomination.

The factors that lead to a chair's interpretation of senatorial courtesy are not well known, but that interpretation has great consequences for nominations to the lower federal courts. This is not true, though, for Supreme Court nominations. When region exerted a greater influence on the selection of justices, home-state Senators did occasionally attempt to block such nominations, but these days courtesy and blue-slipping are not in much evidence over candidates to the Supreme Court. Unlike district court nominees, Senators, though free to submit Supreme Court names to the administration, have little expectation of seeing their favored candidate get the nod.

On the other hand, presidents can hardly ignore the Senate when contemplating Supreme Court nominations. Because Senators have shown their willingness to reject candidates for the high court, failure to attend to them at the nomination stage can be perilous. What this means in practice, as many scholars have outlined it, is that presidents must pay heed to the fact that electorally oriented Senators vote on the basis of their constituents' "principle concerns in the nomination process" (Cameron, Cover, and Segal 1990, 528; see also Watson and Stookey 1995; Segal,

Cameron, and Cover 1992). Those concerns primarily (though not exclusively) center on whether a candidate for the Supreme Court is (1) qualified for office, and (2) sufficiently proximate to the Senator (and his or her constituents) in ideological space. Because these are the concerns of Senators who can stand in the way of a successful appointment, they too must become the concern of presidents.

Qualifications

Beginning with qualifications, it is certainly true that presidents have nominated unqualified, even unsavory people to serve as federal judges. We think here of G. Harrold Carswell, a little-known federal judge from Florida whom Richard Nixon (unsuccessfully) sought to place on the US Supreme Court. Carswell's record on the bench was so deficient—he was reversed far more frequently than any other judge in his circuit—that even his supporters had a hard time justifying confirmation. About the best they could muster was the infamous defense uttered by Senator Roman Hruska (R-Neb.): “Even if [Carswell] is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they?” (quoted in Harris 1971, 110).

Yet, and despite the lack of formal criteria outlined in the US Constitution, most presidents have sought to appoint persons of professional merit to the bench. One reason is that they themselves may prefer highly qualified candidates. If the president is concerned with leaving a lasting legacy to the nation in the form of jurists who will continue to exert influence on the law well after he leaves office, then professional merit may come into play. While this entire subject deserves more systematic enquiry, it does seem that many judges universally acclaimed as great by contemporary legal scholars were also universally perceived as exceedingly well qualified at the time of their nomination. Falling into this category are Supreme Court Justices Oliver Wendell Holmes (1902–32), Benjamin Cardozo (1932–8), William J. Brennan (1956–90), and more recently Antonin Scalia (1986–), and the circuit court judge Richard Posner (1981–). In some instances, as we explain later, the appointing presidents would have been pleased with the legacy they left (for example, Ronald Reagan and Scalia). In others, their displeasure is a matter of public record (Dwight Eisenhower thought Brennan a “mistake”). Either way, though, it is hard to deny the effect that outstanding jurists have had on the course of American legal history, an effect that transcends their appointing president.

There is another reason—one that directly implicates the Senate. As we have noted throughout, the president cannot achieve any of his goals—whether focused on advancing his partisan or policy interests—unless the Senate confirms his candidates. And Senators, as systematic research indicates, are more likely to support candidates they perceive as qualified for office (see, e.g. Epstein et al. 2006; Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992). This was true during the nation's earliest days and it remains so even today, an era in which many commentators

claim that professional merit is immaterial to the Senate's deliberations and that only the candidate's ideology (relative to Senators') matters (e.g., Choi and Gulati 2004).

Ideology

Still, we cannot ignore ideology. While there is no doubt that professional merit acts as a constraint on the president, it now takes a back seat to ideology (Epstein et al. 2006). Just as the president hopes to make appointments that reflect his ideology, so too do Senators. And their votes reflect that objective. According to Epstein, Segal, and Westerland (2008), the predicted probability of a Senator voting for a moderately qualified candidate is a highly unlikely 0.06 when the candidate and Senator are ideological extremes; that figure increases to highly likely 0.91 when they are at the closest levels.

The suggestion here is obvious: When the president's and Senators' political preferences overlap, the president is far freer to select a nominee of his own choosing (Nemacheck 2007; Moraski and Shipan 1999). In those circumstances, the administration's primary task becomes one of selecting the closest surrogate from among the pool of qualified nominees.

On the other hand, when the president and Senate are ideologically distant, the president is far more constrained. Moraski and Shipan (1999) argue that in order to see his candidates confirmed, he must modulate, moving to the right or left as necessary (also see Nemacheck 2007). Ford's nomination of the moderate John Paul Stevens rather than the conservative Robert Bork in light of an overwhelmingly Democratic Senate is a prime example of this kind of presidential pragmatism. The Senate responded in kind, voting 98–0 to confirm Stevens. Of course, not all “compromise” candidates receive unanimous votes, but the inclination of most (though certainly not all) presidents to move toward the Senate may well explain why the rejection rate of Supreme Court nominees is not higher than it is.

This much we know. But many questions about the role of ideology remain. First, while scholars have demonstrated that Senators began to place more emphasis on ideology in the late 1950s and then even more (though no less on qualifications) during and after Robert Bork's nomination, we are not sure why. Bork (1990, 348) himself lays the blame—or credit, depending on one's perspective—on the Court and, in particular, its “increasingly political nature . . . which reached its zenith with the Warren Court.” If Bork's explanation is right, it suggests that the emphasis placed by appointers on ideology is entirely rational—a point to which we return in the final section of the chapter.

A second set of questions centers on issues of measurement. Examining the effect of Senators' ideologies on the president's decisions requires valid and reliable measures of the political preferences of the president, his nominee, and the Senators—not to mention a method for comparing them. Commentators have developed many possible approaches (see, e.g., Epstein et al. 2006; Bailey 2007) but each has its own

set of problems. To assess the ideological distance between the nominee and the Senator, Epstein et al. (2006), for example, use as their “bridge” candidates nominated by presidents whose party held a majority in the Senate at the time of nomination. The assumption here is that presidents whose party controls the Senate face relatively fewer constraints in nominating a candidate who reflects their ideological preferences than do presidents whose party does not control the Senate. While this enjoys some support in the literature, it is obviously imperfect.

These measurement differences, not surprisingly, can influence substantive interpretations. Thus Bailey and Chang (2001), who more carefully measure interinstitutional preferences measures than Moraski and Shipan (1991), find far less robust results on the influence of congressional preferences on presidential nominations.

Overcoming the Constraints

Yet another set of questions are more general in nature: Short of appeasing Senators—whether by taking into account their recommendation or their political preferences—what might a president do to work around the constraints he confronts? What strategies does he have at his disposal to see his nominees confirmed? While these questions deserve far more systematic attention from scholars, we can speculate on a few possible answers.

One, as Johnson and Roberts (2004) note, is to “go public,” that is, to convince Americans that his candidate is very well suited for the position and that only the partisan, ideological Senate can stand in the way. Following in the footsteps of many of his predecessors, George W. Bush attempted a form of this strategy. Throughout 2004 and into 2005, he accused Senate Democrats of “using unprecedented obstructionists tactics” to block his nominees, while simultaneously attempting to appear “above politics”: “Every judicial nominee should receive an up-or-down vote in the full Senate, no matter who is President or which party controls the Senate.” “It is time,” Bush says, “to move past the partisan politics of the past, and do what is right for the American legal system and the American people.”²

Sticking by his nominees turned out to be a good strategy for Bush but it is an indirect approach at best. By playing to the public, Bush was lobbying citizens to contact their Senators. Other presidents (and Bush as well) have attacked the problem more directly, by seeking to cut deals with legislators or, more dramatically, by maneuvering around the Senate altogether. Bill Clinton took the former route in his quest to appoint his (and Hillary Rodham Clinton’s) former classmate at Yale Law School and co-chair of his California election committee, William Fletcher, to the Ninth Circuit. Hoping to change the ideological composition of the left-of-center Ninth, Senate Republicans balked at the appointment of the liberal Fletcher. They agreed to proceed only if Fletcher’s mother, the also-liberal Judge Betty Fletcher, vacated her seat on the Ninth and if the president appointed a candidate

² Quote available at: <www.whitehouse.gov/infocus/judicial_nominees>.

suggested by Republican Senator Slade Gorton to replace her. The “throw Momma from the bench” strategy eventually worked. Clinton was able to appoint his friend William Fletcher, but only by appointing a Republican to fill the other seat (Wilson 2003).

This sort of bargaining seems to be a regular feature of the appointments game. More unusual, but hardly unknown, are attempts to work around the Senate entirely. Ulysses Grant’s Attorney General, Ebenezer Hoar, in an effort to create a more professional judiciary, tried to evade senatorial courtesy by refusing to give home-state Senators a say in nominations. Jimmy Carter, in his quest to diversify the bench, also tried to eliminate senatorial courtesy, this time by establishing merit commissions for the selection of appellate court judges. A decade or so later, George H. W. Bush, in retaliation for the Senate Judiciary Committee’s leak to the press of Anita Hill’s affidavit to the Justice Department accusing Clarence Thomas of sexual harassment, said he would restrict Senators’ access to FBI reports (Gerhardt 2003).

These efforts were not terribly successful: Senators retaliated against Grant and refused to confirm Ebenezer Hoar for a position on the Supreme Court. Carter too generated his own share of problems. He may have succeeded in diversifying the bench, but his approach led to “embarrassment and splintering in his own party,” and the merit commissions he established were eventually abolished. As for Bush, when the Judiciary Committee, no longer privy to the FBI reports, decided to delay Bush’s appointments until it could conduct its own investigations, the administration changed its policy. But it was too late. As Gerhardt (2003) explains, “The delay was fatal to over two dozen subsequent judicial nominees, because the nominees’ earliest opportunities for hearings would not have been until 1992 at which point the Senate slowed the process to a complete standstill pending the outcome of the presidential election.” More generally, while it is true that presidents are free to nominate whomever they like to the federal courts in pursuit of whatever goals move them, the Senate can attempt to curtail that freedom—whether through senatorial courtesy, forced bargains, or nay votes.

DO PRESIDENTS GET WHAT THEY WANT?

Failure to pay heed to the Senate can, of course, result in the president’s least favored alternative: the rejection of his nominee. But assuming confirmation in the Senate, to what extent can the president achieve success once his nominees take their seats on the federal bench? If we define success in terms of the typical goal of presidents—to appoint ideological surrogates to the bench, that is judges who will etch into law their president’s political values—then many presidents would complain. Actually, they are notorious whiners about their judicial appointees, especially to the US Supreme

Court. No discussion of presidential influence over federal justices is complete without Theodore Roosevelt's quip that he could "carve out of a banana a Judge with more backbone" than Oliver Wendell Holmes (1902–32), or Truman's claim that Justice Tom Clark (1949–67) was "my biggest mistake." Eisenhower too purportedly labeled his appointment of the liberal Earl Warren "the biggest damn fool mistake I ever made," and apparently thought much the same of the equally liberal William J. Brennan Jr. (1956–90). Likewise, we cannot imagine that Richard Nixon was pleased with the leftward turn of his once-conservative appointee Harry Blackmun (1970–94) any more than George H. W. Bush probably appreciates the liberal trend of David Souter's (1990–) decisions.

Thus, prominent political scientist Henry Abraham declares, "there is a considerable element of unpredictability in the judicial appointing process" (cited in Epstein and Segal 2005, 120). Constitutional scholar Laurence Tribe (1985, 60), on the other hand, refers to the "myth of the surprised president." By this he means, "in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them."

Who has the better case? As it turns out, generally, Tribe does. At least at the level of the Supreme Court and at least in the short term, systematic research demonstrates that presidents can influence the law via their appointments (e.g., Segal, Timpone, and Howard 2000; Epstein and Segal 2005). We should not be entirely surprised by this finding. If presidents were unable to entrench their political values on the Court through their justices, attention to the ideology of nominees would be entirely irrational—they would be better off using appointments to pursue partisan-electoral goals. But that is not the case. At least for their first decade or so in office, justices carry their president's ideological commitments into their decisions, and that trend may be on the rise, as Figure 27.1 shows. There we plot the results of regression analyses comparing the justices' ideology ("ideal points") based on their voting patterns in their first and tenth terms with the ideology (or "ideal point") of their appointing president.³ The closer a justice is to the line, the better his president's ideology corresponds to the justice's first-term (top panel) or tenth-term (bottom panel) ideal point estimate. Justices above the line are more conservative than we would expect based on the ideology of their appointing president; justices below it are more liberal. For justices on the line, their president's most preferred position perfectly (or nearly so) predicts their own.

Assuming that most presidents hope to identify nominees as close as possible to their own ideology and make their ultimate selection "after a careful and highly ideological search" (Strauss 2007) we would expect them to succeed—and, as Figure 27.1 shows, they typically do. Of course, there are some deviations. Based on

³ We measure the justices' ideology via Andrew D. Martin and Kevin Quinn's (2002) term-by-term ideal point estimates (updated scores are available at: <<http://mqscores.wustl.edu/measures.php>>). Martin and Quinn derive them by analyzing the votes cast by the justices via a Bayesian modeling strategy. To determine the president's ideology, we rely on Keith Poole's Common Space scores (available at: <<http://voteview.org/dwnl.htm>>), which in turn assess ideology by analyzing the president's positions over bills before Congress.

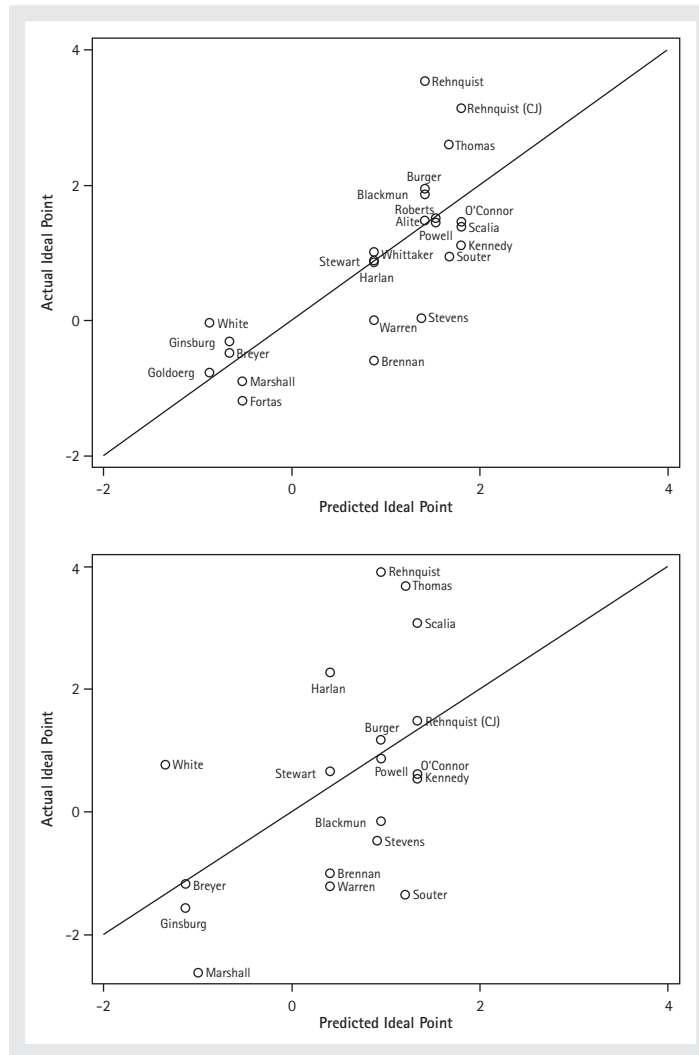


Figure 27.1 Actual ideology during a justice's first and tenth terms plotted against predicted ideology (based on the ideology of the appointing president)

Note: The superimposed lines are where $X = Y$. The closer a circle is to the line, the better the prediction.

these data, it is no wonder that President Eisenhower deemed Brennan a “mistake.” Then again, if Eisenhower appointed Brennan for electoral, rather than ideological, reasons—to court the Catholic vote—perhaps we should not be surprised by the lack of concordance between Eisenhower’s political views and Warren’s votes.

On the other hand—and this is the key point—“mistakes,” regardless of why they occur, are few and far between. By and large, presidents are successful with their appointees. Take George W. Bush’s two nominees, Chief Justice Roberts and Justice Alito. If we were to use Bush’s ideology to predict their voting patterns during their

first terms on the Court, we would be nearly right on the money for both (for Alito, the prediction is 1.53; his actual ideal point estimate is 1.45. For Roberts, the prediction is 1.53; the actual value is 1.51). Also, note that even justices famous for eventually making significant moves to the right or left tended to reflect their president's ideology commitments in their first term. Justice Souter provides a case in point. Based on the ideology of Souter's appointing president, George H. W. Bush, we would have expected a moderately conservative justice, and that is what we observe in Souter's initial term.

Because many presidents have been sufficiently ideologically close to the confirming Senate to nominate nearly whomever they want, and many have actively sought to appoint justices who share their political outlook, Figure 27.1 is not particularly startling. But it is nonetheless suggestive. Politics in part pervades the appointments process because the outcomes of that process—justices on the Supreme Court—are themselves political, and predictably political. More often than not, they vote in ways that would very much please the presidents who appointed them.

But what about the circuit courts? When the president makes an appointment from a state in which one or both Senators belong to the president's party—meaning that senatorial courtesy may be in effect—the relationship between presidential ideology and the judges' voting is not particularly strong. Actually, for these appointments, it is impossible to distinguish the Democrat Lyndon Johnson's judges from the Republican Richard Nixon's. Alternatively, when a president makes an appointment without the constraint of senatorial courtesy, the resulting nominee is far more likely to share the president's ideology. For these appointments, the association between the president's political preferences and his judges' voting is quite respectable and, actually, not altogether different than the one we found for Supreme Court justices.⁴

LASTING LEGACIES?

That justices and, under some circumstances, circuit court judges vote in ways that reflect the political values of their appointing presidents is welcome, though we doubt surprising, news for those presidents. Less welcome is that their influence may be more circumscribed than they may suspect or, of course, desire. Presidents may wish to sway individual jurists and the courts they serve, but to date the evidence that they do so is not as clear cut.

⁴ Analyses supporting these claims appear in Epstein and Segal (2005, ch. 5). Suffice it to note here the correlation between presidential ideology and the votes of circuit court judges when senatorial courtesy was in effect is +.23; it jumps to +.49 when senatorial courtesy was not in effect. See also Giles, Hettinger, and Peppers (2001).

Justices?

While presidents often get what they want in the short term by appointing like-minded individuals to the bench, ten years after appointment, the picture clouds considerably. Underscoring this point is the bottom panel of Figure 27.1. Here, we see a substantial decrease in the association between the president's and his justices' ideologies—the correlation between the two drops from .70 to .51—suggesting a problem for administrations that seek to leave lasting imprints on the Court. Souter is the classic example—a justice who sharply departed from the values of his appointing president within a decade of service. But, as we can see, there are others, including Blackmun, Harlan, and White.

Why can time dampen any legacy presidents hope to leave to the nation? To our knowledge, scholars have yet to address this question systematically, but they have offered several testable hypotheses. For one, even if a president nominates an ideological ally, nothing prevents that ally from rethinking his or her jurisprudence over time (see generally Friedman 1986). Witness Harry Blackmun (1970–94), who early in his career on the Court joined the three other conservative Nixon appointees to uphold the death penalty. But just before he retired, Blackmun declared that “no sentence of death may be constitutionally imposed” and that “from this day forward” he “no longer shall tinker with the machinery of death” (*Callins v. Collins*, 510 US 1141 (1994)).

The passage of time also means that justices will be hearing issues to which their appointing president (and Senate) probably never gave much thought. While Abraham Lincoln's appointees supported him on cases related to the Civil War, they regularly rejected his views on crucial issues—military courts, legal tender, and the Fourteenth Amendment—that arose after the war ended (and after Lincoln was assassinated). Likewise, when Ronald Reagan appointed Anthony Kennedy, criminal law was a far more salient political matter to the president than, say, gay rights. Nonetheless, it was Kennedy who wrote the opinion disallowing states from prohibiting persons of the same sex from engaging in sodomy—an opinion that Reagan very likely would have condemned.

Finally consider the Court's swing justice during her last few terms, Sandra Day O'Connor. Over time, this Reagan appointee grew more liberal in her political preferences and with that movement came a change in her voting behavior. So, for example, based on the calculations of one team of scholars, the probability of the Court upholding an affirmative action program in 1992 was rather small (about .32); by the time the Court heard a challenge to the University of Michigan law school's affirmative action plan in its 2002 term, the odds had increased to over 50 percent—largely because of O'Connor's move to the left (Martin, Quinn, and Epstein 2005). At the end of the day, O'Connor did, in fact, provide the key vote to uphold the Michigan law program, surely a vote that her appointing president would have appreciated about as much as he would have liked Kennedy's opinion in the sodomy case.

Courts?

Long-lasting legacies in the form of individual justices willing to maintain their appointing presidents' ideological commitments are possible but far from certain. While further research is needed to understand why some justices drift and some do not, we can speculate that at least part of the explanation centers on the types of issues coming before the Court or on factors idiosyncratic to particular justices. Serendipity may play an even greater role in determining whether presidents can leave their imprint on the Supreme Court or entire circuits.

To illustrate the point, Segal, Timpone, and Howard (2000, 172–6) and Segal and Spaeth (2002, 217–22) compare the cases of Reagan and Nixon. Few presidents, as they note, had as much opportunity to influence the Supreme Court as Reagan did. The conservative Republican reached out again and again to social conservatives, calling for the return of school prayer, the reversal of *Roe v. Wade* (1973), and reductions in the rights accorded to the criminally accused. While campaigning for Republican Senate candidates in 1986, Reagan argued, “We don’t need a bunch of sociology majors on the bench” (quoted in *New York Times* 1986, 32).

As luck would have it, Reagan made four appointees to the high court and had the opportunity to fill hundreds of vacancies on the lower federal courts. Yet the Supreme Court Reagan left was no more conservative than the one he inherited. Moreover, despite his appointees, the twentieth century ended with organized school prayer still unconstitutional and *Roe v. Wade* still the law of the land.

The more moderate Richard Nixon, in contrast, had a greater impact in pulling the Court to the right. The Warren Court, he declared in his 1968 campaign, had gone too far in protecting criminal forces in society. He wanted to replace liberals with justices who would not be, as we noted earlier, “favorably inclined toward claims of either criminal defendants or civil rights plaintiffs.” Nixon won the election, earning the opportunity, like Reagan, to name four new members of the Supreme Court.

Though a variety of factors worked to constrain the conservative thrust of Nixon’s Court—not the least of which was the president’s own moderation on issues such as the Equal Rights Amendment and affirmative action—Nixon was successful in ways that Reagan was not. Under the leadership of his Chief Justice, Warren Burger (1969–86), the Court declined to declare capital punishment unconstitutional *per se*, and it limited the reach of the Warren Court’s *Mapp* and *Miranda* decisions, which had restricted the use of evidence and confessions illegally obtained. The Burger Court increased the ability of states to ban obscene materials and refused to equalize state spending between school districts. It also turned down the opportunity to extend the right to privacy to homosexual conduct.

An overview of the percentage of liberal votes on the Supreme Court during ten presidential administrations shores up the basic point of this story: presidents have had varying degrees of success in transforming the Supreme Court (Segal and Spaeth 2002). After the Eisenhower administration, the Court grew increasingly liberal during the presidencies of the Democrats John Kennedy and Lyndon Johnson, and

then increasingly conservative when the Republicans Richard Nixon and Gerald Ford were in office—just as we might expect and just as those presidents would have likely desired. As the only modern-day president without the opportunity to appoint any justices, Jimmy Carter obviously had no impact on the Court. Yet Reagan, perhaps the most conservative president of the twentieth century, oversaw a Court, as we suggest above, that was only marginally less liberal than it was during the Ford and Carter years—despite his four appointments to the bench.

Why some presidents seem to have more influence on the ideological direction of the Court than others has a good deal to do with the justices their appointees replace, and not simply with whom the president nominates. At the time Richard Nixon took office in 1969, the justices of the liberal Warren Court voted about seven times out of ten in favor of parties alleging a violation of their rights or liberties. The four justices that Nixon replaced (Warren, Black, Fortas, and Harlan) were even slightly more liberal than average. The four he appointed, in contrast, were quite conservative, voting in favor of liberal interests in about a third of all cases, lowering the Court's overall support for rights and liberties claims to about 50 percent (from about 70 percent during the tail end of the Warren Court). On the other hand, while Ronald Reagan did place the extremely conservative Antonin Scalia on the Court, Scalia took the seat of then-associate justice William H. Rehnquist, another strong conservative. As a result, Scalia's appointment did not have a discernible effect on the direction of Court decisions. Nor did Reagan's other appointments. While they were conservative, they too supplanted other (relatively) conservative justices, leaving the president's short-run impact on the high court fairly negligible.

We should note that similar problems afflict the president's ability to change the ideological direction of the courts of appeals. If, for reasons political or economic, few vacancies exist across or within the circuits, a president's influence will be negligible, obviously. But even when they are able to appoint many judges, moving the circuits is still no easy task.

PACKING THE COURTS

Given the discretion and power held by federal judges, especially Supreme Court justices, and the effect of their political outlooks in shaping how they use that discretion and power, Chief Justice Rehnquist (1987, 348) found it “normal and desirable for Presidents to attempt to pack” the judiciary.

Whether or not packing the courts is a laudable goal, a variety of factors can conspire against presidents seeking to achieve it. When it comes to the lower courts, judges are constrained by the Supreme Court, and presidents by the tradition of senatorial courtesy. Moreover, for judges and occasionally justices too, presidents may be more interested in pursuing electoral or partisan objectives rather than those

centering on policy. Such was the case when Eisenhower selected the Catholic Democrat William Brennan or when Reagan redeemed his campaign promise by naming a woman, Sandra Day O'Connor, to the Court. So too, changing attitudes can rob a president of the long-lasting influence he may have wished from one of his justices.

But the public that elected Richard Nixon in 1968 desired and received a more conservative Supreme Court. Though the Reagan revolution did not make the courts substantially more conservative in their decision making, it did guarantee another generation of conservative domination, and provided four of the five votes (all but that of Clarence Thomas, a George H. W. Bush appointee) needed to select George W. Bush as the forty-third president.

It is thus no wonder why presidents have taken so seriously their constitutionally assigned task of appointing federal judges. They may whine about disappointing appointees; and they may fail to pack the courts. But they do seem rational in their anticipation that the federal judges and justices they name can help ensure their ideological legacy at least in the first few years after they depart from office.

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