

*The Federal Judiciary and the Clinton Administration:
A Potential for Ideological Change*

Tom N. McInnis, *University of Central Arkansas*

After twelve years of Republican control of the executive branch, President Clinton is inheriting a judicial branch in which seventy percent of all judges have been appointed by Presidents Reagan and Bush. By all accounts, the cohort of judges appointed by Reagan and Bush has resulted in conservative decisions. The ability of President Clinton to reverse this trend is examined here by focusing on four factors: Clinton's commitment to make ideologically-based appointments; the number of appointments Clinton will be able to make; Clinton's political clout; and the judicial climate Clinton inherited. It concludes that Clinton will be able to appoint a substantial percentage of the federal judiciary in a first term of office, allowing him to have a sizeable impact on the future direction of the federal judiciary.

One of the primary messages coming out of the Clinton campaign in the fall of 1992 was the need for change within American government. Although it was never central to the message of his campaign, one area of government in which the election of President Clinton could effect the most change is the federal judiciary. Due to the constitutional term of office for federal judges (good behavior), continuity within the judiciary should be expected until there are changes in personnel. While other appointments that President Clinton can make, such as the Solicitor General, can have a large impact on the legal process, this article concerns itself only with appointments to the federal judiciary and the capacity of President Clinton to create ideological changes in the judicial branch of government *within a single term of office*.

The Constitution requires that the president shall nominate all members of the federal judiciary with the advice and consent of the Senate. The role of the president and the Senate in this process has not been without controversy (Melone 1991, 68). Simply because the Constitution demands continuity in the appointment process does not mean that there will be no changes in political practice under the Clinton administration. Historically, presidents have appointed members to the federal courts based upon the varying motivations of patronage, increasing judicial quality and professionalism, and to advance policy concerns (Solomon 1984). Presidents have rejected

TOM N. MCINNIS is Assistant Professor of Political Science and Pre-Law Advisor at the University of Central Arkansas.

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the view that members of the judiciary mechanically apply the law and, instead, implicitly have accepted Llewellyn's statement that "What these [judicial] officials do about disputes is, to my mind, the law itself" (1951, 12). As a result, most recent presidents have sought to use their appointments in hopes of creating a judiciary reflective of their own priorities for the judicial system. The procedures that the last three administrations have used to appoint members to the federal judiciary illustrate a variety of priorities on the part of presidents.

One of the Carter administration's top priorities concerning the filling of vacancies in the federal courts was the development of a pluralistic bench which included more women and minorities (Goldman 1981). In order to achieve this goal, President Carter issued an executive order creating non-partisan judicial selection commissions in each circuit of the court of appeals. The members of these commissions, made up of lawyers and lay persons, were given the task of presenting the president with three to five names to be considered for a particular vacancy on the court. Carter also made a request of senators, which was honored by most state delegations, to establish merit commissions to make recommendations for district court vacancies (Slotnick 1980).

The primary goal that the Reagan administration set for the federal judiciary was to reshape it ideologically. To accomplish this goal, President Reagan disbanded the merit commissions, although some state delegations have kept them active at the district court level. President Reagan centralized the appointment process through the creation of the Justice Department's Office of Legal Policy, which dominated the judicial selection process. The Office of Legal Policy worked closely with the President's Committee on Federal Judicial Selection, which was centered in the White House and staffed by some of the president's closest advisors. Through the inter-workings of these two bodies the Reagan administration was capable of closely screening all potential nominees to the federal courts in an attempt to learn their judicial philosophy before forwarding their names to the Senate (Neubauer 1991, 140-141).

The Bush administration also sought to appoint people who reflected its political views to the federal bench. President Bush continued the President's Committee on Federal Judicial Selection in the White House but abolished the Justice Department's Office of Legal Policy and reassigned its responsibilities for judicial selection to the Attorney General's office. The Department of Justice and the President's Committee on Federal Judicial Selection continued the extensive screening and personal interview process

started under the Reagan administration in an attempt to learn more about the judicial philosophy of possible candidates. If the candidate had a judicial record, it also was analyzed in the White House Counsel's office (Goldman 1991, 295-98).

The procedures used by presidents Reagan and Bush, and to a lesser extent Carter, show that they understood the power of the courts to reflect the values of those who appoint them. This knowledge, especially at the Supreme Court level, has not been lost on Bill Clinton, who stated upon Justice White's announcement of his retirement that "there are few decisions a president makes which are more weighty, more significant and have greater impact on more Americans than an appointment to the Supreme Court" (*Washington Post* 21 March 1993). It can be assumed, then, that President Clinton will continue past practice, and will develop a process of making judicial appointments that will reflect his priorities for the judiciary. However, in light of the problems he has had in staffing the Justice Department, it is fair to say that this is not one area where the Clinton administration hit the ground running. In fact, after the announced retirement of Justice White a senior White House Official discussing the appointment process stated, "Obviously, this is not an event we have focused a great deal of attention on so we don't have a process in place" (*Washington Post* 20 March 1993).

The question that must be asked is, to what extent will the Clinton administration be able to remake the federal judiciary to reflect its own values? Unfortunately, Clinton's tenure as governor of Arkansas reveals little about how he might use judicial appointments as a vehicle to further long term policy goals. This is because the Arkansas Constitution calls for the election of members of the judicial branch, and includes Amendment 29, which prohibits interim judges appointed by the governor to run for election to succeed themselves. As a result, Clinton did not have the opportunity in Arkansas to make the longterm appointments necessary to pack the judiciary for purposes of judicial policy-making. Therefore, in order to make some tentative predictions regarding President Clinton's ability to reshape the federal judiciary to mirror his own political values and philosophy we will use a model suggested by Stidham, Carp, and Rowland (1984). Based upon this model the factors that will be examined to determine President Clinton's probable success include (1) his level of commitment to making ideologically-based appointments, (2) the number of appointments he will be able to make, (3) his political clout, and (4) the judicial climate into which his appointments enter.

Ideological Commitment

Due to the failure of the Constitution to establish any eligibility requirements, presidents have emphasized different criteria in reaching their decisions regarding whom to nominate to the federal courts (Wasby 1988, 97-98; Abraham 1992, chapter 4; and Baum 1990, 131-141). The Clinton administration can be expected to emphasize different factors in its appointments than did the Bush administration. This is illustrated best by comparing the statements of both Bush and Clinton regarding what types of individuals they would appoint to the federal judiciary.

During the elections of both 1988 and 1992, President Bush indicated ideological commitment to reshaping the federal judiciary. President Bush emphasized judicial restraint in his 1988 campaign, writing “I am firmly committed to appointing judges who are dedicated to interpreting the law as it exists, rather than legislating from the bench” (Bush 1988). Once elected, Bush told members of his administration that he had four priorities in making judicial appointments. These were (1) the appointment of highly qualified conservatives; (2) the selection of persons sensitive to separation of powers; (3) the opening up of the process beyond traditional appointments; and (4) to search out qualified women and minorities (Goldman 1991, 297).

During the 1992 campaign Clinton was openly critical of President Bush’s ideological commitment to reshape the judiciary. In Clinton’s words, “the Bush administration, and the Reagan administration before it, picked judges very often for their ideological views . . . so they could get people on the bench who would live forever and always vote the party line. I don’t think that’s what the Founding Fathers had in mind” (Federal News Service 24 June 1992). If Clinton is critical of using ideology as a qualification for appointment, what factors does he believe should be taken into consideration? The most common answer Clinton gave to this question during the campaign was to emphasize professional qualifications. After Clinton appeared on MTV’s “Choose or Lose Special: Facing the Future with Bill Clinton” and stated that he thought Gov. Mario Cuomo would be a good Supreme Court justice, Clinton clarified his position regarding professional qualifications. In doing so, Clinton referred to his previous position as a professor of constitutional law and claimed:

I will be very careful to select for the federal bench only those with unquestionably good judgement, excellent educational backgrounds, and wide-ranging experiences. I also believe it is important that the federal judiciary represent society as a whole, and I will make sure that all qualified candidates are given due consideration (Clinton 1992, 100).

Although President Clinton plans to appoint qualified personnel to the courts, their qualifications still may be challenged by opponents, because merit varies in the eye of the beholder (Handberg 1984, 539).

Another important criterion that the Clinton administration can be expected to weigh in its appointments is that of diversity. William A. Martin, the Arkansas Bar Association's executive director, credits Clinton with bringing more diversity, specifically more women and minorities, to the Arkansas bench in his appointments (*Arkansas Democratic-Gazette* 21 March 1993). While not committing himself to quotas for minority representation on the federal courts, candidate Clinton said that he would be surprised if he didn't appoint "more women and members of different racial minorities . . . to important positions in the government than any other president." Specifically discussing the Supreme Court, Clinton added "I think the fact that there's one African-American and one woman on the Supreme Court should not disqualify others from being considered" (Federal News Service 9 September 1992).

Knowing that President Clinton plans to nominate a diversity of well-qualified individuals for the courts fails to answer the central concern of whether or not he has a commitment to reshape the ideology of the federal judiciary. During the election, Clinton complained "that the Court has been so politicized by recent appointments under the last two Presidents that we ought to appoint someone who can provide some balance . . ." (Cable News Network 18 June 1992). Despite these complaints, and after an initial hesitation about developing ideological litmus tests, Clinton's comments show a willingness to use his appointments in a similar ideological manner.

There are several ideological goals toward which Clinton has expressed commitment. Clinton has said that he will appoint no one to the Supreme Court who does not believe that the Constitution mandates equal opportunity for racial minorities. Clinton also is committed to an expansive view of the Bill of Rights, and due process of law. He told the American Judicature Society that while his greatest concern with the federal courts was their ability to dispense justice in a timely manner, "we must never sacrifice due process" (Clinton 1992, 100).

The ideological issue that Clinton was most vocal about during the election was the protection of an expansive view of the right to privacy. After the Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), Clinton remarked that "If we are only one justice away from returning to the painful past before *Roe v. Wade*, then only a president committed to maintaining the present law can maintain the constitutional right to choose" (Cable News Network 29 June 1992). While

not wanting to refer to agreement with his position as a litmus test, during the campaign Clinton stated on record that “I would expect any judge that I appoint to have an expansive view of the Bill of Rights, including the right to privacy, including the right to choose” (Federal News Service 30 June 1992).

Past presidents also have held ideological commitments they wished to advance through their appointments to the courts, only to be later disappointed (Scigliano 1970, 125-147). President Clinton believes that he will be able to predict the behavior of, at the very least, Supreme Court appointees. Clinton clarified the reasoning underlying this belief, stating “if you know anything, it’s that anybody that’s lived long enough to give speeches, to do writings, to be in public life in any way, shape, or form, you have some sense of where they are on these larger issues” (ABC News 29 October 1992). While candidates under consideration for the Supreme Court usually are individuals of such stature that they have a written record, it is not always the case at other levels of the federal system. Regarding appointments to the lower courts, it cannot be determined, at this time, whether President Clinton will rely on the candidate’s party affiliation in cases in which the public record is sparse and does not reveal ideological preferences, or will formalize a screening process as did the two previous administrations. Regardless of the method by which President Clinton screens possible nominees, he has voiced a commitment to try to change the ideological direction of the federal judiciary.

The Number of Judicial Appointments

A second factor that will affect President Clinton’s ability to reshape the judiciary is the number of appointments he will be able to make (Stidham, Carp and Rowland 1984, 551). Predicting the number of appointments that President Clinton will get to make during his term of office is difficult. The lower federal courts currently consist of 649 district court judgeships and 179 court of appeals judgeships, for a total of 828 judgeships below the Supreme Court. We first examine the possibilities President Clinton may have in the lower courts, then in the Supreme Court. The number of appointments any president can make is dependent on the number of retirements or deaths of sitting judges, and whether or not legislation is passed that increases the number of judgeships. Such factors are difficult to determine prior to their happening, but some preliminary generalizations can be made.

The Bush administration moved slowly at making appointments to the federal judiciary (Goldman 1991, 296). During the 102nd Congress,

for example, it took Bush an average of 10 months to name a nominee for a vacant position. Once the nomination was made by President Bush it took the Senate Judiciary Committee another 105 days to report a nominee out of committee (Simon 1992). As a result of the Bush administration's slow rate of progress in making appointments President Clinton inherited, upon taking office, 86 vacancies on the district courts and 16 vacancies on the courts of appeals. Half of these vacancies resulted from Bush's failure to nominate an individual by the time of Congress' adjournment in October, 1992; on the other half, the Senate did not act. As of 20 March 1993, the number of lower court appointments available to be filled by Clinton had risen to 116, or 14 percent of the entire lower federal bench.

In addition to this backlog, President Clinton will be able to fill the routine vacancies that occur in any president's administration. An examination of the average number of vacancies per year that Presidents Carter, Reagan, and Bush filled, minus the number of new judgeships created, shows an average of 31 vacancies a year. If this pattern holds during President Clinton's tenure he will be able to appoint in the neighborhood of an additional 124 judges to the lower courts during his first term alone. Although the number of retirements may be affected by the partisan affiliation of judges, it is not unreasonable to assume that President Clinton should be able to appoint a number in this vicinity. Adding these to the legacy of vacancies inherited from President Bush should give President Clinton around 240 appointments to the lower courts, or about 29 percent of the total number of judgeships.

The number of appointments that Clinton could make to the judiciary also could be expanded by legislation increasing the number of federal judges. Legislation adding federal judges has not been uncommon in the recent past, having been passed under a variety of circumstances in 1961, 1966, 1970, 1978, 1984, and 1990. In the last six bills enacted to enlarge the judiciary, the number of judgeships created has varied between 80 and 152. Since 1960 legislation has passed increasing the number of lower court judgeships every six years on the average. Although there is no formal schedule for enlarging the federal judiciary, the above pattern suggests that it would not be unusual to see an increase in the number of federal judgeships passed by 1996. Currently, the federal courts, especially those in metropolitan areas, are experiencing substantial delays in the administration of justice, and a debate has begun concerning the wisdom of enlarging the federal judiciary (Williams 1993; Newman 1993). Any increase in the size of the federal judiciary only would add to the Clinton administration's ability to reshape the judiciary.

It is always difficult trying to predict when a member of the Supreme Court may decide to retire. Clinton will be able to appoint at least one Justice to replace Byron White, who has announced his plans to retire at the end of the present term. An examination of other possible departures from the Supreme Court should be conducted with an eye on two primary considerations—the age and health of the justices. The oldest justice on the Court is Justice Blackmun, who was born in 1908. There has been speculation, brought on by Justice Blackmun's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that he is ready for retirement. Blackmun wrote, "I am 83 years old. I cannot remain on this Court forever . . ." (*Casey* 1992, 2854). Rumors of his impending retirement also have been fueled by his failure to hire law clerks for the 1993 Supreme Court term. Justice Stevens was born in 1920, and has been treated for prostate cancer, which may lead him to consider retirement during Clinton's presidency. Chief Justice Rehnquist, born in 1924, may be at an age at which retirement may seem desirable; however, it may be speculated that he will hold out for a president that is ideologically closer to his own position. The continuation of Justice O'Connor, born in 1930, is questionable due to her past history of breast cancer. Barring set backs, she should be able to complete another four years, if she chooses. Justices Scalia, Kennedy, and Souter all are currently in their fifties, and Justice Thomas is in his forties; thus, barring any medical problems, none of them should be expected to leave the Court in the next four years.

Looking at the announced retirement of Justice White and the ages and health records of the other justices of the Supreme Court, it is likely that President Clinton will get a minimum of one and possibly as many as two other appointments to the Supreme Court. The next justice most likely to leave the Court is Justice Blackmun. Justice Stevens may have an additional incentive, other than age and health, to leave the Court: as one of the more liberal justices on a conservative court, Stevens, like Blackmun, may have added incentive to retire during Clinton's administration in the hope of being replaced by a justice of similar values. There is an outside chance of retirement by almost any of the remaining justices; but such probably would have to be predicated on a change in their personal health, rather than a desire to have a Democratic president replace them.

Political Clout

A third criterion that may have predictive value concerning the ability of a president to reshape the judiciary is that of political clout (Stidham, Carp, and Rowland 1984, 551). The primary obstacle to the president's ability to create a judiciary that mirrors his own political philosophy is the Senate, in particular, the Senate Judiciary Committee. This barrier presented no major obstacle to President Bush and his nominees (Goldman 1991, 295). President Clinton's clout should be enhanced by the fact that, for at least the first two years of his term, the Senate will be controlled by the Democrats. The sense of party loyalty and shared values that Democratic senators feel should make it easier for President Clinton to get his nominations through the Judiciary Committee and the whole Senate.

Another factor that should help President Clinton gain the political clout needed to gain confirmation of his nominees will be his popularity and public approval ratings. Exactly how much political clout President Clinton won in a three-person election in which he received only a 43 percent plurality of the vote, compared to 38 percent for President Bush and 19 percent for Ross Perot, is questionable. Clinton built a considerable base of support among the American people after the election and on the week of the inaugural his favorable support ratings were at 71 percent (NBC 15 January 1993). As the Clinton administration shifts its focus from the campaign to governing, no doubt there will be fluctuations in its approval ratings. Should President Clinton nominate a candidate for the Supreme Court that conservative interest groups regard as too liberal, they no doubt will try to rally public opinion against the nomination. Clint Bolick, litigation director of the conservative Institute for Justice, warns that "If Clinton nominates an ideologue, it's payback time. . . . At the very least, even if our side can't defeat a nominee in a particular instance we would force Clinton to expend enormous political capital by mobilizing activists at the grass roots level" (*Washington Post* 20 March 1993). However, if President Clinton can maintain favorable support ratings, evidence suggests that Congress does respond to public opinion (Edwards 1980, 110).

One early indication that President Clinton may not have sufficient clout to allow his nominees to sail through the Senate Judiciary Committee without close scrutiny is the unsuccessful nomination of Zoe Baird for Attorney General. Despite a resume that included short stints of governmental service in the Carter Justice Department and in the White House, followed by positions as the head of General Electric's legal department

and as chief counsel for Aetna Life and Casualty, the news that Ms. Baird had employed illegal aliens and had not paid social security taxes on them caused the Senate Judiciary Committee to lose confidence in her ability to run the Justice Department. The large number of phone calls from constituents led senators on the Judiciary Committee to try to salvage what was left of the Committee's diminished reputation after the Clarence Thomas hearings, rather than to try to save the nomination.

One factor that potentially may diminish presidential clout and impede any president's effort to restyle the judiciary is the practice of senatorial courtesy. The level of interest that individual senators take in the appointment process varies from relative disinterest to the proprietary view that they own the job (Chase 1972, 36-37). The current Senate does not intend to abandon the practice of senatorial courtesy during the Clinton years (Simon 1992). Clinton has indicated a willingness to continue the practice of senatorial courtesy, adding that he hopes that when senators make their recommendations they will "judge potential appointees to the federal bench as I would—on their merits, considering their judgement, education, and experience" (Clinton 1992, 100).

The Judicial Climate

A final factor to consider in determining the possible impact that President Clinton may have upon the federal judiciary in his first term is the existing judicial climate. A president will be more influential if the judicial branch already reflects the basic values that the president holds. The existing judicial climate "restricts the time frame and the degree of association between the appointing president's ideology and the ideological output of the judiciary" (Stidham, Carp, and Rowland 1984, 553). President Clinton believes the judicial climate he is inheriting to be a conservative one, in which presidents Reagan and Bush "picked judges very often for their ideological views and their youthful age—so they could get people on the bench who would live forever and always vote the party line" (Federal News Service 24 June 1992).

An examination of the present judicial climate shows that an overwhelming majority of the lower federal judges and a majority of the Supreme Court have been appointed in the last twelve years of Republican control of the White House. President Reagan made 368 appointments to the lower courts and 3 appointments to the Supreme Court, while President Bush made 184 appointments to the lower courts and 2 appointments to the Supreme Court. Clinton inherits a judicial climate in which 70 percent of the federal judiciary are Republicans, the worst

partisan imbalance in the judicial branch since the Truman administration. The current demographic picture of the federal judiciary shows that an overwhelming percentage of all federal judges are middle-aged, white, well-to-do Republican males, who were at a minimum rated as qualified by the American Bar Association Committee on the Federal Judiciary (Goldman 1991, 298-306).

The ideological leaning of the current lower courts shows that both President Reagan and President Bush were effective at bringing conservatives onto the district courts and courts of appeals. A recent study of decisional patterns at the district court and court of appeals levels sheds light on the conservatism of the judicial climate that the Clinton administration is inheriting (Carp et al. 1992).

Bush's cohort of district court judges were found to be the most conservative of all presidents for which data are obtainable (from Woodrow Wilson onward). President Bush's appointees have a record of deciding cases against liberal policies in the areas of criminal justice and labor and economic regulations compared to other recent presidents, including fellow Republicans. In the area of criminal justice, Bush's appointees sided with the liberal position 26 percent of the time, compared to 28 percent for Reagan's and 39 percent for Carter's. In the area of labor and economic regulation, Bush's appointees sided with the liberal position 48 percent of the time compared to 47 percent for Reagan's and 61 percent for Carter's. President Bush's appointees also have been conservative in cases involving civil rights and liberties, siding with the liberal position only 23 percent of the time compared to 31 percent for Reagan's and 53 percent for Carter's (Carp et al. 1992, 10).

At the court of appeals level, President Bush's appointments, while maintaining their conservative credentials, have been more moderate in their decisions than the Reagan appointees. In the area of criminal justice, Bush's appointees reached a liberal decision in 20 percent of their cases, compared with 15 percent for Reagan appointees and 26 percent for Carter's. Bush's appointees to the courts of appeals sided with the liberal position in civil rights and liberties 34 percent of the time, compared to 25 percent for Reagan's and 48 percent for Carter's. In cases involving labor and economic regulations Bush's appointees sided with the liberal position 44 percent of the time, compared to 35 percent for Reagan's and 49 percent for Carter's (Carp et al. 1992, 11).

The ability of President Clinton's appointments to break out of the present conservative judicial climate and change the ideological direction of the lower courts seems, on the surface, limited. However, this may not be an accurate portrayal of the potential of President Clinton's lower

court appointments to have an immediate impact on the legal system. The reason for this is found in the traditional independence that is a part of the federal legal system. Judicial independence allows lower court judges the necessary discretion to interpret and apply the law and legal rulings based upon a variety of cues that may be particular to individual cases (Baum 1976, 91). Judicial discretion resulting from either vague or ambiguous language in statutes or higher court rulings leave lower court judges the latitude to follow several courses of action in resolving the case before them. Indeed, according to a sample of court of appeals judges, 74 percent of the judges admit that when there are ambiguous precedents or rulings their own personal view of justice is very important in reaching a decision (Howard 1981, 165-167).

In the lower courts, Clinton's appointments should be able to impact the current judicial climate, even when the policy of a higher court is clear. This is because implementation choices regarding policies of higher courts often are left to the district court judge. When it comes to the implementation of higher court decisions, research has shown that lower court judges allow factors other than strictly legal ones to influence their decisions. This results in differences in the decisions made by Republican and by Democratic judges, respectively (Carp and Rowland 1983, chapter 2). Therefore, we should expect the Clinton appointments to have almost immediate impacts on the judicial climate within the geographical areas under their jurisdiction.

However, the amount of influence that Clinton appointees to the lower courts will have in their first years should not be overstated, and must be qualified. At the court of appeals level, the influence of Clinton's appointees will be limited by fellow panel members appointed by other presidents. At the district court level, Clinton's appointments will have a direct impact on the lives of citizens within their jurisdiction, but little influence on the court system as a whole. In the past, the Rehnquist Court has not used *certiorari* to engage in error correction, a practice that, if continued, would allow decisions by Clinton appointees to stand. However, this should not be interpreted to mean that these appointments would create major changes in the judicial climate, because the Rehnquist Court has used *certiorari* to affirm lower court decisions that have been consistent with its conservative agenda (Segal and Spaeth 1990).

The role of the Supreme Court in setting the overall judicial climate in this nation cannot be overemphasized. The addition of two more appointees during the Bush administration has allowed the Republicans to create a solid conservative majority on the Court. Carp and Stidham claim that this "is President Bush's first and foremost judicial legacy"

(Carp and Stidham 1993, 257). In examining the judicial climate on the Supreme Court, law professor David Bryden has said that “we now have a conservative Court . . . [that] is virtually devoid of truly liberal tendencies, except . . . in the dissents of Justice Stevens and Blackmun” (Bryden 1992, 73).

Although there were six Republicans on the Court when President Bush was elected, there was not a rock-solid conservative voting bloc (Neubauer 1991, 415). President Bush’s appointment of Justice Souter to replace Justice Brennan had a profound impact on the ideological makeup of the Court. Not only is Justice Souter philosophically a conservative, but Justice Brennan had been a master at putting together coalitions that would be supportive of liberal positions (Baum 1990, 306). Souter brought to the Court a conservative philosophy, resulting in high levels of vote agreement with the other conservative justices already on the Court (Rehnquist, Scalia, Kennedy, O’Connor, and, at times, White) during the 1990 term. An examination of the indices of interagreement on the Court show that Souter’s decisions were consistently high enough, over .70, to allow him to be considered a bloc voter with every conservative member of the Court individually, and in various group formations. It also shows that a firm conservative bloc of six justices, consisting of Souter, Rehnquist, O’Connor, Scalia, Kennedy, and White, could be identified with an interagreement index of .73 (Johnson and Smith 1992, 239). More important, Souter’s replacement of Brennan brought to the Court the crucial fifth vote in fourteen of the twenty-one 5-4 votes in the 1990 term. In many of these decisions Souter provided the vote needed to create a conservative majority, especially in the area of criminal justice.

The appointment of Clarence Thomas to the Supreme Court by President Bush thus far has not solidified the conservative hold on the Court. Based upon the strong, six-justice conservative voting bloc that had existed in the prior term, it would seem that appointing another conservative would effect a conservative seven-justice voting bloc in the 1991 term. However, such a bloc failed to develop. Rather than experiencing a solidification of the conservative bloc, the 1991 term saw it splinter into generally smaller and weaker voting blocs, consisting of strong conservatives and moderate conservatives. Justice Thomas’ voting pattern helped to create the strongest voting bloc on the Court. This was the bloc of strong conservatives which included himself, Rehnquist, and Scalia, with an interagreement level of .75. The 1991 term also produced a conservative majority bloc containing Justices Scalia, Thomas, Rehnquist, Kennedy, and Souter, but the level of interagreement was moderate at .69 (Smith and Johnson 1993, 174).

It is easier to describe what happened to stop the development of a larger conservative bloc, than to explain why the justices took such actions. Empirically, the failure of it can be explained by the independent voting patterns of the moderate conservative justices—Souter, Kennedy, O'Connor, and White. While able to muster only a voting bloc of moderate strength with an interagreement index of .66, these justices controlled the outcomes of many cases by casting seemingly unpatterned votes (Smith and Johnson 1993, 174). In a number of cases, the final majority determination came down to whether or not the individual members of this group of justices cast their votes with the strong conservative bloc of Rehnquist, Scalia and Thomas, or with the liberal pair of Blackmun and Stevens.

Explaining the aggregate pattern of votes on the Supreme Court is easier than trying to explain why particular individual justices voted as they did, and whether such votes represent a permanent change in the thinking of individual moderate conservative justices, or are just a reaction to the particular issues that came before the Court in the 1991 term. A clearer view of the judicial climate that the Clinton administration has inherited rests on the question of what is the basis of the current divisions on the Court, and how could future appointments be used to reshape the decisions of the Court. There are several debates which currently divide the Reagan and Bush appointees on the Court, culminating in the mixed results of the 1991 term. The debates are centered around three questions. First, what should be the role of precedent in the Court's decision-making process? Second, what history is relevant to constitutional interpretation? Third, what is the role of the Court, and should its pronouncements should be in the form of unchangeable rules, or standards that leave open the option of refinement?

The debate over the proper role of judicial precedent has been observable since *Payne v. Tennessee* (1991), but became painfully obvious last term in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), when four members of the Court voted to overrule *Roe v. Wade* (1973). While it is dangerous to talk about the judicial philosophies of the justices as if they were written in stone, it is possible to discuss a division on the Court between those justices who believe that a *wrongly-decided* precedent should be overruled, regardless of impact, and those who believe that greater caution should be used when overruling any precedent. The Reagan and Bush appointees on the Court who are most willing to overrule past precedent include Scalia, Rehnquist, and Thomas. This group of justices have expressed in their opinions (as best exemplified in the 1991 *Casey* decision)—a willingness to abandon precedent when they

believe it is not reflective of the true or correct meaning of the Constitution. In this way, constitutional error can be corrected without delay. This approach, if prevalent on the Court, would have a drastic impact on the judicial climate that the Clinton administration must confront.

A separate group of Reagan and Bush appointees are not as willing to overrule past decisions of the Court. This group is best identified as including the joint authors of the *Casey* opinion: O'Connor, Souter, and Kennedy. These justices have more respect for precedent and believe that it performs the important function of maintaining the legitimacy of the Court. While believing that precedents rarely should be overruled, these justices did set forth in their joint opinion in *Casey* four criteria to be examined to determine if precedent should be overruled. The first criterion that may indicate it is okay to overrule a precedent is whether the precedent has proven to be unworkable. A second criterion to follow is to overrule only if people have not come to rely upon the law as understood under the precedent. A third factor to examine is whether or not the laws surrounding the precedent have changed. A final factor that may determine whether or not precedent can be overruled is if the facts upon which the precedent was predicated have changed too much (*Casey* 1992, 2808-2815). In *Casey*, the co-authors believed that the people had come to rely on the precedent established in *Roe v. Wade* (1973), that it was still workable, and that neither the laws nor the facts surrounding the precedent had changed enough to justify overruling it.

A second debate between the Reagan and Bush appointees that came to light in the 1991 term was over how history and tradition should be used to interpret the Constitution. The difference between the use of history by the strong and moderate conservatives in the 1991 term has been identified by Sullivan as one in which "One side invoked the immediate, continuous past; the other, the discontinuous past of an older history and tradition" (Sullivan 1992, 75).

The strong conservative bloc of Scalia, Rehnquist, and Thomas show a propensity to interpret the Constitution from the text, or when that is unclear, from the original intent of the framers. For them the Constitution means what it says, or what the framers meant it to say. History and tradition must be consulted to give meaning to the Constitution, fixing it in time to that of the framers. This method of interpretation allows these justices to overrule those precedents in which constitutional meaning has been misfounded on contemporary moral or societal standards. In overruling such precedents these justices can make the argument that by resorting to the original meaning of the Constitution, they have removed personal discretion and value choices from their decisions. Although

examples of this approach to interpretation may be found in several cases, the most readily apparent in which this approach and the opposing view of interpretation are debated is the Establishment Clause case of *Lee v. Weisman* (1992). Justice Scalia's dissenting opinion, which was joined by Rehnquist, Thomas, and White, started with a reference to George Washington praying at his inauguration. The rest of the historical examples and traditions which Scalia's opinion relied on looked back to the period of the framers of the Constitution. Scalia's dissenting opinion went on and belittled the justices in the majority for interpreting the Constitution based upon contemporary studies in psychology instead of historical evidence.

The moderate conservative justices also look to the past, *but to a much more recent past*, in their interpretation of the Constitution. For example, Justice Souter's concurring opinion in *Lee*, joined by O'Connor and Stevens, began its analysis of the First Amendment with *Everson v. Board of Education* (1947). In the majority opinion, Justice Kennedy also consulted a much more contemporary past than that cited by his brethren in the dissent. An emphasis on more contemporary history allows the justices in the moderate conservative bloc to retain the continued legitimacy of the Court by not overruling current constitutional practices based upon a reading of what an understanding of the Constitution may have allowed 200 years ago. This also allows for the development of more flexible constitutional standards and the ability of the Court to adjust the substantive meaning of the Constitution to modern changes in society, much like the practice of common law. The reliance on an evolving interpretation of the Constitution based on precedent protects the moderate conservative justices from charges that they are expressing their personal policy choices and at the same time allows them to slow down or stop the advancement of new rights under the Constitution.

The strong conservatives and the moderate conservatives also differ as to what they believe the role of the Court should be. The strong conservatives support a very limited role for the Court. As a result, they believe that the Court's pronouncements should be in the form of unchangeable rules. Their belief in a close examination of the text of the Constitution has the effect of deconstitutionalizing many issues, especially in regard to civil liberties, which throws the question back in the hands of legislative bodies.

The moderate conservative justices on the Court, while maintaining their fundamental conservative roots, showed in the 1991 term a willingness to enlarge the judicial role beyond that perceived by the strong conservatives. Rather than emphasizing the deconstitutionalization of issues, the moderates perceive the judicial role to be that of a balancer of the

great issues of the day. As a result, they believe that the Court's pronouncements should be in the form of standards that are subject to refinement. This position allows the moderate justices to take into consideration all the factors they believe to be relevant in deciding a case. They can look both backwards at the relevant historical development of the law and forwards to the need for continuing evolution. In this role as balancers, the moderate conservatives were capable of shifting their votes between their brethren who are to the left or to the right of them, providing both sides with the votes necessary to form a majority, depending on the specific issues and facts of the case.

Conclusion

The impact that President Clinton eventually will have upon the federal judiciary cannot be ascertained clearly at this early point in his administration. Two factors that cannot be gauged with accuracy—the number of appointments President Clinton will be able to make, and his political clout—may be the key to how effective his efforts will be at the end of four years. However, it can be estimated that even if there is not an increase in the size of the federal judiciary, President Clinton should be able to appoint in the neighborhood of 240 lower court judges and between one and four Supreme Court justices. President Clinton should have sufficient clout to get his nominees through the Senate. Despite the inability to predict these factors with precision, there are a number of things that Clinton can do during his administration to make the judiciary more reflective of his personal ideology.

Clinton would do well to remember, with regard to the lower courts, that the most influential non-legal factor affecting judicial behavior is party affiliation (Goldman 1973; Carp and Stidham 1993, 285-288). For this reason, if Clinton is committed to creating a judiciary that is more respectful of the right to privacy, equal opportunity, and due process of law, he would be well advised to follow the traditional practice of selecting nominees from his own party. He also would be well served by continuing the centralized screening practices of the last two administrations.

It is through his Supreme Court appointments that President Clinton will be most able to alter the present judicial climate. Although justices generally support in consistent fashion the policies of the presidents who appointed them, President Clinton should develop strategies for achieving his goals on the Court. The strategies of appointment, no doubt, will be dependent on which justices retire, and in what order. In exercising his options, President Clinton should bear in mind that there are two

characteristics a justice may have that are influential upon other justices. These are intellect and personality. Justices with superior intellects are capable of appealing to the other justices by the force of their arguments. A superior intellect can be enhanced further by a charming personality. Justices who have social skills as one component of their personality “seem able to put together winning coalitions and to hammer out compromises a bit more effectively than colleagues who have a reputation for condescension, self-righteousness, hostility, or vindictiveness” (Carp and Stidham 1993, 325).

A first option that President Clinton could exercise would be to appoint strong liberals to the Court who would push a liberal agenda reflecting his concern with the right to privacy, equal opportunity, and due process of law. While a tempting option for those who believe that the Court has slipped too far to the right, this alone probably would be an ineffective strategy for changing the overall direction of the Court. The appointment of a liberal replacement for Justice White still would leave the Court split, six conservatives against three liberals on most issues.

The inability of this strategy to change dramatically the direction of the Court is clearer when one considers that if President Clinton is enabled to make further appointments in addition to Justice White’s replacement, the first openings in all likelihood will be replacements for Justices Blackmun and Stevens, who are the two most liberal members currently on the Court. With an interagreement rating of .77 in the 1991 term, these two justices only have been able to form a moderate voting bloc with one other justice (Souter), with an interagreement index of only .61. While the replacement of White, Blackmun and Stevens with strong liberals possibly would create a larger and stronger liberal voting bloc than on the present court, it also would run the risk of weakening the ability of the liberal bloc on the Court to continue to woo the moderate conservatives into coalitions.

Thus, a strategy of appointing strong liberals probably would not dramatically change the present pattern of results until at least the third or fourth appointment. The appointment of two or three strong liberals in place of the two or three comparatively most liberal votes on the present Court would not change outcomes, but would result in more frequent resort to written dissents in order to express their stronger ideological disagreements. This also would have the effect of raising the level of conflict among the justices. Conflict and the writing of strong dissents can serve an important function when it “makes for alertness, clarifies issues, raises alternative approaches, and tests the intensity of justices’ commitments to given positions.” However, conflict also can be destructive

(Dannelski 1986, 34). Another possible outcome of the appointment of strong liberals is the chance that the Court may divide into three firm voting blocs: strong conservatives, strong liberals, and moderate conservatives. If the moderate conservative bloc ceased its present pattern of swinging back and forth between the others, the result could be an increase in the number of plurality opinions. Since plurality opinions are not binding, this would leave the lower courts with an unclear understanding of what precedent to follow. Thus, appointing liberals, in all likelihood, would not result in the formation of a new majority, but it still could have an effect upon the judicial climate through the writing of strong dissents. That effect might be positive: strong dissents in the past have provided the reasoning around which precedents have been overruled. However, such outcomes have been the exception rather than the rule, and the alternative effects, as already noted, have tended to be destructive.

A more preferable option may be to appoint *moderate liberals* who, while not likely to extend the liberal agenda, will protect the gains already made in this direction, i.e., the existing precedents that are endangered by the current direction of the Court. This strategy also may encourage the moderate conservatives to build bridges with those who share their reluctance to overrule precedent. Another factor that could facilitate bridge-building between moderate liberals and moderate conservatives is the tendency of the strong conservatives, Scalia and Thomas, to be less than diplomatic in their relations with justices they disagree with and to use their opinions openly to criticize other justices (Smith and Johnson 1993, 177; Smith 1990, 804-808). While not allowing for a liberal agenda quickly to be advanced, this option probably provides the best realistic hope for any movement on a liberal agenda. In the short run, it would allow moderate liberals and moderate conservatives to expand on precedent, as societal change over time necessitated, in a manner analogous to common law. In the long run, this strategy would help to build the foundation of a liberal voting bloc on the Court, should President Clinton be able to make more appointments than suggested.

Overall, the number of appointments that President Clinton will be able to make to the lower courts (approximately thirty percent of the total) and to the Supreme Court (between one and three) will be large enough to allow him to alter substantially the current direction of the federal judiciary during a first term of office. To facilitate this change in direction, it is imperative that Clinton not use judicial appointments as bargaining chips to gain short-term support for his policy goals. It also would be unwise of Clinton to use his judicial appointments to satisfy the

political demands of interest groups. In order to bring about lasting change in the direction of the federal courts, Clinton must put off short-term political gains and maintain a commitment to ideologically-based appointments.

Addendum

During the lapse between editorial deadline and press we have had the opportunity to witness (1) the process by which President Clinton selected his first nominee to the Supreme Court, and (2) the pace of his own judicial appointment process. Clinton's choice of Ruth Bader Ginsburg as nominee on 14 June was well received by both Senate Democrats and Republicans, who voted 96-3 to confirm on 3 August 1993. Despite the popularity of the nominee, whom Clinton predicted would be a consensus builder on the Court, the process was not a smooth one *within* the Clinton administration.

Although Clinton had three months in which to deliberate before making his choice, the actual decision to nominate Ginsburg was made in the last hours of the process, after other candidates' names were floated. Surprisingly, the final choice may have reflect more on Clinton's lack of clout—the fruit of early mistakes made by his administration—than on his preferred ideological coloration of the Court. The Clinton administration began the process with a list of 42 possible candidates, for whom they compiled personal profiles. After meeting with staff, the list was narrowed down to 15 to 20 names. Early in the process, Clinton hoped to select a nominee with a “political” background (*New York Times* 15 June 1993). Pursuant to this goal, Clinton, as reported a week prior to the announcement of Ginsburg's nomination, leaned toward selecting his Secretary of Interior, Bruce Babbitt, as the nominee. This drew opposition from Senate Republicans, who thought such a choice “too political,” and from a variety of other interests that preferred to see Babbitt remain in his position. Rather than expend any of his scarce political capital, Clinton then considered nominating Judge Stephen G. Breyer. Clinton was on the verge of nominating Breyer when it came to the attention of the White House that Breyer had failed to pay Social Security taxes for a maid he employed. Again wanting to avoid the expenditure of scarce political capital, as well as charges of gender discrimination after having not stood by two female Attorney General picks who had committed the same indiscretion, Clinton felt it necessary to re-examine the credentials of Ginsburg, whom he earlier had passed over as ‘uninspired’ (*New York Times* 15 June 1993). Then, after a 90-minute meeting with Ginsburg on

13 June, the three month process came to an end as Clinton formally nominated Ginsburg on 14 June 1993.

Clinton's process for appointments to the rest of the federal judiciary has not been as prompt. As of 8 September 1993, the number of unfilled federal judicial vacancies has grown to 143, from the 116 vacancies that existed on 20 March 1993 (Biden 8 September 1993). Senate Judiciary Committee Chair Joseph Biden (D-DE) attributes this surge of vacancies to "the large number of positions created by the change in government" (Biden 8 September 1993).

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