

Shaping the Federal Courts: The Obama Nominees*

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Objectives. The objective of this study is to explore President Obama's nominations to the lower federal courts and compare his patterns to those from George W. Bush and William Jefferson Clinton using a typology established by Goldman in 1997. *Methods.* Using data from 1993 to 2012 provided by the American Constitution Society for Law and Policy, we examine a series of cross-tabulations to make our comparisons. *Results.* The data indicate that President Obama has nominated more women and minorities to the federal bench than either of his two immediate predecessors. Additionally, his nominees possess more moderate ideological preferences than the nominees from either Bush or Clinton. *Conclusions.* These results demonstrate that Obama seems more concerned with racial and gender diversity rather than ideological preferences. Therefore, President Obama's claims of pragmatism and his desire to nominate individuals who reflect American society, often doubted by both political supporters and detractors, appear supported by the available data.

I think that it's important for judges to understand that if a woman is out there trying to raise a family, trying to support her family, and is being treated unfairly, then the court has to stand up, if nobody else will. And that's the kind of judge that I want.

Barack Obama, speaking at the October 15 debate during the 2008 election campaign.

This quote exemplifies the pragmatic approach taken by President Obama when it comes to selecting potential nominees to the federal courts. But it begs the question of how this pragmatism manifests more specifically—does it involve only aspects of diversity on the bench or does Obama's pragmatism extend to ideological considerations also? Examining his two most visible nominations, Justices Sotomayor and Kagan to the U.S. Supreme Court, helps to illustrate this quandary. Clearly, these two nominees extend the diversity of the Supreme Court not only by providing the first instance where the Court included three female justices, but also the first instance of a Hispanic justice

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on the bench. Thus, these nominees succeed in fulfilling Obama's wish that "judges that look more like the rest of the American people" (NPR, 2012). However, what is less clear is the extent to which ideology factored into Obama's decision calculus. Though initially he claimed to want a nominee who possessed "empathy," it is not apparent whether this quality equates to a position on the liberal-conservative ideological dimension. Even less clear is the extent to which Obama's nominees to the lower courts emphasize more of a focus on diversity than ideology. This article provides insight into these unanswered questions by examining the recent appointees made by President Obama to the lower federal courts and comparing these patterns to those exhibited by Presidents William Jefferson Clinton and George W. Bush.

Theoretical Foundations of Judicial Nominations

The topic of judicial nominations historically continues to receive a fair amount of attention from scholars. The literature contains numerous examples of studies focused on selection to the Supreme Court (e.g., Abraham, 1992; Epstein and Segal, 2005; Johnson and Roberts, 2004; Moraski and Shipan, 1999; Watson and Stookey, 1992), the lower federal courts (e.g., Bell, 2002; Binder and Maltzman, 2002, 2004; Epstein et al., 2006; Hartley and Holmes, 1996; Hartley, 2000; Johnson and Songer, 2002; Martinek, Kemper, and Van Winkle, 2002; Massie, Hansford, and Songer, 2004; Scott, 2006; Scherer, Bartels, and Steigerwalt, 2008), and state courts (e.g., Bonneau and Hall, 2003; Hall and Aspin, 1992). Often these studies focus on the particular delays experienced by nominees to the lower federal courts during the confirmation process in the Senate (e.g., Epstein and Segal, 2005; Nixon and Gross, 2001; Massie, Hansford, and Songer, 2004).

Of particular interest for understanding the Obama nomination process is the theoretical framework developed by Goldman (1997). He describes three basic patterns for judicial nominations based on observations from the presidencies of Franklin Delano Roosevelt through Ronald Reagan. The first pattern, partisan nominations, seeks to elevate individuals in order to gain favor with elected and party officials, to please home state senators, and/or to gain political capital. Personal nominations include attempts to elevate individuals who satisfy specific idiosyncratic goals that are valuable to the president, such as increasing the number of women and minorities on the bench. Finally, policy nominations focus on appointing individuals who will actively seek to alter the policy outputs of the judiciary, thereby bringing judicial policy into closer convergence with the president's policy goals. Though these three goals are not necessarily mutually exclusive, Goldman indicates that most presidents tend to focus more closely on one. For example, Reagan and Roosevelt tended toward policy-oriented nominations whereas Truman and Eisenhower focused more on partisan concerns. Carter notably nominated a record number of women and minorities to the federal bench as did Clinton when he became president.

With Goldman's framework in mind, we ask whether President Obama's judicial nominees focus on personal, partisan, or policy concerns.¹ As a former constitutional law professor, will he recognize the powerful policy potential inherent in the judiciary and seek nominees who reflect his policy goals? Or as the first African-American president, will he seek to satisfy personal goals and focus on increasing the diversity of the judiciary by appointing women and minorities to the bench? The nominations of Justices Sotomayor and Kagan to the U.S. Supreme Court indicate the latter may hold more influence. However, to develop a better understanding we turn to his nominations for vacancies on the lower federal courts.

If Obama approaches his judicial nominations with the same level of pragmatism displayed in other areas, then we expect this will translate into a focus on increasing the diversity of the federal bench; what Goldman describes as fulfilling personal goals. While one may initially suspect that pragmatism should lead to policy-oriented nominations—those individuals who will likely uphold the president's policy objectives—we believe the personal dimension becomes more likely. This is simply due to the dynamics of the U.S. Senate and the difficulty past presidents have encountered in securing confirmation for nominees perceived as too ideological. Consequently, our expectations for Obama's nominees are twofold. First, we expect to observe a greater number of women and minorities nominated to the lower federal courts. Second, we expect that these judicial nominees will possess more moderate ideologies than those displayed by nominees from previous presidents.

Finally, given the highly polarized political dynamics of the Senate, it is important to examine the degree of success exhibited by the president because it may provide important signals concerning future nominations. For example, suppose Obama adopts a more pragmatic approach early in his presidency by shunning ideological considerations in favor of gender and racial diversity. If he experiences significant success in terms of Senate confirmation, that may provide an incentive to nominate more ideologically extreme individuals, thereby allowing a shift in his focus to policy concerns. However, if the initial pragmatic approach encounters difficulties during confirmation, then it is likely the president will remain hesitant to depart from the personal focus on promoting diversity. As a result of this polarized climate, we expect that the Senate will confirm a smaller percentage of individuals nominated by Obama than observed by his predecessors.

Empirical Results

Data for this study come from the American Constitution Society for Law and Policy. It compiles nomination and confirmation data from the beginning

¹More specifically, we examine whether Obama's nominees focus on personal or policy concerns. Currently, the data are too limited to adequately assess whether his nominations achieve specific partisan goals.

TABLE 1
Comparison of Nominees by Race

	Clinton (%)	W. Bush (%)	Obama (%)
Asian	1	1	5
Black	7	9	12
Hispanic	16	7	18
White	75	82	64

of Clinton's presidency in 1993 through the last year of Obama's presidency (March 8, 2012). Because the limited number of Obama nominees precludes more sophisticated empirical models, we rely on a series of cross-tabulations to compare across the three presidents.

We begin the initial comparison by examining the racial composition of confirmations appointed by Clinton, W. Bush, and Obama. These results appear in Table 1. Immediately, it is apparent that President Obama has placed considerable more emphasis on increasing racial diversity than his two immediate predecessors. In terms of nominees of Asian heritage, Clinton and W. Bush tie at 1 percent whereas 5 percent of Obama's nominees are Asian. When examining African-American nominees Clinton has the lowest percent (7 percent), W. Bush is slightly higher at 9 percent, and 12 percent of Obama's nominees are black. Finally, 16 percent of Clinton's nominees were Hispanic, compared to only 7 percent from W. Bush, and 18 percent from Obama. Consequently, it is apparent that President Obama has worked diligently to promote racial diversity within the lower federal courts. He has consistently appointed more minorities to the bench than his two predecessors.

Examining confirmed nominations based on gender reveals similar patterns to those seen with race. The results from Table 2 show that 29 percent of Clinton's judicial nominees were female, which is slightly higher than George W. Bush, whose female appointees account for 22 percent of nominations. In stark contrast is President Obama; 46 percent of his nominees to the lower federal courts consist of females. There is abundant evidence that Obama has placed much greater emphasis on appointing women to the courts than either of his predecessors. Therefore, the evidence seems to reinforce our expectation

TABLE 2
Comparison of Nominees by Gender

	Clinton (%)	W. Bush (%)	Obama (%)
Male	71	78	54
Female	29	22	46

TABLE 3
Comparison of Nominees by Ideology

	Clinton	W. Bush	Obama
Mean ideology score	-0.319	0.466	-0.301
Standard deviation	0.092	0.096	0.225
Minimum	-0.595	0.260	-0.441
Maximum	-0.088	0.573	0.374

that Obama’s nomination strategy focuses on his personal goal to increase diversity on the bench.

However, before we can confidently claim the previous statement, we need to examine the ideological preferences of Obama’s nominees compared to his predecessors. Though the evidence currently indicates a pragmatic approach based on increasing diversity, it is quite plausible that Obama’s nominees possess strong ideological positions as well. If so, then this would mitigate against a conclusion that the president was only concerned about diversity; strong ideologues would support the conclusion that Obama was also seeking to satisfy what Goldman claims is a policy focus.

We therefore examine the ideology of a subset of Obama nominees to determine whether they possess more moderate or extreme positions when compared to his predecessors. Unfortunately, since many of the nominees have not held prior positions on the federal bench, it is difficult to adequately measure their ideological proclivities. Therefore, in order to make this comparison, we examine only those individuals currently serving as federal district court judges whom Obama has nominated to the courts of appeals. By focusing on the subset of 13 judges elevated from the trial courts to the appellate courts, we can examine their ideological scores as measured by Giles, Hettinger, and Peppers (2001) and compare these results to Clinton and W. Bush appointees to the courts of appeals. These results are reported in Table 3.

Examining the mean ideology scores of appeals court nominees reinforces our expectation that Obama relies on a more pragmatic strategy focused on the personal goal of promoting diversity. Table 3 indicates that the average ideology score for a Clinton nominee is relatively liberal (-0.319)² whereas the average score for a W. Bush nominee is strongly conservative (0.466). President Obama’s nominees appear more moderate than either Clinton’s or W. Bush’s with an average score of -0.301. Additionally, if we examine the standard deviation around these means we see much smaller deviations for Clinton and W. Bush (0.092 and 0.096, respectively) than for Obama (0.225).

²The ideology scores calculated by Giles et al. (2001) extend from the most extreme liberal judge (-0.699) to the most extreme conservative (0.608).

TABLE 4
Comparison of Nominees by Senate Confirmation Success

	Clinton (%)	W. Bush (%)	Obama (%)
Court of appeals	81	60	63
District court	81	84	77
Overall success	81	78	74

Consequently, not only does Obama nominate individuals who are more moderate than his predecessors but his nominees exhibit a wider range of ideological scores than either Clinton or W. Bush. This is even more dramatically demonstrated when we examine the most extreme individuals nominated by each president. Here we see that Clinton's nominees remain consistently on the liberal side of the continuum (from a minimum score of -0.595 to a maximum score of -0.088). Conversely, W. Bush's nominees remain consistently conservative (from a minimum score of 0.260 to a maximum score of 0.573). In contrast, President Obama's nominees span across the liberal-conservative ideological continuum (from a minimum score of -0.441 to a maximum score of 0.374). Consequently, these results indicate that President Obama is not placing an emphasis on policy or ideological goals. His nominees come from a much broader range of individuals than either Clinton or W. Bush.

Finally, we examine the extent to which President Obama has been successful in getting his nominees confirmed by the Senate. Initially, one may suspect that his pragmatic approach and focus on increasing diversity might encourage the Senate to confirm these nominees. However, as we indicate earlier given the intensely partisan environment in the Senate, it is likely that Obama's nominees experience difficulties and delays during confirmation. Thus, we expect to see lower confirmation rates than compared to his predecessors.

Table 4 presents a comparison of confirmation success across Clinton's, W. Bush's, and Obama's judicial nominations. If one examines court of appeals nominations, President Clinton is the most successful (81 percent) with Obama second (63 percent) and W. Bush last (60 percent). However, if one examines nominations to the federal district courts a different picture emerges. George W. Bush has the highest confirmation rate (84 percent) followed closely by Clinton (81 percent), and Obama (77 percent). If we take both of these levels into account, the final row provides information about the overall confirmation success for each president. Here we see that Clinton experienced the most success (81 percent), W. Bush is a close second (78 percent), and Obama has the least successful confirmation record (74 percent). This result is somewhat surprising, given that President Obama has followed a relatively pragmatic strategy focused on increasing diversity on the bench and not focused on appointing extreme ideologues.

Conclusions

President Obama frequently mentions that his ideal judicial candidate is one who can empathize what it is like for the average American citizen. While one may initially view this statement as “code” for particular ideological preferences, it is also possible that the president possesses a desire to nominate individuals who represent America’s diversity. Using the theoretical framework identified by Goldman (1997) we compare Obama’s judicial nominees to those of his two immediate predecessors in order to determine the extent to which he focuses on personal (i.e., diversity) or policy (i.e., ideological) goals.

The results indicate that Obama’s focus is directed toward increasing diversity on the federal bench. A greater portion of his nominees are women and racial minorities than either Clinton or Bush. Additionally, Obama’s nominees tend to possess more moderate ideological preferences and a greater range across the ideological spectrum than either of his predecessors. Therefore, President Obama’s claims of pragmatism, often doubted by both political supporters and detractors, appear supported by the available data. The president has already reshaped the federal bench along gender and racial lines than his two immediate predecessors, and if he is reelected to a second term there is no indication to believe this trend will cease.

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