

Policy Links Among the Citizenry, the President, and the Federal Judiciary

Chapter Goals and Objectives

In this chapter, readers will learn that . . .

- The ability of a president to make an impact upon the decision-making output of the federal courts rests upon four key factors.
- The President's values and policy references are often manifested via their judicial appointees' decisions.
- Presidents Trump and Obama are, in differing ways, positioned to have significant influences upon the federal judiciary.

Because this book is about judicial policymaking, it is appropriate to examine the links between the policy values of the elected chief executive and the decisional propensities of federal judges. If in electing one presidential candidate rather than another, the citizenry expresses its policy choices, do such choices spill over into the kinds of judges presidents appoint and the way those judges decide policy-relevant cases? For instance, if the people decide in an election that they want a president who will reduce the size and powers of the federal bureaucracy, does that president subsequently appoint judges who share that philosophy? And equally important, when those judges hear cases that give them the opportunity either to expand or to reduce the extent of a bureaucrat's power, do they opt for the reduction of authority? Recent evidence, while incomplete, suggests the existence of some policy links.

This phenomenon will be examined by means of two questions. First, what critical factors must exist to enable presidents to obtain a judiciary that reflects their own political philosophy? Second, what empirical evidence is there to suggest that judges' decisions to some degree carry the imprint of the presidents who selected them?



Andrew Hurrell/Bloomberg via Getty Images

On July 9, 2018, President Donald Trump announced the nomination of Brett Kavanaugh to the U.S. Supreme Court. Kavanaugh, a judge on the U.S. Courts of Appeals for the District of Columbia, replaced retiring Supreme Court Justice Anthony Kennedy. After a highly contentious confirmation battle involving allegations of sexual assault against Kavanaugh, the judge was ultimately confirmed by a narrow vote in the Senate.

The President and the Composition of the Judiciary

Four general factors determine whether chief executives can obtain a federal judiciary that is sympathetic to their political values and attitudes. These are ideology, the number of vacancies to be filled, the president's political clout, and the judicial climate the new judges enter.

Presidential Support for Ideologically Based Appointments

One key aspect of the success of chief executives in appointing a federal judiciary that mirrors their own political beliefs is the depth of their commitment to do so. Some presidents may be content merely to fill the federal bench with party loyalists and pay little attention to their nominees' specific ideologies. Some may consider ideological factors when appointing Supreme Court

justices but may not regard them as important for trial and appellate judges. Other presidents may discount ideologically grounded appointments because they themselves tend to be nonideological. Still others may place factors such as past political loyalty ahead of ideology in selecting judges.

Bill Clinton was a chief executive in the first category. Referring to himself as a “New Democrat,” Clinton tried to distance himself from the more liberal image that characterized the Democratic Party during most of the twentieth century. Throughout his administration Clinton sought to establish a judicial cohort that *looks like America*—a team reflective of the nation’s diverse ethnicity and gender instead of a cohort characterized by any singular ideological perspective. As for ideology, one key member of the president’s judicial selection team, who worked in both the Justice Department and the White House, put it this way: “Neither side is running an ideology shop. Neither of us consider ourselves to be the guardians of some kind of flame. . . . [T]his is not a do or die fight for American Culture. This is an attempt to get . . . highly competent lawyers on the federal bench so they can resolve disputes.”¹

As a president, Harry S. Truman had strong political views, but when selecting judges, he placed loyalty to himself ahead of the candidate’s overall political orientation. Truman’s premium on personal loyalty rather than ideology is generally reflected in the group of judges he put on the bench. For example, scant linkage existed between Truman’s personal liberal stance on civil rights and equal opportunity and his judicial selections. He appointed only one Black and just one woman to the bench, and at least three of his key southern district court appointees have been identified as being very unfriendly to the cause of civil rights.²

If Clinton and Truman exemplify presidents who eschewed ideological criteria, Ronald Reagan and George W. Bush provide good examples of chief executives who selected their judicial nominees with a clear eye toward compatibility with their own conservative philosophy. During his two terms, Reagan appointed 368 judges to the district and appeals courts, and George W. Bush selected 322 jurists for the lower courts. Virtually all of the Reagan and W. Bush judges had established records as political conservatives. Indeed, Reagan’s communication director, Pat Buchanan, made it very clear that ideology was a top concern in picking judges when he stated, “[Our conservative appointment strategy] . . . could do more to advance the social agenda—school prayer, anti-pornography, anti-busing, right-to-life and quotas in employment—than anything Congress can accomplish in 20 years.”³ Reagan and W. Bush were not the only modern presidents to pack the bench with those who shared their political and legal philosophies. Presidents Lyndon B. Johnson and Jimmy Carter successfully appointed reliably liberal judges, a fact which demonstrates that both political parties have attempted to use the courts to further their political ideologies.

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 ten 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. A study of proposals for new-judges bills in thirteen Congresses tested the following two hypotheses: (1) "proposals to add new federal judges are more likely to pass if the party controls the Presidency and Congress than if different parties are in power," and (2) "proposals to add new federal judges are more likely to pass during the first two years of the President's term than during the second two years." The author of this study concluded that his "data support both hypotheses—proposals to add new judges are about 5 times more likely to pass if the same party controls the Presidency and Congress than if different parties control, and about 4 times more likely to pass during the first two years of the President's term than during the second two years." He then noted that these findings serve "to remind us that not only is judicial selection a political process, but so is the creation of judicial posts."⁴ Thus, the number of vacancies that a president can fill—a function of politics, fate, and the size of the 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 Clinton was left with a whopping one hundred district and trial court vacancies—14 percent of the total—by his predecessor, George H. W. Bush. 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.

The President's Political Clout

Another factor determining whether the president can get a sympathetic federal judiciary is the scope and degree of presidential skill in overcoming any political obstacles. One such stumbling block is the U.S. Senate. If the Senate is controlled by the president's political party, the White House may find it easier to secure confirmation than if opposition forces are in control, although nothing is ever guaranteed. For example, even though the Republicans were firmly in control of the Senate at the time, 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 exchange for Bush's nomination of a moderate candidate for a district court vacancy in their state, Levin and Stabenow agreed not to oppose two more conservative nominees for judgeships in other states selected by the Bush administration.⁵ Of course, when the opposition is in power in the Senate, presidents may 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 was obliged to make a deal with the conservative chair of the Senate Judiciary Committee, Orrin Hatch. To ensure smooth sailing for at least ten of Clinton's judicial nominations that had been blocked in the Senate, the president agreed to nominate for a federal judgeship a conservative Utah Republican, Ted Stewart, who was vigorously opposed by liberals and environmental groups. "Administration officials defended the deal, saying they would get more than an acceptable amount in return for nominating Stewart, whom they acknowledged would not be chosen for the Federal bench by a Democratic President under ordinary circumstances,"⁶ reported the *New York Times*.

The Senate Judiciary Committee is another roadblock that may prevent presidents from placing their chosen men and women on the federal bench. Some presidents have been more adept than others at maneuvering their candidates through the jagged rocks of the Judiciary Committee rapids. Both Presidents John F. Kennedy and Lyndon B. Johnson, for example, had to deal with the formidable committee chair James Eastland of Mississippi, but only Johnson seems to have had the political adroitness to get most of his liberal nominees approved. Kennedy lacked this skill. Under the Clinton administration, despite the president's considerable political acumen, he was never able to parlay those skills into much clout with the conservative and often hostile Senate Judiciary Committee. Although George W. Bush did not have to deal with an especially hostile committee during most of his two terms in office, relations between his secretive White House and the GOP Congress were not as warm as some might have anticipated.

The president's personal popularity is another element in the political power formula. Chief executives who are well liked by the public and command the respect of opinion makers in the news media, the rank and file of their political party, and the leaders of the nation's major interest groups are much more likely to prevail over any forces that seek to thwart their judicial nominees. Personal popularity is not a stable factor and is sometimes hard to gauge, but presidents' standing with the electorate clearly helps determine the success of their efforts to influence the composition of the American judiciary. For example, in 1930, President Herbert Hoover's choice for a seat on the Supreme Court, John J. Parker, was defeated in the Senate by a two-vote margin. If the nomination had been made a year or so earlier, before the onset of the Great Depression took Hoover's popularity by the throat, Parker might have gotten on the Supreme Court. Likewise, in 1968, President Johnson's low esteem among voters and the powers-that-be may have been partially responsible for the Senate's rejection of his candidate for chief justice, Abe Fortas, and also for the Senate's refusal to replace Fortas with Johnson's old pal Homer Thornberry. As one observer commented, "Johnson

failed largely because most members of the Senate ‘had had it’ with the lame-duck President’s nominations.⁷⁷ Conversely, President Dwight D. Eisenhower’s success in getting approval for an inordinately large number of nominees dubbed *not qualified* by the American Bar Association (13.2 percent) may be attributed, at least in part, to his great popularity and prestige.

Ronald Reagan generally enjoyed robust popularity ratings during much of his presidency, which certainly helped him get his judges through the Senate. On the other hand, Clinton’s approval ratings varied, and he showed little desire to expend political muscle in pushing through controversial candidates over Judiciary Committee and Senate objections. This was confirmed by Eleanor Dean Acheson, who was primarily in charge of overseeing Clinton’s judicial selections. “There are a couple of cases,” she said, “in which we decided that even if we thought we had a shot at winning a fight . . . that it was not worth the time and resources . . . because these fights go for months and months, and during that period it is very difficult to concentrate.”⁷⁸

The Judicial Climate the New Judges Enter

A final matter affects the capacity of chief executives to secure a federal judiciary that reflects their own political values: the current philosophical orientations of the sitting district and appellate court judges with whom the new appointees would interact. Because federal judges have lifetime appointments during good behavior, presidents must accept the composition and value structure of the judiciary as it exists when they first take office. If the existing judiciary already reflects the president’s political and legal orientation, the impact of new judicial appointees will be immediate and substantial. However, if the trial and appellate judiciary has values that are radically different from those of the new chief executive, the impact of subsequent judicial appointments will be weaker and slower to materialize. New judges must respect the controlling legal precedents and the constitutional interpretations that prevail in the judiciary at the time they enter it, or they risk having their decisions overturned by a higher court. Such a reality may limit the capacity of a new set of judges to get in there and do their own thing—at least in the short run.

When Franklin D. Roosevelt (FDR) became president in 1933, he was confronted with a Supreme Court and a lower federal judiciary that had been solidly packed with conservative Republican jurists by his three GOP predecessors in the White House. A majority of the high court and most lower court judges viewed most of Roosevelt’s New Deal legislation as unconstitutional, and it was not until 1937, that the Supreme Court began to stop overturning much of FDR’s major legislative programs.

To make matters worse, his first opportunity to fill a Supreme Court vacancy did not come until the fall of 1937. Thus, despite the ideological screening that went into the selection of FDR’s judges, it seems fair to assume that, at least between 1933 and 1938, Roosevelt’s trial and appellate judges had to restrain their liberal propensities in the myriad of cases that came before them. This may explain in part why the voting record of the Roosevelt court appointees is not

much more liberal than that of the conservative judges selected by Roosevelt's three Republican predecessors; the Roosevelt team just did not have much room to maneuver in a judiciary dominated by staunch conservatives.

The decisional patterns of the Eisenhower judges further serve to illustrate this phenomenon. Although the Eisenhower appointees were more conservative than those selected by Presidents Truman and Roosevelt, the differences in their rulings were small. One major reason was that the Eisenhower jurists entered a realm that was dominated from top to bottom by Roosevelt and Truman appointees, who were for the most part liberals. Eisenhower's generally conservative judges were only marginally less constrained than were Roosevelt's liberal jurists in the face of a conservative-dominated judiciary.

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

However, President Clinton's impact on the judiciary was slower to manifest itself because his nominees entered an environment that was not conducive to liberal decision making. When Clinton's jurists took their seats on the federal bench, about three-quarters of the sitting judges—including the supervisory appellate panels—were conservative Republicans appointed primarily by Presidents Reagan and George H. W. Bush. Even if the Clinton judges had been closet liberals, they would have had little opportunity to express these values in a judiciary so dominated by more conservative jurists. By comparison, when George W. Bush entered the White House in 2001, a slim majority—51 percent—of federal judges had been appointed by Democratic presidents. This relative balance provided Bush with the opportunity to tilt the ideological direction of the judiciary in a conservative direction.

Presidents' Values and Their Appointees' Decisions

What evidence is there that presidents have been able to secure a judiciary in tune with their own policy values and goals? When the people elect a particular president, is there reason to believe that their choice will be expressed in the kinds of judges that are appointed and the kinds of decisions they render?

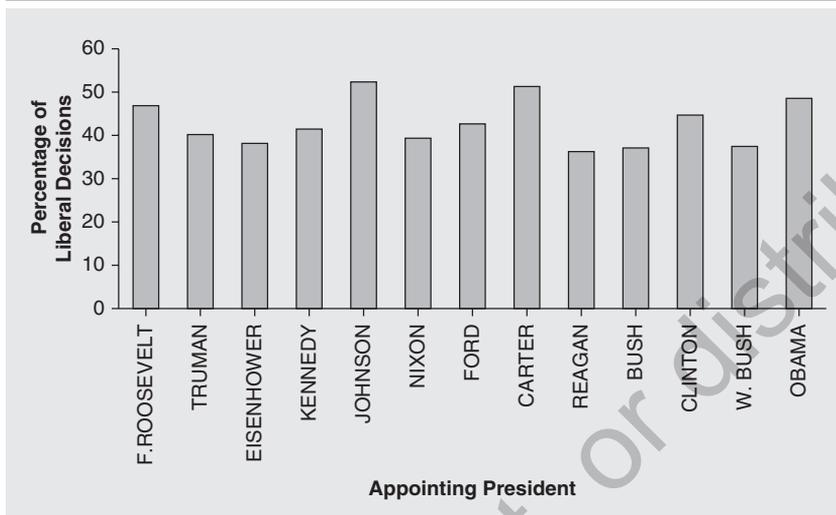
To answer these questions, we examined the liberal–conservative voting patterns of the teams of district court judges appointed by thirteen presidents during the twentieth century and the first eleven years of the twenty-first century. This comprehensive study is the only one that covers enough presidents, judges, and cases to allow for some meaningful generalizations. In essence, the focus is on whether liberal presidents appointed trial judges who decided cases in a more liberal manner and whether conservative chief executives were able to obtain district court jurists who followed their policy views.

We analyzed cases in three broad categories. In the realm of civil rights and civil liberties, liberal judges would generally take a broadening position—that is, their rulings would seek to extend these freedoms. Conservative jurists, by contrast, would prefer to limit such rights. For example, in a case in which a government agency wanted to prevent a controversial person from speaking in a public park or at a state university, a liberal judge would be more inclined than a conservative to uphold the right of the would-be speaker. Or in a case concerning affirmative action in public higher education, a liberal judge would be more likely to favor special admissions for minority petitioners. In the area of government regulation of the economy, liberal judges would probably uphold legislation that benefited working people or the economic underdog. Thus, if the secretary of labor sought an injunction against an employer for paying less than the minimum wage, a liberal judge would be more disposed to endorse the labor secretary's arguments, whereas a conservative judge would tend to side with business, especially big business. Another broad category of cases often studied by judicial scholars is criminal justice. Liberal judges are, in general, more sympathetic to the motions made by criminal defendants. For instance, in a case in which the accused claimed to have been coerced by the government to make an illegal confession, liberal judges would be more likely than their conservative counterparts to agree that the government had acted improperly.

Figure 7.1 indicates the percentage of liberal decisions rendered by the district court appointees of Presidents Franklin D. Roosevelt through Barack Obama. Forty-seven percent of the decisions of the FDR judges are liberal, which puts these jurists on par with those of Lyndon Johnson and Jimmy Carter for having the most liberal voting record. Franklin Roosevelt used ideological criteria to pick his judges, and he put the full weight of his political skills behind that endeavor. He once instructed his dispenser of political patronage, James A. Farley, to use the judicial appointment power, in effect, as a weapon against senators and representatives who were balking at New Deal legislation: "First off, we must hold up judicial appointments in States where the [congressional] delegation is not going along [with our liberal economic proposals]. We must make appointments promptly where the delegation is with us. Second, this must apply to other appointments. I'll keep in close contact with the leaders."⁹

At first, the comparatively conservative voting record of the Truman judges seems a bit strange in view of Truman's personal commitment to liberal economic and social policy goals. Only 40 percent of the Truman judges' decisions were

Figure 7.1 Percentage of Liberal Decisions Rendered by District Court Appointees of Presidents Franklin D. Roosevelt Through Barack Obama



Source: Data collected by Robert A. Carp, Kenneth L. Manning, and Ronald Stidham.

liberal, a full 7 percentage points less than those of Roosevelt’s jurists. However, Truman counted personal loyalty much more heavily than ideological standards when selecting judges, and as a result, many conservatives found their way into the ranks of Truman jurists.

Because of Truman’s lack of interest in making policy-based appointments, coupled with strong opposition in the Senate and lack of popular support throughout much of his administration, his personal liberalism was generally not reflected in the policy values of his judges. Eisenhower’s judges were more conservative than Truman’s, as expected, but the difference is not great. This resulted in part because Eisenhower paid little attention to purely ideological criteria in making appointments and also because his judges had to work in the company of an overwhelming Democratic majority throughout the federal judiciary. These factors must have curbed many of the conservative inclinations of the Eisenhower jurists.

The 42 percent liberalism score of the judges appointed by Kennedy represents a swing to the left. This is to be expected, and at first, it may appear strange that Kennedy’s team on the bench was not more left of center. However, Kennedy had problems dealing with the conservative, southern-dominated Senate Judiciary Committee; he lacked political clout in the Senate, which often made him a pawn of senatorial courtesy; and he was unable

to overcome the stranglehold of local Democratic bosses, who often prized partisan loyalty over ideological purity—or even competence—when it came to appointing judges.

Johnson's judges moved impressively toward the left and were more liberal than FDR's, and much more so than Kennedy's. This can be accounted for on the basis of the four criteria that predict a correspondence between the values of chief executives and the orientation of their judges. Johnson knew how to bargain with individual senators and was second to none in his ability to manipulate and cajole those who were initially indifferent or hostile to the issues (or candidates) he supported. His impressive victories in Congress—for example, the antipoverty legislation and the civil rights acts—are monuments to his skill. Undoubtedly, too, he used his political prowess to secure a judicial team that reflected his liberal policy values. In addition, Johnson was able to fill a large number of vacancies on the bench, and his liberal appointees must have felt at home ideologically in a judiciary headed by the liberal Chief Justice Earl Warren.

If the leftward swing of the Johnson team is dramatic, it is no less so than the shift to the right made by the Nixon judges. Only 39 percent of the decisions of Nixon's jurists were liberal. Nixon placed enormous emphasis on getting conservatives nominated to judgeships at all levels. He possessed the political clout to secure Senate confirmation for most lower court appointees—at least until the Watergate scandal, when the Nixon wine turned into vinegar—and the rightist policy values of the Nixon judges must have been prodded by a Supreme Court that was growing more and more conservative.

The 43 percent liberalism score of the Ford judges puts them right between the Johnson and Nixon jurists in terms of ideology. That Ford's jurists were less conservative than Nixon's is not hard to explain. First, Ford himself was much less of a political ideologue than his predecessor, as reflected in the way he screened his nominees and the types of individuals he chose. (Ford's appointment of the moderate John Paul Stevens to the Supreme Court, as compared with Nixon's selection of the highly conservative William H. Rehnquist, illustrates the point.) Also, because Ford's circuitous route to the presidency did not enhance his political effectiveness with the Senate, he would not have had the clout to force highly conservative Republican nominees through a liberal, Democratic Senate, even if he had wished to. (Recall that Ford was not elected to the presidency, having become chief executive after the resignation of Nixon.)

With a score of 51 percent, Jimmy Carter is close to Lyndon Johnson's record for having appointed judges with the most liberal voting records of the thirteen presidents under consideration. Despite Carter's call for an "independent" federal judiciary based on "merit selection," his judges were selected with a keen eye toward their potential liberal voting tendencies.¹⁰ That a correspondence exists between the values of President Carter and the liberal decisional patterns of his judges should come as no surprise. Carter was clearly identified with liberal social and political values, and although his economic policies were perhaps more conservative than those of other recent Democratic presidents, Carter's

commitment to liberal values in the areas of civil rights and liberties and of criminal justice was not in doubt. Carter, too, had ample opportunity to pack the bench. The Omnibus Judgeship Act of 1978, passed by a friendly Democratic Congress, created a record 152 new federal judicial openings for Carter to fill. He also possessed a fair degree of political clout with a Judiciary Committee and Senate controlled by Democrats. Finally, the Carter judicial team found many friendly liberals (appointed by Presidents Kennedy and Johnson) already sitting on the bench.

Reagan's judicial team has one of the most conservative voting records of all the judicial cohorts in our study. Only 36 percent of their decisions bear the liberal stamp. Reagan's conservative values and his commitment to reshaping the federal judiciary were well known. Early in his first presidential campaign, he had inveighed against left-leaning activist judges and promised a dramatic change. As did his predecessor, Carter, Reagan had the opportunity, through attrition and newly created judgeships, to fill the judiciary with persons reflecting his own inclinations. (At the end of his second term, about half of the federal judiciary bore the Reagan label.) This phenomenon was aided by Reagan's great personal popularity throughout most of his administration and a Senate that his party controlled during six of his eight years in office. Finally, the Reagan cohort entered the judicial realm with conservative greetings from the sitting right-of-center Nixon and Ford judges. The data also indicate that the overall ideology of judges appointed by Reagan's vice president and successor, George H. W. Bush, is virtually identical to that of Reagan.

President Bill Clinton's judges were heavily criticized in the 1990s by Republican senators and representatives, some of whom even called for the impeachment of his so-called liberal-activist judges.¹¹ However, the data have not supported these GOP condemnations. Clinton's judges have handed down liberal decisions 45 percent of the time. While this is certainly more progressive than the 36 percent or so for Reagan and George H. W. Bush jurists, it is decidedly more conservative than the 53 and 51 percent liberal decisions handed down by Johnson and Carter appointees, respectively. The record indicates that Clinton's judges have been similar to those appointed by Republican Gerald Ford. They have, in a word, been moderate.

The judicial cohort appointed by President George W. Bush is consistent with the Reagan and Bush Sr. jurists—the W. Bush are among the most conservative in our study. With a score of 37 percent, his judges have shown themselves to be reliable conservatives. The George W. Bush administration made judicial nominations a priority and sought to leave a clear ideological mark on the federal bench. In 2003, Bush's assistant attorney general, Viet Dinh, made it clear that Bush's judges would adhere to the president's conservative philosophy when Dinh said in an interview, "we want to ensure that the President's mandate to us that the men and women who are nominated by him to be on the bench have his vision of the proper role of the judiciary. That is, a judiciary that will follow the law, not make the law."¹²

The data indicate that President Barack Obama appointed judges who are moving in a different ideological direction from their Republican colleagues.

Forty-nine percent of the Obama judge decisions have been liberal. This places them slightly to the left of the judges appointed by Clinton but not quite as liberal as the jurists selected by Presidents Johnson and Carter.

President Barack Obama and the Federal Judiciary

What kind of men and women did President Barack Obama select for service on the federal bench, and what has been the ideological direction of their decision making? To respond, we refer to our four-part model, which addresses whether chief executives can obtain a federal judiciary that is sympathetic to their political values and attitudes.

First, was Obama personally committed to making ideologically based appointments? On the campaign trail in 2008, candidate Obama placed a lot of emphasis on the idea of *change*. To be sure, Obama charted a very different course than George W. Bush's staunchly conservative approach to the judiciary. However, though Obama's judges have been more liberal than those selected by previous Republican administrations, his judges are hardly ideological extremists. Indeed, President Obama's nominees did not generate unanimous antipathy from all persons of right-wing persuasion. In 2009, Republican senator John Thune of South Dakota called two of Obama's nominees to federal judgeships in his state "good picks."¹³ And in July 2011, two of President Obama's federal district court nominees in Texas were recommended by both of Texas's conservative Republican senators.¹⁴

Obama also resorted to occasional ideological "horse trading" to get his judges approved. For example, in 2013, Obama nominated Michael P. Boggs to fill a vacancy on the U.S. district court in northern Georgia as part of a bipartisan deal brokered between the White House and Republican senators as a means for moving forward on a group of stalled judicial nominations.¹⁵ A judge on the Georgia Court of Appeals, Boggs had previously served in the state legislature. Boggs's background was hardly that of the stereotypical progressive Democrat. During his stint as a Georgia lawmaker, Boggs had sponsored legislation that sought to restrict access to abortion rights, and he had voted to retain the state flag that contained the Confederate battle emblem. Liberal interests were deeply unsettled by the Boggs nomination. "It breaks my heart that this is the first African-American president who is doing something like this," said U.S. representative David Scott (D-Ga.). The Boggs nomination was ultimately unsuccessful after it was made clear that the Senate Judiciary Committee would not approve him.¹⁶ Still, the simple fact that Boggs was tapped for a seat on the federal bench as part of a bipartisan deal was a testament to the ideological flexibility that the Obama administration was willing to show on occasion to fill positions in the judiciary.

Somewhat similar dynamics have occurred regarding Obama's first two Supreme Court nominations. In May 2009, the president selected Sonia Sotomayor as his first Supreme Court nominee. Sotomayor, who was initially selected for a federal judgeship by Republican President George H. W. Bush, was the first

Hispanic nominated to the Supreme Court and became only the third woman to serve there. Although Sotomayor was widely recognized as a loyal Democrat, a review of her judicial and legal record turned up no real instances of liberal ideological extremism. Sotomayor also possessed sterling professional qualifications and an ethically unimpeachable background. Some opponents grumbled about Sotomayor's comment in a past speech about a "wise Latina" being better able to reach a conclusion "than a white male who hadn't lived that life."¹⁷ Still, Republicans were unable to mount a serious challenge to her nomination, and she was confirmed easily.¹⁸

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 he nominated a mainstream candidate for this high court office—Elena Kagan. As one seasoned observer quipped, "President Obama's announcement of Elena Kagan was perfectly boring—and that's what makes her such a bold choice."¹⁹ 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."²⁰ On August 5, 2010, the Senate confirmed Kagan's appointment by a vote of sixty-three to thirty-seven.

Furthermore, the data strongly indicate that the Obama administration sought to follow in the footsteps of George W. Bush and Bill Clinton in seeking to increase the diversity of the judiciary. Of the 324 jurists President Obama appointed to the federal bench, 63 percent were women and/or members of ethnic minority groups. One administration official noted that "the unifying quality that we are looking for is excellence, but also diversity, and diversity in the broadest sense of the word. We are looking for experiential diversity, not just race and gender. We want people who are not the usual suspects, not just judges and prosecutors but public defenders and lawyers in private practice."²¹

We now return to the original question: does the evidence suggest that President Obama tried to move the judiciary's center of gravity in a liberal direction? Figure 7.1 and Table 7.1 provide a look at the decision-making patterns of President Obama's trial court appointees. The data previously reported in Figure 7.1 indicate that 49 percent of the Obama judge decisions have been liberal. This places his judges to the left of the Republican appointees and also of those judges selected by Bill Clinton. However, Obama's judges are generally less liberal than the jurists selected by Presidents Johnson and Carter.

Also intriguing are the numbers reported in Table 7.1, which looks at the decision making of judges selected by the nine most recent presidents, divided into three general categories: criminal justice (such as motions made by criminal defendants), civil rights and liberties (such as freedom of speech, abortion, gay rights, and racial discrimination), and labor and economic regulation (such as

Table 7.1 Percentage of Liberal Decisions in Three Categories of Cases Rendered by District Court Appointees of Presidents Lyndon B. Johnson Through Barack Obama

Appointing President	Criminal Justice	Civil Rights and Liberties	Labor and Economic Regulation
Johnson	36.9	57.3	63.4
Nixon	26.8	37.7	51.1
Ford	33.0	38.7	53.0
Carter	37.7	50.0	61.9
Reagan	25.4	32.7	49.6
George H. W. Bush	26.8	33.7	50.2
Clinton	37.7	41.6	55.7
George W. Bush	29.1	33.0	51.0
Obama	36.1	43.4	61.8

Source: Data collected by Robert A. Carp, Kenneth L. Manning, and Ronald Stidham.

disputes between labor and management, environmental protection cases, and governmental efforts to regulate business).

With a liberal decision rate of 36.1 percent, the decisions by Obama judges in criminal justice cases have not been as liberal as other Democratic presidents and are only slightly more liberal than those of judges appointed by Republican Gerald Ford. By comparison, 37.7 percent of the Clinton judges' decisions have been liberal, which is on par with Carter's judicial team.

We see some significant differences in the area of civil rights and liberties. Obama's judges voted on the liberal side of these cases 43.4 percent of the time—certainly much more liberal than the score of 33.0 for the George W. Bush team, and also slightly more than the score of 41.6 for the Clinton judges. Interestingly, Obama's judges appear to be much less liberal in these cases than the appointees of Democratic presidents Johnson and Carter. Conversely, only 33 percent of the George W. Bush cohort voted on the liberal side of issues pertaining to the Bill of Rights and civil rights matters.

We find some significant differences in labor and economic regulation cases. The judges appointed by Obama hand down liberal decisions 61.8 percent of the time in these cases, on par with the judicial appointees of Presidents Johnson and Carter. When compared to the 51 percent liberalism rate by George W. Bush jurists, one sees that the Obama jurists have staked out very different

positions in these cases when compared to the jurists selected during the previous administration.

The results identified in these three main policy areas may not be too surprising. Taken in sum, the data show that the judges appointed by Obama are certainly more left of center than the jurists appointed by Republican presidents. However, the data also indicate that the Obama judges are not extremists. They are mainstream liberals largely in line with the judges appointed by previous Democratic presidents.

The second element affecting a president's capacity to influence the ideological direction of the judiciary is the number of vacancies the chief executive can fill. This is, of course, influenced by the number of vacancies inherited from the president's predecessor, how long the president serves in office, and whether or not Congress enacts legislation that significantly increases the number of judgeships. When Barack Obama assumed the presidency in 2009, he inherited fifty-four judicial vacancies—forty-four at the district court level and ten in the courts of appeals. Democrats who controlled the Senate in the final years of the George W. Bush administration were in no mood to approve the judicial nominees of the then-unpopular, lame-duck president. President Obama thus came into office with a sizable number of vacancies to fill. However, the number was not as high as that which greeted George W. Bush when he took the reins of power in early 2001. At that time, Bush was presented with twenty-nine courts of appeals and sixty-two district court vacancies. Still, with fifty-four judicial positions open, Obama had the opportunity to make a good start in filling the bench with judges who shared his philosophy.

Despite this initial opening opportunity for the president, the Obama White House was slow to fill many judicial vacancies and was subjected to 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. Experts blame Republican delaying tactics, slow White House nominations and a dysfunctional Senate confirmation system."²² In fact, a Brookings Institution report determined that "had the Obama administration nominated judges at the same rate as the [George W.] Bush administration, it would have filled all the vacancies it inherited."²³ The pace of nominations improved as Obama's time in office increased, but the judicial confirmation process during the Obama years was a roller coaster of victories and disappointments.

What about the possibility of Congress passing a new omnibus judges bill that would give the president the opportunity to pack the judiciary with men and women of like-minded values—a phenomenon that greatly enhanced President Kennedy's and President Carter's ideological impact on the judiciary? Unfortunately for President Obama, he had no such luck. Measures were introduced

in Congress between 2009 and 2015 to create a few new judicial positions, including a bipartisan 2015 effort in Colorado to add two new permanent district court judgeships in that rapidly growing state.²⁴ But between the budget-cutting mentality that prevailed in Congress and the bitter political divisions that characterized the times, Congress showed no indication that it would offer the president an omnibus judges bill that would serve to increase Obama's impact on the federal judiciary.

The data suggest that despite a slow start by the administration in nominating judges and extraordinary obstructionism by Republicans in the Senate, President Obama had about an average set of opportunities to make an ideological impact on the federal bench. Obama placed 172 jurists on the bench in his first term and completed his second term having placed 324 jurists on the federal bench. This total number is exactly the same as that of his predecessor, George W. Bush. The pace of nomination approvals improved dramatically in 2014, but it ground to a virtual halt once Republicans gained control of the Senate in 2015, following their election victories in November 2014. As President Obama concluded his second term, some 26 percent of all active judges at the time had been selected by him. However, Obama did not match or exceed the total number of jurists tapped by Bill Clinton (372) or Ronald Reagan (364). In terms of sheer numbers, Obama had a substantial, though not record-breaking, imprint upon the federal judiciary.

A third variable affecting the president's ideological impact is the extent of his political clout—that is, his power and skill in nudging the Senate and Senate Judiciary Committee to approve his nominees. Also included in this variable is the chief executive's personal popularity, which, if great, can enhance his capacity to attain confirmation of his nominees.

What about President Obama's political influence? Although the president was elected by a clear electoral majority in 2008—and reelected by a decisive margin in 2012—his political “glory days” were limited. The high approval numbers given to the president during his early months in office were fleeting, and throughout much of his second term, President Obama's net approval rarely topped 50 percent. Of course, the president was able to get a number of pieces of progressive legislation passed during this first two years in office, including his landmark health care reform law. The administration also scored some notable victories before the Supreme Court, including twice winning crucial cases dealing with the Affordable Care Act and the historic win on same-sex marriage. But it is also true that much of the Obama legislative agenda ground to a virtual halt after the 2010 elections, when Republicans recaptured control of the House of Representatives and a series of bitter budgetary battles subsequently dominated relations between Capitol Hill and the White House. And when Republicans gained control of the Senate after the November 2014 elections, a lame-duck President Obama faced the prospect of working with a potentially hostile Senate in no mood to give the administration many accomplishments. When Obama left office, his approval rating as measured by Gallup stood at 59 percent, with 37 percent disapproving of the way he handled his job.²⁵ This marked a

reasonably robust level of popular approval, but Obama was often unable to translate that support into legislative and judicial appointment victories via a Republican Congress.

In fact, Obama's success vis-à-vis the Senate judicial confirmation process was one of ups and downs, with plenty of delay and acrimony along the way. From 2009 to 2015, Obama's fellow Democrats wielded control of the Senate and the all-important Judiciary Committee. This would suggest that the Obama administration faced smooth sailing when it came to Senate approval of his judicial nominees. But for the most part, that was definitely not the case. Though in the minority, Republicans aggressively used the complex Senate rules to obstruct and delay the judicial confirmation process. During the early months of the Obama administration, scholars observed that "the [Senate Judiciary] 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."²⁶ These scholars further noted that the "surface cooperation" between Senate Democrats and Republicans 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."²⁷ Russ Wheeler, a scholar at the Brookings Institution, noted, "It used to be more collegial. Minority senators realized elections had consequences and the federal system needs judges. [Now] all those rules are out the window. It's fighting tooth and nail every day."²⁸

This *delaying action* on the part of opponents to Obama's judicial appointees was intense. Considering Obama's first full term, two respected judicial researchers observed that Obama's judicial nominations "faced nearly historic delays in reaching the Senate floor, and confirmation rates for the nation's federal trial and appellate courts remained depressed."²⁹ The average length of the confirmation process for Obama's successful appellate court nominees during his first term was around 220 days; it was approximately 190 days for district court positions. By historical standards, these numbers were very high, even compared to the Clinton and George W. Bush administrations.³⁰ As recently as the early 1990s, the average length of time was around 100 days, and during much of the 1970s, the average length of the confirmation process for a successful judicial nomination was well under fifty days. As for Obama's political influence, these data clearly indicate that the administration was unable to spur prompt Senate action on the president's judicial nominations.

In terms of the sheer percentage of nominees approved, the data indicate that a majority of Obama's nominees were confirmed. Republicans pointed out that Obama nominees in the 111th (2009–2010) and 112th (2011–2012) Congresses were confirmed at higher rates than were George W. Bush's nominees: the Senate confirmed roughly 60 percent of Obama's appellate court nominations whereas George W. Bush, who faced similar delaying tactics by Senate Democrats,

had seen only 50 percent of his nominees approved during his early years. The 65 percent confirmation rate for Obama's district court nominees during his first term was also slightly better than George W. Bush's nominees. However, these numbers do not approach those seen prior to the 1980s, when nearly 90 percent of judicial nominees gained Senate approval.³¹

Perhaps the most notable development in the power struggle over judges between the Senate and the White House came in November 2013, when Democrats changed the Senate rules and eliminated the possibility of a filibuster for lower court nominees. The rule change was precipitated by increasing frustration among Democrats toward Republican refusals to allow votes on numerous presidential nominations. In particular, Senate Republicans began aggressively using the threat of filibusters to block the majority party from approving new judges.

This ongoing partisan battle reached a tipping point in 2013 over three nominees to the D.C. Circuit Court of Appeals.³² The judicial candidates in question at the time were well-regarded, highly qualified individuals with strong credentials. Still, Republicans filibustered their nominations and refused to allow a vote on their approval, arguing that the D.C. Court was underworked and did not need the judges. Most legal experts considered that argument completely unfounded, and reports indicated that Democrats increasingly came to feel that the GOP was altering the balance of power between the executive and legislative branches by refusing to allow the duly elected president to fulfill his constitutional authority to appoint jurists and other governmental officials. Senator Elizabeth Warren, a Democrat from Massachusetts, asserted that “[Republicans] have filibustered people [President Obama] has nominated to fill out his administration, and they are now filibustering judges to block him from filling any of the vacancies with highly qualified people: We need to call out these filibusters for what they are: Naked attempts to nullify the results of the last election.”³³ Frustrated after years of unprecedented obstructionism by Republicans, Democrats used their majority power and changed the Senate rules, ending the possibility of a minority party filibuster of lower court nominees.

The 2013 filibuster rule change paved the way for a significant number of judicial nominees to be approved. Senate Majority Leader Harry Reid (D-NV) sought to gain approval of numerous judicial nominees in 2014, particularly since it was clear that Democrats risked losing control of the Senate in that year's November elections. Obama got Senate approval of 101 nominees in the thirteen months after the filibuster rule change in the 113th Congress, a figure that is nearly one-third of the 324 judges selected by Obama during his eight years in office.

However, the filibuster rule change did not remove all hurdles for the administration. Attention soon turned to the use of another tactic—the *blue slip* process—as a means for delaying or blocking judicial nominations. The blue slip tradition dictates that when a judge is nominated by the president, the chair of the Senate Judiciary Committee sends a form (printed on aqua-hued paper) to home-state senators seeking their approval of a judicial nominee. If the senators approve, the committee may move forward with the nomination. However, if one or both of the senators withholds the blue slip or signals their disapproval,

the nomination typically stalls. The blue slip process is not mandated by law or by Senate rules; it is, rather, an institutional norm.

After the filibuster rule change, Republicans turned to using the blue slip process as a means to prevent President Obama from filling some judicial vacancies. For example, in June 2013, President Obama nominated Jennifer May-Parker to a U.S. district court position in North Carolina after she had been recommended for the position by Republican senator Richard Burr from that state. However, after she was selected, Senator Burr reversed his position and withheld his blue slip support for May-Parker. The nomination eventually failed; Senator Burr refused to allow her name to go forward and the nomination effectively died when Congress ended its 113th session on January 3, 2015. In Texas, a number of federal judicial positions remained unfilled and lacked nominees, reportedly due in large part to the blue slip process. One news report indicated that the White House sought informal preclearance of any nominees from the two Republican senators from the Lone Star State before any names were formally put forward by the administration. This was because the White House realized that the blue slip process could be used by the senators to block any nominations. However, the senators were not cooperative.³⁴

Other Republican delaying tactics included frequent refusals of unanimous consent to floor votes on nominations and extensive use of holds on nominees by individual senators.³⁵ And there was little question that those delays and obstructions were deeply tinted by partisanship. In April 2013, Senate Judiciary Committee Chair Patrick Leahy, a Democrat from Vermont, noted that at that time “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.”³⁶ The year 2014 would turn out to be a banner year for the Obama administration in gaining approval of its judicial nominations. Republicans won a majority of the seats in the Senate after the 2014 elections, and with that, they seized control of the Senate Judiciary Committee and the judicial confirmation process. In 2015, it was clear that Obama’s luck had sharply changed, and the Senate approval process ground to a virtual halt. In Obama’s final two years in office, senators voted to confirm only twenty-two of his judicial nominees, the lowest total since 1951–1952, in the final years of Harry Truman’s presidency.³⁷ One news report noted that “Republicans say there’s little reason to shift gears with a lame-duck president in office and hopes running high that they will win the White House [in 2016]. ‘It’ll be a slow, steady pace,’ said Senate Majority Whip John Cornyn (R-Texas).”³⁸ In Obama’s final months, Republicans invoked the *Thurmond Rule*, an informal Senate tradition which emerged in the 1960s that dictates that senators will generally not approve lifetime appointments during the final months of a lame-duck president’s term of office.

The Obama administration has also had a few high-profile judicial nominees blocked outright by Republicans. Most notable among these was the Supreme Court nomination of Merrick Garland. On February 13, 2016, conservative Justice Antonin Scalia died in his sleep while on a hunting vacation in Texas. This sudden and unexpected event opened the potential for President Obama

to appoint a third Supreme Court justice, and in doing so, he could tip the ideological direction of the Court in a decidedly liberal direction. However, the same day that Scalia's passing was confirmed in the news, Senate Majority Leader Mitch McConnell (R-KY) announced that the Senate would not hold hearings or consider any nominee by President Obama. Senator McConnell made it clear that the Senate would keep the Supreme Court seat vacant until after the 2016 elections. Democrats howled in protest as Senate Republicans engaged in a transparent power grab, but there was little that Obama and his fellow partisans could do to stop the GOP. Despite McConnell's opposition, President Obama nominated D.C. Courts of Appeals Judge Merrick Garland to replace Scalia.³⁹ Garland, a respected and experienced jurist with impeccable credentials, was considered an ideological centrist. But unified Republican opposition to considering any nomination meant that Garland's bid for a spot on the High Court went nowhere, and Obama departed the White House with the seat still vacant.

Obama also had a few high profile Court of Appeals nominations blocked. Goodwin Liu, who was tapped in 2010 for a seat on the Ninth Circuit Court of Appeals, withdrew his name after Senate Republicans blocked a vote on his confirmation via a filibuster in 2011.⁴⁰ In 2013, a similar parliamentary fate 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 in the Senate.⁴¹ Both Liu and Halligan were considered to be accomplished and qualified nominees but were staunchly opposed by Republicans who argued that the nominees were too ideological.

When President Obama completed his second term in January 2017, there were eighty-eight district court vacancies, seventeen open positions on the courts of appeals, and one empty seat on the Supreme Court. Thus, a staggering 105 vacancies existed on the federal bench (recall that Obama had inherited fifty-four empty seats when he took office eight years before). As one observer noted, "Republicans slow-walked or stonewalled dozens of federal judicial nominations,"⁴² and this undoubtedly had the effect of limiting Obama's impact upon the judiciary.

So what is one to conclude about the impact of Obama's political clout in terms of his success in shaping the judiciary with his court appointments? In spite of the president's diminished political effectiveness that quickly followed his election victory, and despite the obstruction tactics of Republican opponents in the Senate, a decided majority of Obama nominees were confirmed, and he was able to appoint the same number of federal judges (324) as his predecessor. Still, it is fair to say that there were many missed opportunities for the Obama White House.

The final ingredient in the president's capacity to make an ideological mark on the federal judiciary is the judicial environment that new judges enter. If it is unfavorable because the judiciary is packed with jurists whose ideologies are opposed to that of the appointing president, the chief executive may have a long wait before the new appointees can fully vent their judicial values. On the other hand, if the judiciary is evenly divided, or even somewhat disposed to the

president's ideological values, the fruits of the appointments will be much more readily seen.

How did this affect President Obama's potential to leave his ideological mark on the composition of the judiciary? At the end of the George W. Bush administration, 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 Democratic values.

As President Obama completed his eighth and final year in office, around 60 percent of *active* federal judges at the time had been appointed by Democratic presidents, while approximately 40 percent had been selected by Republican chief executives. When one factored in judges with *senior judge* status, the numbers were fairly similar: of all federal jurists on the bench, around 55 percent were Democratic appointees while 45 percent were those chosen by GOP presidents.⁴³ Thus, the data indicate that Obama was able to move the ideological balance of the courts in a leftward direction, but the overall picture was one of a federal bench that was not especially far from the political center. With regard to the Supreme Court, however, Obama's inability to replace Antonin Scalia with a new, presumably more liberal justice had a huge limiting impact upon the 44th president's ability to shift the overall ideological direction of the federal bench. So while it is clear that Obama moved the ideological split of the overall judiciary in a direction more favorable to Democrats, the administration's failure to tilt the Supreme Court in a liberal direction stands out as a monumental missed opportunity.

President Donald Trump and the Federal Judiciary

What do we know about the current and potential impact of Donald Trump's administration now that he has been in the White House for two years? At this point, there are no reliable quantitative data that would allow us to make empirical evaluations about the relative ideology of the Trump judicial cohort compared to other presidents. It takes years for an adequate number of judges to gain seats on the bench, to hear cases, hand down decisions, and then for scholars to gather and analyze sufficient numbers of these court cases to make definite statements about a president's judicial team. This will have to be the work for future studies. Still, at this point, we can employ the four-part model and speculate about Donald Trump's potential impact on the bench.

First, is Donald Trump committed to making ideologically based appointments? Candidate Trump ran as a combative Republican, though at one point in his adult life he had aligned with Democrats and his positions on a number of issues did not always hew closely to GOP orthodoxy. This led some to speculate that Trump might not govern from a consistent ideological position. Noted conservative columnist Charles Krauthammer observed during the 2016 campaign that "Trump doesn't even pretend to have [principles], conservative or otherwise."⁴⁴

As president, however, Trump has governed from a hard-conservative perspective. His policy proposals—tax cuts, deregulation, repealing the Affordable Care Act, hardline immigration positions—have found almost no support among

liberals. And while President Trump's staff has experienced extremely high rates of turnover, few, if any, working in his administration have found their ideological home in the moderate wing of the Republican Party. This has been a White House firmly staked on the right, away from the political center.

More significantly, there is indication that the White House has pursued a coordinated and well-planned strategy with regard to filling judicial positions. One news organization reported that

In the weeks before Donald J. Trump took office, lawyers joining his administration gathered at a law firm near the Capitol, where Donald F. McGahn II, the soon-to-be White House counsel, filled a white board with a secret battle plan to fill the federal appeals courts with young and deeply conservative judges.

Mr. McGahn, instructed by Mr. Trump to maximize the opportunity to reshape the judiciary, mapped out potential nominees and a strategy, according to two people familiar with the effort: Start by filling vacancies on appeals courts with multiple openings and where Democratic senators up for re-election next year in states won by Mr. Trump—like Indiana, Michigan and Pennsylvania—could be pressured not to block his nominees. And to speed them through confirmation, avoid clogging the Senate with too many nominees for the district courts, where legal philosophy is less crucial.⁴⁵

Furthermore, many of President Trump's judicial nominees have had ties to The Federalist Society, a nationwide group of conservative lawyers and legal thinkers. This group has served as a professional and intellectual incubator for right-leaning attorneys, academics, and Republican jurists. A noted Supreme Court watcher called The Federalist Society the "conservative pipeline to the Supreme Court."⁴⁶ One of the key leaders of that group, Leonard Leo, took a leave from the organization to work with the Trump team to compile a list of potential Supreme Court nominees. One professor who studies the courts called Leo a judicial nominee "gatekeeper" who "has a lot of power and influence" in the Trump administration.⁴⁷

Trump's commitment to a clear judicial appointment strategy is also reflected in his tendency to select younger people for positions on the bench. The average age of Mr. Trump's first-year circuit court nominees was 49, younger than the first-year nominees of Presidents Obama, George W. Bush, and Bill Clinton.⁴⁸ Appointing jurists of a younger age will generally enable the judge to serve in the position longer and further enhance the appointing president's long-term impact on the judiciary. Trump has also shown little willingness to sacrifice ideology in pursuit of diversity. As of November 1, 2018, President Trump had appointed seventy-nine jurists to positions on the bench. Of those judges, only 32 percent were women and/or people of color. This stands in significant contrast to the administrations of Barack Obama and George W. Bush, both of which sought out significant numbers of nontraditional nominees.

When considering all of the evidence seen so far, there is unmistakable indication that the Trump administration is aggressively pursuing a strategy of making ideologically based appointments to the federal judiciary.

The second element affecting a president's capacity to influence the ideological direction of the judiciary is the number of vacancies he can fill. This is, of course, influenced by the number of vacancies inherited from the president's predecessor, how long the president serves in office, and whether Congress enacts legislation creating new judgeship positions that the president may fill.

As was the case with other recent presidents, there have been no proposals during the early going of the Trump presidency to add new judgeships. And given that the Trump administration is halfway through a first term as this book went to press, speculation about how long the president will remain in office is premature.

But there is no question that at least with regard to inherited vacancies, President Trump was given an extraordinary opportunity to leave a substantial impact upon the courts. As discussed previously, when President Obama left office in early 2017, there were 105 judicial vacancies. The large number of open positions was due in no small part because of the bitter partisan politics that occurred during the Obama administration and Republican efforts to slow-walk, block, and/or otherwise impede that administration from making appointments to the bench. Regardless of where the blame lies, the fact is that these vacancies afforded the Trump administration the chance to leave a substantial and lasting imprint upon the federal court system.

President Trump was also afforded the exceptional opportunity to fill two Supreme Court vacancies during his first two years in office. Since Senate Republicans held Scalia's seat open for the incoming administration, the new president wasted no time in nominating Neil Gorsuch to fill the vacant seat. An appellate judge with sterling credentials and a former Federalist Society member, Gorsuch was opposed by Democrats, who filibustered his nomination (recall that Democrats had ended the filibuster for lower court and executive branch nominees but retained the power of the minority party to filibuster a Supreme Court pick). Senate Republicans, led by McConnell, countered the Democrats' filibuster of Gorsuch by changing the Senate rules and ending the filibuster for *all* nominations. With that procedural hurdle removed, and out-numbered Democrats powerless to stop the nomination, Gorsuch was confirmed on April 7, 2017, less than four months after Trump assumed office.⁴⁹ Just over one year later, Justice Anthony Kennedy announced his retirement from the High Court in June 2018, handing another opportunity to President Trump to leave a major imprint upon the judiciary. Trump nominated Brett Kavanaugh, a D.C. Court of Appeals judge widely regarded as a staunch conservative, to replace Kennedy. The Kavanaugh nomination turned out to be much more contentious than that of Gorsuch, in large part because of allegations of sexual misconduct during Kavanaugh's younger years by Christine Blasey Ford, a professor of psychology at Palo Alto University. After a very bitter committee hearing process, which included riveting testimony by Dr. Ford and an angry response by the nominee who denied the

allegations, the Senate ultimately confirmed Kavanaugh on an extremely close, nearly party line vote of fifty-to-forty eight.⁵⁰

In sum, given the vacant judgeship positions Trump inherited and two Supreme Court vacancies to fill, it is clear that with regard to the number of judicial vacancies, the president's potential influence on the federal judiciary could be exceptional.

The third variable affecting the president's ideological impact is the amount of his political clout. How well is the president able to get the Senate to approve his nominees? As of November 1, 2018, President Trump's approval rating of 40 percent—with a disapproval rating of 56 percent—attests to the fact that he has been a remarkably unpopular president.⁵¹ Indeed, at no point during his first eighteen months in office did President Trump's approval rating ever top 45 percent. This might lead some to speculate that Trump faced tough sledding on Capitol Hill, perhaps anticipating that lawmakers would be hesitant to support the agenda of an unpopular leader. This, however, was not the case.

Why? While unpopular among the general public, President Trump enjoyed outsized support among loyal Republicans. A *Wall Street Journal/NBC News* poll in July 2018 found that Trump had 88 percent approval among self-identified Republicans.⁵² What's more, though many Republicans grumbled about how Trump comported himself in office, the vast majority of these same Republicans strongly agreed with the president's agenda of appointing staunch conservatives to the federal bench. Most Americans do not pay a lot of attention to nominations to the federal courts. But as one researcher noted, "a strong part of the Republican Party base, more so than the Democratic base, are tuned into judges."⁵³

Trump thus enjoyed the benefit of a majority Republican Party that shared his administration's judicial ambitions and a minority party in the Senate largely unable to block the president. The White House found a willing partner in Senate Republican leader Mitch McConnell, who worked closely with the administration in moving judicial nominations forward at a rapid clip. Republicans also took advantage of the Democrats' 2013 decision to end filibusters for lower court judicial nominees. What's more, the GOP engaged in some rule changes of their own. As noted above, they ended filibusters for Supreme Court nominations. They also altered the blue-slip tradition. Senator Charles Grassley, the Republican chair of the Senate Judiciary Committee, sharply curtailed the blue-slip by deciding to only selectively recognize blue-slips.⁵⁴ Democrats, recalling that the GOP aggressively used blue-slips to stall or block a number of Obama's nominees, were incensed by the Republican flip-flop. But lacking the votes, and with the filibuster gone and the blue-slip process in tatters, there was very little that the minority party in the Senate could do to block Trump's judicial nominees.

That is not to say that President Trump saw all of his judicial nominees approved. The White House was forced to withdraw the nomination of Ryan Bounds to a position on the Ninth Circuit Court of Appeals in July 2018. Bounds had ridiculed multiculturalism and groups concerned with racial issues while

an undergraduate at Stanford University. Faced with this evidence, two key GOP senators—Tim Scott of South Carolina and Marco Rubio of Florida— withdrew their support for the nominee, and Republicans found themselves without enough votes to confirm Bounds.⁵⁵ Another Trump nominee, Matthew Petersen, withdrew his name from consideration for a position as a judge on the D.C. district court after video surfaced of Peterson at a Congressional hearing being unable to answer basic questions about the law and judicial procedure. A staff lawyer with the Federal Election Commission, Peterson admitted that he had no trial court experience.⁵⁶ Two other district court nominees, Brett Talley and Jeff Mateer, were pulled after Senator Grassley told the White House to “reconsider” the nominations. Talley received a *not qualified* rating from the American Bar Association, due in large part to his lack of courtroom experience. Mateer ran into trouble over comments describing transgender youth as part of “Satan’s plan” and labeling as “disgusting” the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, which legalized gay marriage.⁵⁷

These instances aside, it is clear that President Trump held substantial political sway when it came to pushing his judicial nominations during his two years in office. Will this record of political clout continue? Much depends on the outcome of future elections. Russell Wheeler, a Brookings Institution researcher, noted that now more than ever the confirmation process is more about hardball politics and less about cooperation between the parties. “It’s just dog-eat-dog for the moment, and we’ll worry about what happens when the tables get turned later,” he said. “I don’t see how you ratchet it back.”⁵⁸ As one conservative former law clerk of the late Justice Antonin Scalia and supporter of Trump’s judicial nomination agenda lamented, “if the Republicans lose the Senate in November [2018], the great start will be nothing more than a great start.”⁵⁹

The fourth variable in the president’s capacity to make his ideological mark on the federal judiciary is the judicial climate that his judges enter. How has this affected President Trump’s potential to leave his stamp on courts? As noted previously in this chapter, when Trump became president, a clear majority of jurists on the bench were appointed by Democrats. As of November 1, 2018, Trump had obtained appointment of seventy-nine judges to the bench and he had some sixty-nine nominees pending. These, to be sure, are significant numbers given the new president’s relatively short time in office. Still, the number of judges Trump had appointed by that date represent only around 8 percent of the total number of authorized judgeships. President Trump’s lower court nominees will undoubtedly leave a mark, but it will take much time before they are present in substantial enough figures for them to be a force. But this is not the case with regard to the Supreme Court. With two justice nominations under his belt, and one of them replacing a key swing vote (i.e., Kavanaugh replacing Kennedy), Trump’s impact upon the Supreme Court is already very substantial.

SUMMARY

At the national level, the judicial selection process includes a variety of participants, despite the constitutional mandate that the president shall do the appointing with the advice and consent of the Senate. If presidents are to dominate this process and name to the bench individuals with similar policy values, several conditions must be met. Chief executives must want to make ideologically based appointments; they must have an ample number of vacancies to fill; they must be adroit leaders with political clout; and the existing judiciary must be attuned to their policy goals. If most of these conditions are met, presidents tend to get the kinds of judges they want. In other words, an identifiable policy link exists among the popular election of the president, the appointment of judges, and the substantive content of the judges' decisions.

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. When presidents make judicial appointments, should they anticipate how their nominees are going to rule on important policy decisions, or should they consider only the quality of their formal credentials and/or the relative prestige of their professional accomplishments?
2. Over time, the judicial appointees of Republican presidents have had decidedly more conservative decision-making records on the bench than those of judges selected by Democratic chief executives. Is this evidence that our judicial system has been *tainted* by politics, or is it proof that the democratic process prevails throughout our political system? What does this suggest about judicial independence?
3. Since large numbers of people do not pay close attention to most judicial nominations and confirmations, to what extent do you think the process is influenced by special interest groups and/or political partisans who have distinct ideological agendas?

SUGGESTED RESOURCES

Binder, Sarah A. and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Washington, DC: Brookings Institution Press, 2009. A well-researched discussion of the sources on conflict in the judicial confirmation process, with a particular focus on the lower federal courts.

Epstein, Lee and Jeffrey Segal. *Advice and Consent: The Politics of Judicial Appointments*. Oxford, UK: Oxford University Press, 2007. A thorough discussion of the politics of the judicial selection process and how this process does—and does not—reflect the democratic process.

Judicature 92 (2009). An entire journal issue devoted to the impact of President George W. Bush on the federal judiciary.

Goldman, Sheldon. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, CT: Yale University Press, 1997. Based on thorough, careful scholarship, Goldman writes in easy-to-follow prose about the judicial selection process between 1933 and 1989.

Slotnick, Elliot, Sara Schiavoni, and Sheldon Goldman, "Obama's Judicial Legacy: The Final Chapter," *Journal of Law and Courts* 5 (2017): 363–422. A review of the judges appointed by President Barack Obama and the confirmation battles during his years in office.

Yalof, David A. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. Chicago, IL: University of Chicago Press, 2001. A thorough discussion of the political pressures upon presidents as they select people to nominate for a position on the U.S. Supreme Court.

NOTES

1. Sheldon Goldman and Elliot Slotnick, "Clinton's First Term Judiciary," *Judicature* 80 (1997): 256.
2. "Judicial Performance in the Fifth Circuit," *Yale Law Review* 73 (1963): 90–133.
3. Jack Nelson, "Courts' Main Hope for Reagan Social Stand," *Houston Chronicle*, March 18, 1986, A6.
4. Jon R. Bond, "The Politics of Court Structure: The Addition of New Federal Judges," *Law and Policy Quarterly* 2 (1980): 182, 183, 187.
5. Sam Hananel, "Judicial Nomination Held Up over Same-Sex Ceremony," *Detroit Free Press*, October 6, 2006, <http://www.freep.com/apps/pbcs.dll/article?AID=/20061006NEWS99/310060004>.
6. Neil A. Lewis, "Clinton Critic Is Key to Deal to End Tie-up on Judgeships," *New York Times*, July 3, 1999, <http://www.nytimes.com>.
7. Henry J. Abraham, *The Judicial Process*, 3rd ed. (New York, NY: Oxford University Press, 1975), 77.
8. *ibid.*, 257.
9. James A. Farley, "Why I Broke with Roosevelt," *Collier's*, June 21, 1947, 13.
10. See Jon Gottschall, "Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals," *Judicature* 67 (1983): 165–173.
11. See Jon O. Newman, "The Judge Baer Controversy: Correspondence from the White House, Senator Dole, Congressmen, and Judges," *Judicature* 80 (1997): 156.

12. As quoted in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, "W. Bush Remaking the Judiciary: Like Father Like Son?" *Judicature* 86 (2003): 284.
13. Associated Press, "Thune: Federal Judge Nominees Are 'Good Picks,'" *Rapid City Journal*, September 9, 2009, <http://www.rapidcityjournal.com/articles/2009/09/09/news/doc4aa7f74c398bf352231062.txt>.
14. Gary Martin, "State's Senators Recommended Two for Federal Bench," *Houston Chronicle*, July 20, 2011, B2.
15. Carl Hulse, "Post-Filibuster, Obama Faces New Anger over Judicial Choices," *New York Times*, February 27, 2014, <http://www.nytimes.com/2014/02/28/us/politics/post-filibuster-obama-faces-new-anger-over-judicial-choices.html>.
16. Carl Hulse, "Obama Judicial Choice Is Urged to Withdraw," *New York Times*, September 22, 2014, <http://www.nytimes.com/2014/09/23/us/obama-judicial-choice-michael-p-boggs-is-urged-to-withdraw.html>.
17. Carolina A. Miranda, "Just What Is a 'Wise Latina,' Anyway?" *Time*, July 14, 2009, <http://www.time.com/time/politics/0,8599,1910403,00.html>.
18. Fox News, "Senate Confirms Sotomayor to U.S. Supreme Court," August 6, 2009, <http://www.foxnews.com/politics/2009/08/06/senate-prepares/sotomayor-confirmation-vote>.
19. Dana Milbank, "In Kagan, Obama Picks a Nominee, Not a Fight," *Washington Post*, May 11, 2010, A2.
20. *ibid.* 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," *Judicature* 94 (2011): 262–304.
21. Jeffrey Toobin, "Are Obama Judges Really Liberals?" *The New Yorker*, September 21, 2009, http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin.
22. Jerry Markon and Shailagh Murry, "Federal Judicial Vacancies Reaching Crisis Point," *Washington Post*, February 8, 2011, http://www.washingtonpost.com/national/vacancies-on-federal-bench-hit-crisis-point/2011/02/07/ABzpkZF_story.html.
23. Russell Wheeler, "Judicial Nominations in the Bush and Obama Administrations' First Nine Months," October 23, 2009, Washington, DC: Brookings Institution.
24. Kirk Mitchell, "Colorado Seeks Two Additional Federal Judges, Citing Backlog," *Denver Post*, July 1, 2015, http://www.denverpost.com/news/ci_28416014/colorado-seeks-two-additional-federal-judges-citing-backlog.
25. See *Gallup: Obama Job Approval*, <https://news.gallup.com/poll/113980/gallup-daily-obama-job-approval.aspx>.

26. Goldman, Slotnick, and Schiavoni, "Obama's Judiciary at Midterm," 280.
27. *ibid.*
28. Matt Viser, "Senators Can Still Block Nominations without Filibuster," *Boston Globe*, November 29, 2013, <http://www.bostonglobe.com/news/politics/2013/11/29/with-filibuster-gone-senate-attention-will-shift-alternative-means-thwart-obama-court-nominees/7Xo7mLycJLokNlnOuraHQN/story.html>.
29. Sarah Binder and Forrest Maltzman, "New Wars of Advice and Consent" *Judicature* 97 (2013): 48.
30. Matt Viser, "As Obama, Senate Collide, Courts Caught Short," *Boston Globe*, March 10, 2013, <http://www.bostonglobe.com/news/nation/2013/03/10/obama-senate-collide-gridlock-hits-federal-courts/zQVtUmOSol9sHre7Oux3MP/story.html>.
31. *ibid.*
32. Jeremy W. Peters, "In Landmark Vote, Senate Limits Use of the Filibuster," *New York Times*, November 21, 2013, <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>.
33. Burgess Everett, "Elizabeth Warren Calls for Filibuster Changes," *Politico.com*, November 13, 2013, <http://www.politico.com/story/2013/11/elizabeth-warren-filibuster-99799.html>.
34. Jeffrey Toobin, "Blue-Slip Battle: The Senate Obstructionists' Secret Weapon," *The New Yorker*, November 26, 2013, <http://www.newyorker.com/online/blogs/comment/2013/11/blue-slip-battle-senate-obstructionists-secret-weapon.html>.
35. Goldman, Slotnick, and Schiavoni, "Obama's Judiciary at Midterm: The Confirmation Drama," p. 280.
36. Amanda Terkel, "Mitch McConnell: Senate GOP Has Treated Obama's Judicial Nominees 'Very Fairly,'" *Huffington Post*, April 17, 2013, http://www.huffingtonpost.com/2013/04/09/obamas-judicial-nominees_n_3046778.html.
37. David G. Savage, "This Congress filled the fewest judgeships since 1952. That leaves a big opening for Trump," *Los Angeles Times*, December 31, 2016, <http://www.latimes.com/politics/la-na-judges-trump-senate-20161231-story.html>.
38. Burgess Everett and Seung Min Kim, "Judge Not: GOP Blocks Dozens of Obama Court Picks," *Politico.com*, July 6, 2015, <http://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743.html>.
39. Shear, Michael D. and Harris, Gardiner. "Obama Chooses Merrick Garland for Supreme Court," *New York Times*, March 16, 2016.
40. Denied a place on the federal bench, Liu was subsequently named by Gov. Jerry Brown to fill a position on the California State Supreme Court.

41. Rachel Weiner, "White House withdraws Caitlin Halligan nomination," *Washington Post*, March 22, 2013, <https://www.washingtonpost.com/news/post-politics/wp/2013/03/22/white-house-withdraws-caitlin-halligan-nomination/>.
42. Nan Aron of the Alliance for Justice, as quoted by Donna Owens, "Obama's Legacy on Judicial Appointments, By the Numbers," *NBC News*, January 19, 2017, <https://www.nbcnews.com/storyline/president-obama-the-legacy/obamas-legacy-judicial-appointments-numbers-n709306>.
43. It should be emphasized that when one is discussing a president's potential to make an ideological impact on the judiciary, it is not sufficient to count only the number of appointments the chief executive can make. One also has to factor in which cohorts of judges are retiring from the bench. Thus, if Obama appointed a mainstream Democrat to replace a retiring Clinton judge who is also a mainstream Democrat, there is no ideological gain for the administration. However, if Obama appoints a liberal Democrat to replace a retiring conservative Reagan jurist, there is a twofold gain. This enhanced Obama's potential to nudge the judiciary to the left because he was more likely to replace a conservative Republican with a Democrat who was likely to be more liberal.
44. Charles Krauthammer, "The GOP's Ideological Earthquake and the Aftermath," *National Review*, May 6, 2016, <https://www.nationalreview.com/2016/05/donald-trump-not-conservative-gop-doesnt-care/>.
45. Charlie Savage, "Trump Is Rapidly Reshaping the Judiciary. Here's How," *New York Times*, November 11, 2017, <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.
46. Jeffrey Toobin, "The Conservative Pipeline to the Supreme Court," *The New Yorker*, April 17, 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.
47. See radio interview by Mary Louise Kelly, "What Is The Federalist Society And How Does It Affect Supreme Court Picks?" *National Public Radio*, June 28, 2018, <https://www.npr.org/2018/06/28/624416666/what-is-the-federalist-society-and-how-does-it-affect-supreme-court-picks>.
48. Thomas Kaplan, "Trump Is Putting Indelible Conservative Stamp on Judiciary," *New York Times*, July 31, 2018, <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html>.
49. Ed O'Keefe and Robert Barnes, "Senate confirms Neil Gorsuch to Supreme Court," *Washington Post*, April 17, 2017, https://www.washingtonpost.com/powerpost/senate-set-to-confirm-neil-gorsuch-to-supreme-court/2017/04/07/da3cd738-1b89-11e7-9887-1a5314b56a08_story.html.
50. Seung Min Kim and John Wagner, "Kavanaugh Sworn In as Supreme Court Justice After Divided Senate Votes For Confirmation," *Washington Post*, October 6, 2018, <https://www.washingtonpost.com/politics/kavanaugh-vote-divided>

- senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html.
51. Gallup.com. "Trump Job Approval," September 1, 2018, <https://news.gallup.com/poll/203207/trump-job-approval-weekly.aspx>.
 52. Michael C. Bende, "Donald Trump's Approval Rating Inches Higher, Buoyed by Republican Support," *Wall Street Journal*, July 22, 2018, <https://www.wsj.com/articles/donald-trumps-approval-rating-inches-higher-buoyed-by-republican-support-1532293201>.
 53. Nina Totenberg, "Three Trump Judicial Nominees Withdraw, Raising Some Questions About Vetting," *National Public Radio*, December 19, 2017, <https://www.npr.org/2017/12/19/572046189/three-trump-judicial-nominees-withdraw-raising-some-questions-about-vetting>.
 54. Kevin Freking, "GOP efforts to disregard 'blue slips' and move forward with Wisconsin judge riles Dems," *Chicago Tribune*, May 9, 2018, <http://www.chicagotribune.com/news/nationworld/politics/ct-blue-slips-wisconsin-judge-michael-brennan-20180509-story.html>.
 55. Karoun Demirjian, "White House withdraws judicial nominee Ryan Bounds, after GOP realizes he didn't have votes for confirmation," *Washington Post*, July 19, 2018, https://www.washingtonpost.com/powerpost/senate-gop-withdraws-judicial-nominee-ryan-bounds-delivering-a-blow-to-trumps-court-plans/2018/07/19/0d81ff50-8b83-11e8-8aea-86e88ae760d8_story.html.
 56. John Wagner and Karoun Demirjian, "Trump judicial nominee Matthew Petersen pulls out after struggling to answer basic questions," *Washington Post*, Dec. 18, 2017, https://www.washingtonpost.com/politics/trump-judicial-nominee-who-struggled-to-answer-basic-questions-pulls-out/2017/12/18/eadf1326-e424-11e7-833f-155031558ff4_story.html.
 57. Josh Gerstein and Seung Min Kim, "Two Trump judge nominees out after criticism," *Politico.com*, December 13, 2017, <https://www.politico.com/story/2017/12/13/brett-talley-trump-nominee-withdraws-295322>.
 58. Sean Sullivan and Mike DeBonis, "With little fanfare, Trump and McConnell reshape the nation's circuit courts," *Washington Post*, August 14, 2018, https://www.washingtonpost.com/powerpost/with-little-fanfare-trump-and-mcconnell-reshape-the-nations-circuit-courts/2018/08/14/10610028-9fcd-11e8-93e3-24d1703d2a7a_story.html.
 59. *ibid.*