

Building Coalitions, Making Policy

*The Politics of the
Clinton, Bush, and Obama Presidencies*

Edited by

Martin A. Levin, Daniel DiSalvo,
and Martin M. Shapiro

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81. E. E. Schattschneider, *The Semi Sovereign People* (New York: Holt, Rinehart & Winston, 1960).

The Bush Administration and the Uses of Judicial Politics

Thomas F. Burke and Nancy Scherer

Most of the chapters in this book tell stories of fiascos, political misadventures in which the Bush administration grievously miscalculated in its quest to build a permanent Republican majority. The administration's strategy of placating the Republican base while adding new constituencies through the enactment of Social Security reform, a new Medicare drug benefit, immigration legalization, and other such policies backfired completely, and as in the case of Iraq, part of the challenge in telling these stories is to diagnose what led administration policymakers so far astray.

This chapter offers a contrast, a small yet significant island of success in a sea of failure. We call that island "judicial politics," though it goes beyond the federal judiciary to include all the ways in which the Bush administration used controversies over law and the legal system to achieve its ends. In this realm the administration found strategies that successfully achieved its twin goals of satisfying its base of interest group supporters and committed partisans while also reaching out to that fabled personage in political science, the median voter. In some significant cases the Bush administration was able to "get past no" despite the strong opposition of Democrats, but on other issues

"no"—or at least "no action"—was precisely what the administration wanted: on many cultural issues judicial politics served to divert attention from troublesome political conflicts in issue areas such as abortion, gay rights, and health care by reframing them as the product of a judiciary run amok.

For the Bush administration, judicial politics was almost always a plus. For Barack Obama it has proven more mixed terrain, in which juggling the demands of base and median has proven more difficult. Both Bush and Obama were able to play to their base through judicial nominations, "scoring points" (Scherer 2005) by placing judges approved by their respective constituencies on the federal bench. But for Bush, judicial politics had another dimension: he was able to use law and judiciary as villains, reframing difficult political issues by castigating "activist judges" and "runaway litigation" as the source of the nation's difficulties. Obama famously tried this strategy himself in his State of the Union address, criticizing Supreme Court justices to their faces for their decision in *Citizens United*, the corporate campaign spending case, but the relationship of Obama and the Democratic Party to the legal system is too complex for this attack to have had much resonance. Bush, by contrast, could draw on anti-law and anti-judge themes that have been built up over decades by conservatives and so have become quite familiar to the public. Beating up on plaintiff lawyers and "runaway litigation" as a cause of the nation's economic ills is a technique that was first nurtured in the Nixon administration and reached maturity in the George H. W. Bush administration (Burke 2002). Castigating "judicial activism" and promoting "strict construction" of the Constitution are rhetorical techniques that go much further back.

These judicial politics strategies may have been particularly important for George W. Bush. Ronald Reagan famously argued that "government is not the solution to our problem, government is the problem" (Reagan 1981). Reagan's presidency capped the ascendancy of an antigovernment conservatism within the Republican Party. The Bush administration's attempt to create a Republican majority, however, was founded on much different premises. Bush's embrace of "compassionate conservatism," and of ambitious government policies such as No Child Left Behind and Medicare Part D, simply underlined that Bush, in both philosophy and practice, was a big government conservative. For Bush this weakened a rhetorical resource central to Reaganism, the ascrip-

tion of problems in the economy and society to big government and government bureaucracies. Political movements need enemies, both to rally supporters and to construct persuasive narratives about social problems. Often in political narratives the starring role is played by a villain, as in Bush's claim that "everyone pays more for health care" because of "excessive litigation" (Bush 2003), or that "activist courts" are discouraging Americans who have "deep concerns about our culture" (Bush 2006). Of course, for Bush the main enemy was found offshore; antiterrorism was used to justify policies foreign and domestic. But Bush also used judges and avaricious lawyers as his scapegoats, to a degree that observers, focused on the big-ticket items in his presidency, often missed.

Admittedly this was mostly small-bore politics; it certainly did not have the sweep or resonance of Reagan's call to get the government off the backs of the people. Nonetheless, judicial politics proved a durable resource, as lawyers and activist judges effectively took the villainous roles previously assigned to overweening government bureaucrats and welfare queens.

The balance of the chapter describes three ways in which the Bush administration used judicial politics and the results the administration achieved. In the final section we offer a brief comparison with Barack Obama's approach to judicial politics. We argue that for the Obama administration, judicial politics has often been a source of difficulty rather than the useful political tool it proved for Bush.

Supporting Business and Professional Constituencies

Presidents need to pay off their constituencies, and Republican presidents in particular need to find ways to reward business and professional supporters. The main mechanisms by which the Bush administration helped out business constituencies were the old-fashioned ones—subsidies, tax breaks, and favorable regulations. These all incurred costs, usually budgetary but also political, as when the administration controversially imposed tariffs on imported steel (Washington 2003) or championed energy legislation replete with subsidies to the oil, gas, and nuclear industries (Adams 2005).

The administration's judicial politics strategies, by contrast, proved relatively costless, both fiscally and politically. In both of his terms, Bush embraced "tort reform," the effort to reduce the size and frequency of personal

injury damage claims, mostly against businesses, insurers, and professionals. Among business and professional groups, tort costs have become a perennial issue. Tillinghast, a consulting group, estimates that in 2005 the tort system absorbed about \$261 billion in costs, roughly 2 percent of GDP (Towers Perrin Tillinghast 2006). There are reasons to question Tillinghast's methodology in arriving at this figure (Chimerine and Eisenbrey 2005), but in the business community it is widely accepted that tort is a substantial problem, limiting innovation and impairing productivity. For the past three decades, an array of business and professional groups have spent millions of dollars on lobbying, research, public relations, and campaign contributions in the quest to reform the system. Their efforts are to some extent coordinated through the American Tort Reform Association and the U.S. Chamber of Commerce Institute for Legal Reform, which both specialize in the issue (Burke 2002).

For Bush, as for his Republican predecessors, tort reform was safe ground. Outside of a few academics and the main plaintiff lawyer organization, the American Association for Justice, few contest the narrative of a tort system out of control and constricting the economy. Tort reformers have largely won the war of public opinion (Haltom and McCann 2005). Thus, "tort talk" for Bush was an unmitigated positive. Bush advertised tort reform as one of his main accomplishments as governor of Texas, and in his 2000 campaign he regularly denounced plaintiff lawyers for sucking the life out of the economy. The 2000 Republican Party platform called for an array of tort reforms, including sanctions for attorneys who file frivolous suits, caps on damages, special protections for educators, and changes in medical malpractice and product liability law (Republican Party 2000). Bush endorsed tort reform in each of his State of the Union addresses, contending that "our economy is held back" by irresponsible litigation (Bush 2005c) and asking Congress to protect business "from junk and frivolous lawsuits" (Bush 2003).

Bush was particularly focused on medical malpractice reform, an attractive policy because it promised to address the pressing issue of health care costs without cutting the incomes of health care providers or the options available to patients. Bush suggested an array of mostly small-bore health policies in his State of the Union addresses and in his presidential debates, but medical malpractice reform was the one constant. In 2005 Bush even traveled to Southern

Illinois, which he identified as "the number one place for trial lawyers to sue," to disparage malpractice lawyers:

Many of the costs that we're talking about don't start in an examining room or an operating room. They start in a courtroom. What's happening all across this country is that lawyers are filing baseless suits against doctors. . . .

Because junk lawsuits are so unpredictable, they drive up insurance costs for all doctors, even for those who have never been sued; even for those who have never had a claim against them. When insurance premiums rise, doctors have no choice but to pass some of the costs on to their patients. That means you're paying for junk lawsuits every time you go to see your doctor. That's the effect of all the lawsuits. It affects your wallet. If you're a patient, it means you're paying a higher cost to go see your doctor. If part of the national strategy has got to be to make sure health care is available and affordable, health care becomes less affordable because of junk lawsuits. (Bush 2005b)

Variations on this theme could be found throughout the Bush presidency. A particularly memorable formulation came during the 2004 presidential campaign, when Bush told a Missouri crowd, "Too many good docs are getting out of business. Too many OB-GYNs aren't able to practice their love with women all across the country" (Milbank 2004). In a career filled with verbal missteps, it was perhaps Bush's most hilarious gaffe.

Unfortunately for the caring OB-GYNs and the other purported victims of tort litigation, Bush was unable to do much for them: he proved much better at cheerleading for tort reform than delivering. His main proposal, a bill to limit noneconomic damages in medical malpractice cases to \$250,000, was blocked by the threat of filibuster in the Senate. A grand bipartisan compromise on asbestos litigation never came together (Barnes 2011). A bill reforming class action lawsuits was bottled up in the Senate until 2005, when Republicans, having expanded their majority in the 2004 elections, were able to attract enough Democratic votes to reach cloture. This gave Bush his one major tort reform victory, enactment of the "Class Action Fairness Act," whose main feature was to move some class action lawsuits from state to federal court, in some cases a more favorable venue for business interests. The bill was watered down in order to get through the Senate, but it was hailed by business groups, particularly the Chamber of Commerce, which spent a reported \$168 million to campaign for it (Labaton 2005).

For Bush, then, tort politics proved an easy way to rally the troops, at little cost to himself.

Reframing Cultural Issues

Republicans came to power in large part by knitting together their traditional antitax constituency with a new group, cultural conservatives repelled by the Democrats' embrace of gender equality, abortion, and, later, gay and lesbian rights. The challenge for Bush, as for his father and for Ronald Reagan, was to manage the tensions this alliance created. If he went too far in pleasing cultural conservatives, he risked alienating swing voters attracted to the low-tax stance but more moderate on cultural issues. If he did too little, he risked a right-flank rebellion. Bush resolved this dilemma by reframing cultural issues as matters of judicial overreaching, a ground on which his voters could come together.

On abortion Bush temporized. Unlike Reagan, he did not promise a frontal attack on *Roe*. In the 2000 presidential debates he outlined his approach:

Surely we can find common ground to reduce the number of abortions in America. This is a very important topic, and it's a very sensitive topic because a lot of good people disagree on the issue. I think what the next president ought to do is promote a culture of life in America. As a matter of fact, I think a noble goal for this country is that every child, born and unborn, ought to be protected in law and welcomed into life. What I do believe is, we can find good common ground on issues like parental notification or parental consent. ("2000 Unofficial Debate Transcript," October 3, 2000)

Illegalizing abortion is a "noble goal," placed in a distant and hazy horizon. In the interim Bush promised only to work on secondary issues, partial-birth abortion and parental consent, on which the median voter was firmly on his side.

This by itself might not have been enough to assuage cultural conservatives, but Bush had a more substantial promise, that he would pack the federal judiciary with judges who would overturn *Roe*. Yet again, stating this too baldly risked alienating swing voters, so Bush framed his approach to the federal courts carefully, using language that more attentive cultural conservatives could recognize. He criticized judges who "insist on forcing their arbitrary will upon the people" and rule by "the whim of the gavel" rather than "the letter of

the law" (Bush 2004b, 2008). When asked during the 2000 campaign which justice he most admired, Bush picked Scalia and Thomas; his opponent, Al Gore, contended that these were "code words" for judges who would be anti-*Roe* (Lewis 2000). In talking about the judiciary, Bush repeatedly found language that would not alarm moderates yet reassure his Christian conservative supporters. When, during the presidential debate in 2004, Bush was asked what kind of justice he would nominate, he turned the question around, explaining what kind of judge he *wouldn't* want:

I wouldn't pick a judge who said that the Pledge of Allegiance couldn't be said in a school because it had the words "under God" in it. I think that's an example of a judge allowing personal opinion to enter into the decision-making process as opposed to a strict interpretation of the Constitution.

Another example would be the *Dred Scott* case, which is where judges, years ago, said that the Constitution allowed slavery because of personal property rights. ("2004 Debate Transcript")

The recently decided Pledge of Allegiance case was an understandable citation, but what made Bush go all the way back to *Dred Scott* for an example of judicial activism? Among constitutional scholars it was a particularly puzzling example, because some believe that *Dred Scott* was in fact decided according to the interpretive method favored by Bush's favorite judges, original meaning (Graber 2006). To them the reference seemed a non sequitur, but for evangelical Christians, it made perfect sense. Within their circle, *Roe v. Wade* was often framed as another *Dred Scott v. Sanford*, a trampling of basic human rights. Bush's message was not so hard for evangelicals to decipher, notwithstanding his renunciation, a few sentences later in the debate, of any litmus test for nominees (Kirkpatrick 2004).

Bush's debate performance nicely illustrated, in miniature, his ability to have it both ways on abortion, sending reassuring messages to both base and median voters. It is not easy to know the extent to which this was the result of Bush's background as a Christian conservative, which gave him the language and the credibility to connect easily with antiabortion supporters, or a more self-conscious product of polling and focus group technologies. The formulation "a culture of life," employed relentlessly during the Bush years, seems an example of "crafted talk," the use of poll-tested, focus-grouped language to reframe political issues, a technique ubiquitous in national-level politics today (Jacobs and Shapiro 2000; Luntz 2006). But Bush's mention of *Dred Scott*

suggests an even more sophisticated method, of coded appeals, in which a message is sent to a target audience wrapped in an innocuous rhetorical package. Christian conservatives knew exactly what Bush meant by his reference to Dred Scott, but it likely flew by the median voters Bush also wanted to attract. Research suggests that coded appeals may be more effective than more open statements of support, because as they bypass potential opponents they reinforce a bond with the target audience. When Bush said in his 2003 State of the Union address that "there is power—wonder-working power—in the goodness and idealism of the American people," he was using a phrase, "wonder-working power," well known to some Christians. One study found that among those raised as Pentecostals, this statement was more powerful in attracting support than a more openly religious appeal (Albertson 2006).

Whether through the conscious use of coded appeals, crafted talk, or just good political instincts, Bush largely defused the abortion issue, but he faced a more difficult problem with gay and lesbian rights. Here again, the root of the problem was the tension within the Republican alliance, but initially, at least, Bush had no *Roe* to lean on. Legislation on discrimination in employment, for example, posed a real dilemma: a stance against it might persuade moderates that Bush was too closely tied to Christian conservatives, but an endorsement would offend the base. Bush's response was to bob and weave, giving hope to both sides. During the 2000 presidential campaign, he met with a small group of Log Cabin Republicans, a gay organization, and his administration continued to enforce a ban on discrimination in federal employment. Yet when Bush was asked during the 2000 presidential debate about discrimination against gays and lesbians, his response was to rule out providing "special rights," though he did say that personally "I don't hire and fire somebody based on their sexual orientation" ("2000 Unofficial Debate Transcript," October 11, 2000). The equivocating pattern continued through both terms. An administration appointee for a time refused to enforce the federal employment discrimination policy, and the administration threatened to veto legislation banning sexual orientation discrimination, though it was never forced to follow through—the legislation never got out of the Senate (Herszenhorn 2007).

Bush was largely bailed out of his troubles on gay rights by the Supreme Judicial Court of Massachusetts. The Court's 2003 ruling in *Goodridge v. Department of Public Health* allowed Bush to reframe the issue of gay rights as a matter of judicial activism, and from then on this was how he described it, as

in his 2004 State of the Union address: "Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage" (Bush 2004b). Same-sex marriage was deeply unpopular among both cultural conservatives and moderates, so in talking about the decision Bush did not have to worry about splitting his alliance. Bush's endorsement of a constitutional amendment defining marriage as between a man and a woman was less popular, but the president took care to portray it as the only recourse left to the people by "activist courts" that "are presuming to change the most fundamental institution in the country" (Bush 2004a). The constitutional amendment never went very far. Yet in the 2004 election and several that followed, states across the country amended their own constitutions to stop same-sex marriage, a process that may have benefited Republican office seekers, including Bush himself. Lost in the furor over same-sex marriage was that Bush quietly endorsed civil unions, a position that would have been considered liberal at the beginning of his term (Bumiller 2004). In any event, the *Goodridge* ruling turned what had been a problematic issue into a winner. As in the case of abortion, Bush employed judicial politics to defuse tensions between base and median voter.

Bush was not nearly so adroit in his handling of the Terri Schiavo controversy, where he seemed a victim of events. Bush found himself caught up as evangelical Christians mobilized and demanded congressional intervention to overturn unfavorable federal and state court rulings. Indeed, the Schiavo controversy neatly reversed the Bush strategy: it was a case in which the public lined up with the legal system against Congress, and Bush himself, and in which the elected politicians appeared "activist," reaching beyond their normal roles to intervene where they were unwanted (Kohut 2005).

Schiavo was the exception. Bush was largely successful at managing his party's cultural politics. For this he had the judiciary to thank. In a post-*Roe* world Bush would have been forced to confront the core issue of abortion more squarely, and in a world without the same-sex marriage rulings, his endorsement of civil unions would have been far more salient and troublesome to cultural conservatives. As he was excoriating judges for their activism, Bush might have added a word of thanks.

Scoring Points with Cultural Conservatives

Bush could not reward his cultural conservative supporters with major legislation, but he could give them the kind of judges they desired. Here again, though, the Bush administration faced a problem: in a system of judicial independence with lifetime appointment, how can a president guarantee to his supporters that his judicial nominees, once appointed, will reliably vote the party line?

Bush came to power after several decades of conservative frustration with Republican judicial appointees stretching back to the 1950s. President Eisenhower famously expressed regret over his appointments of Earl Warren and William Brennan to the Court. Though both Republicans, they ultimately became the core of the Warren Court, the source of a series of liberal rulings that transformed constitutional law. Richard Nixon ran in large part on the backlash against the Warren Court, promising to appoint "law and order" judges that would ratchet back a series of decisions protecting criminal suspects. From Nixon on, presidential candidates, both Democratic and Republican, articulated litmus tests on the campaign trail designed to signal to their base as to the type of judges they would appoint to the federal courts once elected (Goldman 1997; Scherer 2005).

In the 1980s, Presidents Reagan and George H. W. Bush pronounced their commitment to appoint judges who "believe in the sanctity of human life"—a not-so-subtle signal to their core constituents that they intended to seek out judges who would overturn *Roe v. Wade*. But, despite their best efforts, and five nominations to the Supreme Court between them, these Republican presidents ultimately failed to live up to their campaign promises. Confronted with a case, *Planned Parenthood v. Casey*, in which the justices specifically considered overturning *Roe*, three of the five Reagan/H. W. Bush Supreme Court appointees (O'Connor, Kennedy, and Souter) formed the pivotal swing group that voted to uphold the right to an abortion.

How to avoid such unpleasant surprises? By the beginning of the Bush presidency, Republican leaders figured out a judicial selection system that virtually guaranteed that their judicial nominees would be stalwart conservatives. Integral to this strategy is a conservative organization known as the Federalist Society. As Senate Judiciary Committee member Richard Durbin (D-IL) observed, "As we try to monitor the legal DNA of President Bush's nominees, we find repeatedly the Federalist Society chromosome" (Benac

2005, quoting Durbin). Or as Karl Rove, Bush's political strategist, put it, "One of George W. Bush's greatest contributions as president will be the changes he's brought about in our courts and our legal culture, and those changes would have been impossible were it not for the Federalist Society" (Rove 2005). Thus, any examination of Bush's appointment strategy must begin with the mission of the Federalist Society and the role it has come to play in Republican presidential administrations.

The Federalist Society was founded at Yale Law School in 1980 and began strictly as a law student organization (Bossert 1997; Hicks 2006). From its inception, the Federalist Society sought to provide a counterbalance to the "liberal jurisprudence" that prevailed in the nation's law schools at that time. While Federalist Society members declaim the notion that they are united around a particular philosophy (Teles 2008), many were associated with a method of constitutional interpretation variously referred to as "textualism" or "original meaning." The Society's executive director, Eugene Meyer, explained this approach: "If a word meant 'x' when the Constitution was passed, and it means 'y' today . . . you presumably want to stick with the meaning it had before" (Meyer 2002). Society members contend that judges should practice "judicial restraint," that is, unelected jurists should not interject their personal policy preferences when interpreting the Constitution: "Is the court interpreting the text and meaning of the Constitution? If it is, and they [the judges or justices] are doing the best they can do . . . their judgment might be off, but there is not a structural problem. If the court is saying, 'gee, we don't like the direction policy is going in this country [and we] want to change the direction of policy' . . . that is not a proper role for the courts" (Meyer 2002). The rhetoric of originalism aligns neatly with conservative positions on constitutional questions on abortion and gay rights. Critics point out that conservatives are typically not so intent on following "original meaning" in areas such as affirmative action, executive powers, freedom of speech, and federalism where, it seems, their policy views might not mesh so neatly with historical research on the origins of the relevant constitutional provisions (Rosen 2006). But these subtleties of legal doctrine, while much debated within the academy, are lost in the larger public debate over "judicial activism," which tends to focus on the most salient controversies, over abortion and same-sex marriage. Because the philosophies of Federalist Society members were broadly in line with conservative political policy goals, and because their positions on both constitutional interpretation and the role of unelected

Table 7.1 Federalist Society members nominated to U.S. Supreme Court and the U.S. Courts of Appeals by administration (1989–2007)

Name	Court	Year questionnaire submitted	Membership acknowledged
<i>George H. W. Bush</i>			
Samuel Alito	3rd Circuit	1990	Yes
Lillian Bevier*	4th Circuit	1991	Not available
Dennis Jacobs	2nd Circuit	1992	Yes
Francis Keating*	10th Circuit	1991	Not available
Michael Luttig	4th Circuit	1991	No
Sheldon Plager	Federal Circuit	1989	Yes
John Roberts*	D.C. Circuit	1992	Not available
Clarence Thomas	D.C. Circuit	1989	No
Clarence Thomas	Supreme Court	1991	No
<i>George W. Bush</i>			
Samuel Alito	Supreme Court	2005	Yes
Carlos Bea	9th Circuit	2003	Yes
Janice Brown†	D.C. Circuit	2003	Yes
Jay Bybee†	9th Circuit	2001	Yes
Michael Chertoff	3rd Circuit	2003	No
Edith Clement	5th Circuit	2001	Yes
Steven Collanton	8th Circuit	2003	Yes
Deborah Cook†	6th Circuit	2001	No
Jennifer Elrod	5th Circuit	2007	Yes
Miguel Estrada*	D.C. Circuit	2001	Yes
E. Duncan Getchell*	4th Circuit	2007	Not available
Thomas Griffith†	D.C. Circuit	2004	No
Neil Gorsuch*	10th Circuit	2006	Yes
Raymond Gruender	8th Circuit	2003	Yes
Harris Hartz	10th Circuit	2001	Yes
William Haynes†	4th Circuit	2003	Yes
Kent Jordan	3rd Circuit	2006	Yes
Brett Kavanaugh†	D.C. Circuit	2003	Yes
Peter Keisler*	D.C. Circuit	2006	Yes
Carolyn Kuhl*	9th Circuit	2001	No
Steve Matthews*	4th Circuit	2007	Not available
Michael McConnell	10th Circuit	2001	Yes
David McKeague†	6th Circuit	2001	Yes
Stephen Murphy*	6th Circuit	2006	Not available
William Myers*	D.C. Circuit	2003	Yes
Priscilla Owen†	5th Circuit	2001	No
Gene Pratter*	3rd Circuit	2007	Not available
William Pryor†	11th Circuit	2003	Yes
John Roberts†	D.C. Circuit	2001	No

Table 7.1 (continued)

Name	Court	Year questionnaire submitted	Membership acknowledged
John Roberts	Supreme Court	2005	No
John Rogers	6th Circuit	2001	Yes
Rod Rosenstein*	4th Circuit	2007	Not available
Henry Saad*	6th Circuit	2001	Yes
N. Randy Smith	9th Circuit	2005	Yes
William Smith*	1st Circuit	2007	Not available
Leslie Southwick	5th Circuit	2006	Yes
Shalom Stone*	3rd Circuit	2007	Not available
Jeffrey Sutton†	6th Circuit	2001	Yes
Diane Sykes	7th Circuit	2003	Yes
Timothy Tymkovich†	10th Circuit	2001	Yes
Michael Wallace*	5th Circuit	2006	Yes

*Not confirmed.

†Confirmed in subsequent congressional session.

judges aligned as well, the Society soon found itself enmeshed in Republican administrations.

The association between the Federalist Society and the executive branch began during the Reagan administration, expanded during the George H. W. Bush administration, but reached a new level under George W. Bush. Table 7.1 is a list of all Federalist Society members nominated by Presidents George H. W. Bush and George W. Bush to the Supreme Court and the U.S. Courts of Appeals. While George H. W. Bush nominated eight Federalist Society members to the appellate courts to fill forty-four vacancies (18.1%), George W. Bush nominated thirty-nine Society members to fill seventy-nine vacancies (49.4%).¹ The George W. Bush administration used Society members to fill almost half of all nominations to the courts of appeals and Supreme Court. At the Supreme Court level, one of George H. W. Bush's two nominees, Thomas, came from the Federalist Society; the other was Souter, a profound disappointment to conservatives. George W. Bush's two successful nominees, Roberts and Alito, were both Society members.

George W. Bush relied on Federalist Society members because they were seen as a "sure thing." Unlike Justices Kennedy, Souter, and O'Connor, Society members were virtually guaranteed to vote conservatively once on the bench because their membership signals an allegiance to the principles of constitutional interpretation laid down by the Society. A study by Scherer and Miller

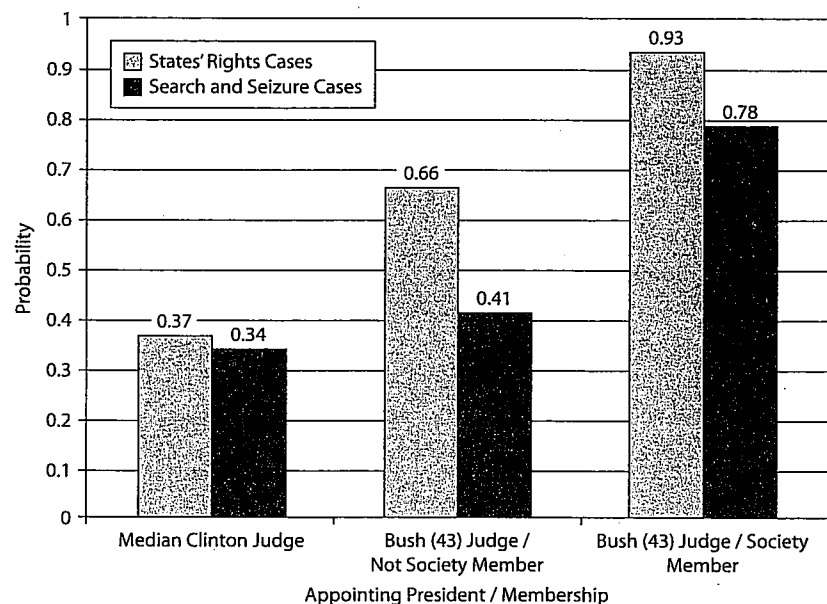


Figure 7.1. Probability of a conservative vote in cases addressing (1) state's rights and (2) search and seizure, 1995–2006.

(2009) confirms that, once on the bench, Society members are much more likely to cast conservative votes than fellow non-Society Republican colleagues, as well as Democratic-appointed judges. As shown in figure 7.1, judges appointed by George W. Bush who are members of the Federalist Society are 27 percent more likely than nonmember Bush-appointed jurists to take the conservative position in states' rights cases and 36 percent more likely to rule against a criminal defendant in search and seizure cases.

This pattern also occurs at the Supreme Court level, where political ideology scores developed by political scientists suggest that Society members are much more conservative than their fellow nonmember Republican justices and far more conservative than their Democratic counterparts. As shown in figure 7.2, Federalist Society members Thomas, Alito, and Roberts are on the far right of the ideological spectrum, with Republican, non-Society nominees Miers and Souter toward the center. As one would expect, the two Democrats appointed in this period, Ginsberg and Breyer, appear on the left side of the ideological continuum.

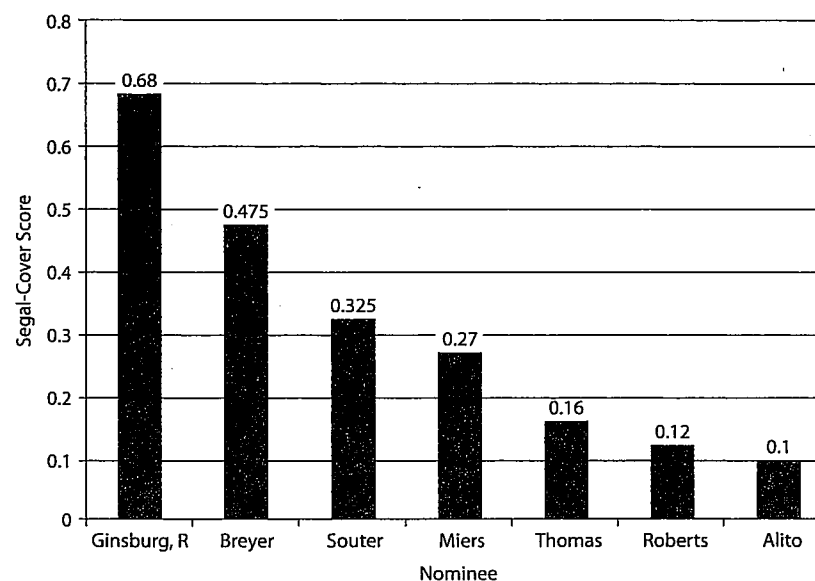


Figure 7.2. Segal-Cover ideology scores of Supreme Court nominees, 1989–2007. Segal-Cover scores range from 0 to 1; 0 indicates most conservative and 1 most liberal.

The one great exception to Bush's reliance on Federalist Society members at the Supreme Court level was his failed nomination of Harriet Miers. This represents perhaps the only time in his presidency that Bush made an appellate nomination that appealed to moderates, and the only time conservative activists opposed a Bush nominee. Thus, this episode invites closer examination.

When Justice O'Connor announced her intention to retire on July 1, 2005, the White House was quick to name D.C. circuit judge John Roberts as her replacement. Well known in conservative legal circles for his work in the Justice Department during the Reagan and George H. W. Bush administrations, Roberts's nomination thrilled conservative activists (Purdham 2005). Roberts's record during his days at the Justice Department and at the Solicitor General's Office was solidly conservative. As deputy solicitor general, Roberts had argued that *Roe* "was wrongly decided and should be overruled" (Reichmann 2005).

When Chief Justice Rehnquist passed away in the fall of 2005, Bush, undoubtedly influenced by the popularity of the Roberts nomination with

conservative groups, renominated Roberts for the chief justice position. This left the O'Connor seat open. At this point in his presidency, Bush's political capital was rapidly waning. His approval ratings hit an all-time low of 41 percent in the wake of his mishandling of Hurricane Katrina (Zogby American Survey 2005) and the war in Iraq (Toner and Connelly 2005).² With so many political disasters with which to contend, Bush wanted to avoid another political setback, this time at the hands of Senate Democrats, over his next Supreme Court nomination. Bush anticipated two concerns of Democrats about the nomination. The first was the desire to appoint a woman to fill O'Connor's seat. Not only were Democratic-affiliated interest groups pressuring the president and Senate Democrats to ensure a second woman remained on the Court (National Organization for Women 2005), but even the First Lady, Laura Bush, publicly endorsed the nomination of a woman to fill the vacancy left by O'Connor (Bumiller 2005). Second, Senate Democrats would likely assess the nominee's willingness to overturn *Roe v. Wade*. While Roberts, an anti-*Roe* justice, had replaced another anti-*Roe* justice (Rehnquist), Bush's second nominee to the Court would be replacing a justice who declined to overturn *Roe*.³

Upon O'Connor's announced retirement, many Court watchers assumed that Bush would appoint an ultraconservative woman to replace O'Connor—someone who, like Roberts and the majority of Bush's courts of appeals nominees, was affiliated with the Federalist Society. But Bush struggled to find such a woman. Before Rehnquist's death, when there was only one vacancy on the Court, Bush had considered nominating one of the women on his original short list for Supreme Court justices (Epstein and Segal 2005, 53–55) but ultimately concluded that these women were unconfirmable. For example, both Priscilla Owen (Fifth Circuit) and Janice Rogers Brown (D.C. Circuit) faced staunch opposition from Democrats during their lower court confirmation proceedings. The Democrats argued that these women's decisions while serving as state court judges were out of the mainstream (Scherer 2005, 150–51).⁴ Another female appellate judge affiliated with the Federalist Society and on Bush's short list, Edith Clement (Fifth Circuit), was considered for a time to be a front-runner to replace O'Connor because she had not faced stiff opposition from Senate Democrats when Bush appointed her at the beginning of his first term in office (Bumiller and Stout 2005). But apparently her interview with the president had not gone well, and so she was crossed off the list (Ertelt 2005). Moreover, other unidentified female candidates for the nomi-

nation asked the White House not to be considered for the O'Connor seat because of "the ordeal of going through the confirmation process" (Baker and Babington 2005, citing Scott McClellan).

With few female options remaining, Bush ultimately decided to go with a "stealth" candidate, Harriet Miers, a personal friend who was serving as White House Counsel. Miers was not an easy target for liberals. She had never served as a judge so she had no voting record; her views on *Roe* and on constitutional interpretation more generally were not well known. Moreover, even before her nomination, Miers already had an important Democratic ally in the Senate: Democratic leader Harry Reid had suggested to the president that Miers should be considered to replace O'Connor (Reid 2005). Miers was attractive also because of the many "firsts" listed on her resume: first woman to be hired by a major Dallas law firm, first woman to be named managing partner of a major Texas law firm, first woman to head the Dallas Bar Association, and first woman to be elected president of the Texas Bar Association (Bush 2005a). She was also named one of the top fifty woman lawyers in the nation (Bush 2005a).

While Miers may have been a stealth candidate to outsiders, Bush's close relationship with Miers, dating back to their days in Texas politics, gave him an insider's advantage. Bush did not worry that Miers would be "another Souter," a traitor to the conservative cause. The president was sure he knew Miers's positions on *Roe* and other controversial legal issues⁵—and that they were in line with the president's conservative agenda. Yet Bush also calculated that Miers would be seen by Democrats as a moderate choice, someone who could potentially serve as a swing vote on the Court, much like O'Connor.

The president did not anticipate the backlash to Miers that erupted from his own Republican base (Coats 2007). Still stinging from the Souter appointment fifteen years earlier, conservative Republican leaders and interest groups were not willing to take another chance on a stealth candidate (Coats 2007). Bush's plea to his base "to trust him" about Miers proved insufficient to turn the tide (Coats 2007). In fact, the conservative Republican base was so intent on not repeating the mistakes of the Souter nomination that, following the struggle over Miers, the party inserted into its 2008 platform a clause denouncing the nomination of "stealth" candidates to the federal bench: "We oppose stealth nominations to the federal bench and especially to the Supreme Court, whose lack of a clear and distinguished record leaves doubt about their respect for the Constitution or their intellectual fortitude. Nominees must have a

record of fidelity to the U.S. Constitution and the rule of law" (Republican Party 2008, 20).

Conservatives insisted that the president nominate someone with a proven written record of opposition to *Roe* and a stated commitment to interpret the Constitution according to Federalist Society principles, in particular the theory of original meaning. The Republican base did not care about the appointment of another woman to the bench; in fact, some accused Bush of engaging in classic liberal affirmative action policies by nominating a less qualified woman over the plethora of qualified men to fill the O'Connor vacancy (O'Beirne 2005). And, so, with growing opposition within the Republican base over her nomination, Miers withdrew her name from consideration.

Bush would not repeat his miscalculation with his second nomination. He chose Samuel Alito to fill O'Connor's seat—a Federalist Society member with an extensive written record from fourteen years of experience as a judge on the Third Circuit, a record that demonstrated his commitment to interpreting the Constitution according to its original meaning and his hostility toward *Roe*.⁶

Taken together, the failed nomination of Miers and the successful nominations of both Roberts and Alito suggest the great value to Republican presidents of the Federalist Society. Federalist Society membership solves the problem that daunted Republican presidents since at least Nixon, how to get reliably conservative judges onto the bench, and how to reassure conservative activist groups that these judges will remain loyal to the cause once appointed.

But while placating the Republican base, Bush also had to be careful not to alienate moderates. Did Bush pay a price with the median voter for his nomination of extremely conservative judges? Political scientists have long observed that the broad public knows little about the Supreme Court and virtually nothing about the lower federal courts. George W. Bush's ultraconservative appointments to the U.S. Courts of Appeals undoubtedly went largely unnoticed by the average American voter; only his political base was paying attention (Scherer 2005). Not surprisingly, then, there is no publicly available polling data on voters' views of George W. Bush's appellate appointments.⁷ We do, however, have polling on the public's views of the president's Supreme Court appointments.

The polls suggest a high level of misperceptions about nominees to the Court. Despite Roberts's and Alito's unequivocal conservative records, including skepticism about *Roe*, independent voters—the median voters—overwhelmingly supported their confirmations. Yet this same group also

Table 7.2 Washington Post/ABC News Poll, July 21, 2005
(500 respondents, margin of error ±4%)

Party	<i>Roe v. Wade</i> ^a		
	Uphold	Overturn	Unsure
Republican	~50%		
Independent	~66		
Democrat	~80		
Overall	~65%	32%	4%
Confirm Roberts ^b			
	Should	Should not	Unsure
Republican	84%		
Independent	58		
Democrat	41		
Overall	59%	23%	17%

^aResponses were to the question, "The Supreme Court legalized abortion 32 years ago in the ruling known as *Roe versus Wade*. If that case came before the court again, would you want Roberts to vote to uphold *Roe versus Wade*, or vote to overturn it?"

^bResponses were to the question, "Do you think the U.S. Senate should or should not confirm Roberts's nomination to the Supreme Court?"

told pollsters that they opposed judicial nominees who wanted to overturn *Roe*. The contrast was demonstrated in a July 2005 poll taken as Roberts's nomination was being considered (table 7.2). A large majority of respondents overall, including the independents, wanted Roberts to uphold *Roe*. Nonetheless, despite Roberts's statements opposing *Roe*, an almost equally large majority supported his confirmation.

A poll on Alito demonstrated a similar pattern (table 7.3). Opinion about Alito was divided equally among the supportive, the opposed, and the unsure. But a large majority of respondents, including the independents, said they would oppose Alito if they knew he would strike down *Roe*.

Another study conducted by the Annenberg Foundation in 2005 provides further confirmation of citizens' confusion over support for Supreme Court nominees antagonistic toward *Roe*. The Annenberg Supreme Court study asked respondents whether Bush's nominees to the Supreme Court should hold the same position on *Roe* as respondents' positions: 67 percent of independents surveyed said it was very important (36%) or somewhat important (31%) that Bush's nominations to the Supreme Court were in sync with the positions on *Roe* held by these respondents (Bartels and Johnston 2008).

Table 7.3 Harris Poll, December 9–14, 2006 (1,961 respondents, ±2%)

Party	Confirm Alito ^a		
	Should	Should not	Unsure
Republican	65%	9%	26%
Independent	34	38	28
Democrat	14	48	38
Overall	34%	31%	34%
If Alito would make abortion illegal ^b			
	Favor	Oppose	
Republican	56%	44%	
Independent	26	74	
Democrat	14	86	
Overall	31%	69%	

^aResponses were to the question, "President Bush has nominated Samuel Alito to be an Associate Justice of the U.S. Supreme Court. Do you believe he should be confirmed by the Senate?"

^bResponses were to the question, "If you thought that Judge Alito, if confirmed, would vote to make abortions illegal, would you favor or oppose his confirmation?"

Two other polls taken at about the same time as the Roberts and Alito nominations are also telling. A Gallup poll in July 2005 found that 63 percent of the public opposed overturning *Roe* (Gallup 2005), and a CNN/*USA Today*/Gallup poll conducted in January 2006 showed that 56 percent of the public would oppose Alito's confirmation if he were unwilling to uphold *Roe* (CNN/*USA Today*/Gallup Poll 2006). Collectively, these polls suggest that the majority of citizens should have been opposed to both Alito and Roberts but were not.

Thus, though independents favored *Roe*, and both Roberts and Alito opposed *Roe*, independents nonetheless went along with the confirmation of both. This suggests that independents pay little attention to the judicial branch of government, giving the president a free hand to make appointments that pleased his base. Moreover, if Alito and Roberts do one day strike down *Roe*, Bush will be far from the scene and immune from the wrath of the median voter.

Judicial appointments are by far the most significant and long-lasting reward Bush has given to cultural conservatives who supported him. For all his talk about a "culture of life" and his rhetorical opposition to same-sex marriage, Bush's achievements in this arena were modest at best. Congress did

enact a partial-birth abortion law (upheld narrowly by the Court), and Bush issued some antiabortion executive orders, but the administration never reached further. Although Bush did endorse a constitutional amendment to stop same-sex marriage, he also endorsed civil unions, and during his two terms the gay rights movement marched forward without any serious federal intervention. "Faith-based initiatives," the rhetorical heart of Bush's compassionate conservatism, in practice turned out to be much less than promised (Kuo 2007; Kuo and Dillio 2008). To the extent that cultural conservatives made any lasting progress on his watch, it was in the federal judiciary.

Anti-Government/Anti-Judiciary

On several fronts, then, the Bush administration used judicial politics to manage tricky political problems, satisfying cultural conservatives and business interests without alienating median voters. Liberal legalism in its various guises has been the target of Republican presidents at least since Nixon, but before Bush, anti-governmental themes loomed much larger. Under Bush those themes receded, making judicial politics strategies all the more significant. In Bush's rhetoric, activist judges and greedy plaintiff lawyers replaced government bureaucrats and foolish government programs as the cause of social ills.

The contrast is nicely illustrated by two passages from State of the Union addresses. Consider first Ronald Reagan in 1984:

The problems we're overcoming are not the heritage of one person, party, or even one generation. It's just the tendency of government to grow, for practices and programs to become the nearest thing to eternal life we'll ever see on this Earth. And there's always that well-intentioned chorus of voices saying, "With a little more power and a little more money, we could do so much for the people." For a time we forgot the American dream isn't one of making government bigger; it's keeping faith with the mighty spirit of free people under God.

Compare George W. Bush in 2006:

In recent years, America has become a more hopeful nation. Violent crime rates have fallen to their lowest levels since the 1970s. Welfare cases have dropped by more than half over the past decade. Drug use among youth is down 19 percent since 2001. There are fewer abortions in America than at any point in the last

three decades, and the number of children born to teenage mothers has been falling for a dozen years in a row.

These gains are evidence of a quiet transformation—a revolution of conscience, in which a rising generation is finding that a life of personal responsibility is a life of fulfillment. *Government has played a role.* Wise policies, such as welfare reform and drug education and support for abstinence and adoption have made a difference in the character of our country. . . .

Yet many Americans, especially parents, still have deep concerns about the direction of our culture, and the health of our most basic institutions. They're concerned about unethical conduct by public officials, *and discouraged by activist courts that try to redefine marriage.* (emphasis added)

Government has been a force for good, Bush argues, but activist courts threaten the progress the culture has made. Of course, Bush also criticized government at times and invoked standard claims about the need to reduce government waste and inefficiency. But he never soared to Reaganesque heights in denouncing government. Only the legal system attracted his sustained ire.

The moment when a national Republican leader would say that “government has played a role” in resolving social issues and in the moral improvement of the citizenry quickly passed, and Bush’s “big government” conservatism looks in retrospect like an anomaly. The events of 2008–12, particularly the controversies over government bailouts, the stimulus package, and health care reform, together with the rise of Sarah Palin, Michelle Bachmann, and the Tea Party, seem to have buried the “big government” version of conservatism. Republicans have once again made antigovernment rhetoric the centerpiece of their politics. The Bush administration’s pro-government policies, to the extent that they were acknowledged by Republicans after 2008, were treated as a betrayal of the conservative movement.

Will the anti-law and anti-judiciary rhetoric of the Bush administration also fade? Increasingly, the unpopular decisions federal courts make are in a conservative direction, raising the possibility of a reversal, in which liberals attack—and conservatives defend—the judicial branch. President Obama’s 2010 State of the Union address featured just such an attack. Obama, speaking “with all due deference to separation of powers,” nevertheless criticized the Supreme Court’s decision in *Citizens United*, which struck down regulations on corporate spending in election campaigns. With the justices he was criticizing sitting just a few feet away, Obama predicted that their decision

would “open the floodgates for special interests—including foreign corporations—to spend without limit in our elections” (Obama 2010b). But Obama’s celebrated attack was more a one-off than the opening salvo in a struggle against judicial conservatism. He didn’t connect *Citizens United* to other “activist” decisions made by the Supreme Court, nor did he move beyond the particulars of the decision to locate the decision in a broader context of conservative judicial activism. In academic circles, critiques of conservative judicial activism are common (Keck 2004), but they have failed to break through to the popular culture. Even the prospect of a judicial decision overturning Obama’s signature legislative accomplishment, health care reform, seems unlikely to revert the American political universe to its pre-*Brown* alignment, with liberals fulminating against “judicial activism” and urging courts to defer to the elected branches. The main barrier to this reversion is the salience of two cultural issues, abortion and gay rights, which more than cancels out a host of significant but less resonant decisions. As long as the Court’s liberal decisions on abortion and gay rights loom largest in the political culture, they will orient the public’s understanding of judicial politics. Thus, whatever the reality of the federal judicial decision making, Republicans should be able to decry liberal judicial activism for years to come.

The Early Obama Years

For the Bush administration, judicial politics often served as a resource, a way to preserve the uneasy coalition that brought the Republican Party to power, satisfying both the conservative base and the median voters Bush needed to be reelected. For the Obama administration, however, judicial politics has not provided a neat solution to the problem of appealing to both base and median.

Take, for example, the arena of gay rights. Strangely enough, Obama entered office with the same position on the most prominent gay rights issue as his predecessor, favoring civil unions but opposing marriage. Aside from this issue, though, Obama pledged to be a “fierce advocate” for gay rights, to repeal “Don’t Ask Don’t Tell,” to enact a federal nondiscrimination law, and to overturn the restrictions on federal benefits to same-sex couples in the Defense of Marriage Act (Stolberg 2010). Of these pledges, the Obama administration had by the end of his first two years in office fulfilled only one, the repeal of Don’t Ask Don’t Tell, and along the way had been criticized repeatedly for its

cautious handling of gay rights. When, for example, gay and lesbian rights organizations brought lawsuits challenging the constitutionality of the Defense of Marriage Act, the Obama Justice Department at first energetically defended the law, angering gay and lesbian rights supporters. The administration argued that it had a legal responsibility to defend the constitutionality of the law until it was repealed (Condon 2010). In 2011, however, the Obama administration reversed course and announced that it would no longer defend the law, concluding that it was unconstitutional (Savage and Stolberg 2011). On Don't Ask Don't Tell, an issue on which he clearly had support from the median voter, Obama took a go-slow approach that nearly ran aground; the Senate enacted the repeal law in the last possible moments before the Republicans took over the House in 2010. On gay marriage, meanwhile, Obama said, nearly two years into his term, that he was "wrestling with" his position and observed that "attitudes evolve, including mine." Yet Obama has continued to stick to his official position against same-sex marriage (Reeve 2010). Obama's wobbling on gay rights issues looked in some respects like a mirror image of the bobbing and weaving that characterized the Bush administration's approach in its first term. Both administrations attempted to placate an intense base while acting so as not to arouse more moderate voters. But when the *Goodrich* decision was handed down, Bush gained a resource Obama lacked, the ability to deflect attention from troublesome issues and bring his coalition together in an attack on "judicial activism." Obama instead appeared to have relied on the proper use of tempo, calculating that he could go slow enough on gay rights so as not to offend moderates, but just fast enough not to cause a rebellion from liberal supporters.

On terrorism the Obama administration also struggled to find a middle ground and was repeatedly criticized by civil liberties groups for its caution. Although Obama barred torture and fundamentally reformed the system for detaining suspected terrorists, civil liberties groups complained of the administration's use of the "state secrets privilege" to defend lawsuits seeking redress for torture and, more broadly, the administration's failure to investigate possible war crimes of Bush administration officials. Above all, Obama was criticized for failing in his campaign pledge to close the Guantanamo prison camp, though he was thwarted mainly by Congress, which barred the use of government funding to bring Guantanamo prisoners to the United States (Cole 2010).

Even judicial appointments proved difficult terrain, though here the Obama administration had some big successes, particularly at the Supreme Court level.

Like all presidents in the modern political era, Obama used his judicial appointments to curry favor with the base of his party and sympathetic political activists. Bush accomplished this goal through the use of a litmus test—does the nominee interpret the Constitution according to the principles of textualism?—validated by the Federalist Society "brand." Obama followed the playbook of previous Democratic presidents, beginning with Carter, who used the appointment of minority and female judges to "score points" with identity interest groups and minority elites in the Democratic Party (Scherer 2005).

Obama did, however, make a rhetorical shift in his approach to judicial appointments that appeared to be designed to comfort median voters. Instead of promising, as his predecessors did, simply to increase minority and female presence on the bench, Obama emphasized the experiences of his appointees and connected those experiences with their decision making. In describing his philosophy of Supreme Court nominations, Obama asserted, "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old—and that's the criterion by which I'll be selecting my judges" (Whelan 2008). President Obama thus suggested that members of marginalized groups are likely to have struggled in life, making them better situated to understand the plight of average citizens who come before the courts. In praising Sonya Sotomayor's qualifications for the Supreme Court, President Obama emphasized her background of hardship but did not stress her ethnicity or gender, saying she had "experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of Justice we need on the Supreme Court" (Obama 2010a). Obama moved away from a "descriptive representation" justification for his appointments, in which the racial and gender makeup of an institution is constructed to reflect that of the nation, and from an emphasis on remedying past discrimination. Both of these justifications, invoked by previous Democratic presidents, can be tied in the public mind to the imposition of racial and gender quotas, which are in disrepute. By shifting the focus away from identity politics and toward a neutral standard of empathy, President Obama may have hoped to quell conservative objections to his pattern of appointment.⁸ Indeed, it appears that President Obama's empathy approach may have found traction

with the American public; a recent study found that 67 percent of the public believes that judges should be empathetic (Gibson 2010).

Whatever the rationale, there can be no doubt about the Obama administration's commitment to diversifying the federal bench. Far fewer than half the nominees in the first two years of Obama's presidency were white men. At the end of his first two years in office, besides his two female appointments to the Supreme Court, Obama had nominated twenty-four people to the courts of appeals, of which 21 percent were white males, and sixty-five to the district courts, of which 35 percent were white males. Sixteen of the appeals court nominees and forty-four of the district nominees were confirmed.⁹

The Obama administration struggled to fill spots on the federal judiciary, leaving an increasing number of positions vacant. This was due in large part, of course, to the many obstacles—holds, delays, and threats to filibuster—that Senate Republicans created to block the administration's nominees. Perhaps because of this determined opposition, or because of the effort put into the administration's two successful Supreme Court nominations, the administration was also slow to nominate candidates at the appellate and district court levels. By the second year of his presidency, Obama had made one-third fewer nominations than Bush did at roughly the same point,¹⁰ a record deeply disappointing to his liberal supporters (Fletcher 2009; Stern 2010). The pace of nominations may have reflected an administration that was careful about vetting potential nominees lest they become objects of controversy, as happened during the Bush and Clinton administrations. After all, a nominee who can be portrayed as "extreme," or who can be tied to some scandal, can damage a president's standing with median voters. In a highly polarized climate, with congressional Republicans ready to seize on any misstep by the Obama administration, the cost of a "nomination gaffe" may have led the administration to be particularly cautious. Whatever the cause of the slow pace, on judicial nominations, as on judicial politics generally, where the Bush administration was frequently on the attack, the Obama administration was often on the defensive.

NOTES

1. One-third of these, however, were blocked in the Senate, where controversy over the Bush nominations for a time nearly reached the "nuclear" stage: Republicans con-

sidered eliminating the use of the filibuster for judicial nominations, a move Democrats suggested would lead to all-out war in the Senate.

2. Of course, Bush's poll numbers would plummet further in the balance of his presidency, reaching 22% in October 2008 (Nagourney and Thee 2008).

3. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

4. The two female nominees, after years of awaiting confirmation, were seated on the appellate bench only after the "Gang of 14"—seven Democrats and seven Republicans in the Senate who joined forces to break the deadlock over judicial nominations—brokered a bipartisan deal to allow some of Bush's stalled nominees (including Owens and Brown) to be confirmed, while forcing other controversial nominations to be withdrawn (Babbington and Edsall 2005).

5. E.g., Bush knew that Miers would be a strong proponent of expansive executive power (Savage 2005), an issue with which the Court had been grappling in the aftermath of September 11 and which a majority of the Court had been unwilling to grant the president. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Hamdi v. Rumsfeld*, 542 U.S. 207 (2004).

6. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 942 F.2d 682 (3d Cir. 1991) (Alito, dissenting).

7. There was, however, one relevant poll conducted by the New Democrat Network that received some attention in the press (*Washington Times* 2003), which highlights voters' lack of attention to even high-profile appellate court appointment battles. The poll asked eight hundred Hispanic voters whether they supported the nomination of Miguel Estrada, a Bush nominee to the D.C. Circuit who had been embroiled in a long-standing confirmation fight with Senate Democrats since first nominated in May 2001. Sixty-one percent of respondents said they never heard of Estrada. Moreover, although 21% said they supported the Estrada nomination, interviews indicated that many of these respondents were confusing Miguel Estrada with the actor Erik Estrada, the star of the 1970s television program *CHiPS* (*Washington Times* 2003).

8. See Scherer (2011). As numerous public opinion polls indicate, a majority of whites favor "affirmative action," but once the question is reframed as one about "quotas" or "preferences," support precipitously drops. See, e.g., Plous (1996). Polls that give respondents only two choices on the affirmative action issue (keep affirmative action "as it currently exists" or "no affirmative action whatsoever") are flawed; when given in-between options, a *Time/CNN* Poll found that 80% of the public wants to continue affirmative action in some form (Shelton and Minor 1995, citing Harris Poll, conducted March 16–18, 1995; Quinnipiac University Polling Institute 2009).

In addition, two Supreme Court rulings between the Clinton and Obama presidencies made the government's use of benign race preferences subject to strict scrutiny standards. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (plan to admit undergraduate university students based in part on race held unconstitutional); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (plan to assign children to elementary public schools based in part by race held unconstitutional).

9. For the courts of appeals, the gender, race, and ethnicity breakdown for Obama's judicial nominees is as follows: five black men (four confirmed), one black woman (confirmed), two Hispanic men (one confirmed), one Hispanic woman (confirmed), two Asian men (one confirmed), eight white women (four confirmed), and five white men (four confirmed). For the district courts, the gender, race, and ethnicity break-

down is as follows: six black men (four confirmed), seven black women (seven confirmed), three Hispanic men (one confirmed), three Hispanic women (one confirmed), two Asian men (one confirmed), four Asian women (four confirmed), seventeen white women (twelve confirmed), and twenty-three white men (fourteen confirmed).

10. By the end of his second year in office, Bush nominated thirty-two courts of appeals judges, compared with Obama's twenty-four (66.7% of Bush's total). As for district courts, Bush nominated a total of ninety-eight people, and Obama sixty-five (66.2% of Bush's total). See www.thomas.gov/home/nomis.html (107th and 111th Congresses).

WORKS CITED

- Adams, Rebecca. 2005. "Hard-Fought Energy Bill Clears." *Congressional Quarterly Weekly Report*, August 1, 2005.
- Albertson, Bethany. 2006. "Dog-Whistle Politics, Coded Communication and Religious Appeals." Unpublished manuscript.
- Babbington, Charles, and Thomas B. Edsall. 2005. "Conservative Republicans Divided over Nominee." *Washington Post*, October 4, 2005.
- Baker, Peter, and Charles Babbington. 2005. "Role of Religion Emerges as Issue." *Washington Post*, October 13, 2005. Available at www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201381.html.
- Barnes, Jeb. 2011. *Dust-Up: Asbestos Litigation and the Failure of Commonsense Reform*. Washington, DC: Georgetown University Press.
- Bartels, Brandon L., and Christopher D. Johnston. 2008. "How Should Supreme Court Selection Processes Be Conducted?" Paper presented at the 2008 Annual Meeting of the American Political Science Association, Boston, MA.
- Benac, Nancy. 2005. "Group Becoming Must for Some Conservatives." Associated Press, July 18, 2005. Available at www.law.yale.edu/documents/pdf/Student_Organizations/Fed_Soc_Group_Becoming_a_Must.pdf.
- Bossert, Rex. 1997. "Conservative Forum Is a Quiet Power." *National Law Journal*, September 8, 1997, A1.
- Bumiller, Elizabeth. 2004. "Bush Said His Party Was Wrong to Oppose Gay Civil Unions." *New York Times*, October 26, 2004.
- . 2005. "Pillow-Talk Pressure for a Woman in O'Connor's Robe." *New York Times*, July 18, 2005.
- Bumiller, Elizabeth, and David Stout. 2005. "Bush Nominating John G. Roberts Jr. to Supreme Court." *New York Times*, July 19, 2005.
- Burke, Thomas F. 2002. *Lawyers, Lawsuits and Legal Rights*. Berkeley: University of California Press.
- Bush, George W. 2003. State of the Union Address, January 28, 2003.
- . 2004a. "President Calls for Constitutional Amendment Protecting Marriage." Washington, D.C., February 24, 2004. Available at www.whitehouse.gov/news/releases/2004/02/20040224-2.html.
- . 2004b. State of the Union Address, January 20, 2004.
- . 2005a. Judicial Nominations—Harriet Miers, October 3, 2005. Available at www.whitehouse.gov/infocus/judicialnominees/miers.html.
- . 2005b. "President Discusses Medical Liability Reform." Collinsville, IL, January 5, 2005. Available at www.whitehouse.gov/news/releases/2005/01/20050105-4.html.
- . 2005c. State of the Union Address, February 2, 2005.
- . 2006. State of the Union Address, January 31, 2006.
- . 2008. State of the Union Address, January 28, 2008.
- Chimerine, Lawrence, and Ross Eisenbrey. 2005. "The Frivolous Case for Tort Law Change: Opponents of the Legal System Exaggerate Its Costs, Ignore Its Benefits." *Economic Policy Institute Briefing Paper #157*. Washington, DC: Economic Policy Institute.
- CNN/USA Today/Gallup Poll. 2006. "Majority Would Oppose Alito If He Would Overturn Roe" (January 10). Available at <http://edition.cnn.com/2006/POLITICS/01/09/alito.poll/>.
- Coats, Dan. 2007. "Anatomy of a Nomination: A Year Later, What Went Wrong, What Went Right and What We Can Learn from the Battles over Alito and Miers." *Hamline Journal of Public Law and Policy* 28:405–30.
- Cole, David. 2010. "Breaking Away: Obama's War on Terror Is Not 'Bush Lite.'" *New Republic*, December 30, 2010.
- Condon, George E. 2010. "Judgment Calls on Gay Rights." *National Journal*, October 16, 2010.
- Epstein, Lee, and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.
- Ertelt, Steven. 2005. "Pro-Life Women Judges Likely Top President Bush's Supreme Court List." LifeNews.com, September 16, 2005. Available at: <http://freerepublic.com/focus/f-news/1485432/posts>.
- Fletcher, Michael. 2009. "Obama Criticized as Too Cautious, Slow on Judicial Posts." *Washington Post*, October 16, 2009.
- Gallup Poll. 2005. Available at www.gallup.com/poll/1576/Abortion.aspx.
- Gibson, James L. 2010. "Expecting Justice and Hoping for Empathy." June 20, 2010. Available at www.miller-mccune.com/legal-affairs/expecting-justice-and-hoping-for-empathy-17677.
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Regan*. New Haven, CT: Yale University Press.
- Graber, Mark A. 2006. *Dred Scott and the Problem of Constitutional Evil*. New York: Cambridge University Press.
- Haltom, William, and Michael McCann. 2005. *Distorting the Law: Politics, Media and the Litigation Crisis*. Chicago: University of Chicago Press.
- Herszenhorn, David. 2007. "House Approves Broad Protections for Gay Workers." *New York Times*, November 7, 2000.
- Hicks, George W. 2006. "The Conservative Influence of the Federalist Society on the Harvard Law School Student Body." *Harvard Journal of Law and Public Policy* 29:625–717.
- Kirkpatrick, David. 2004. "Speaking in the Tongue of Evangelicals." *New York Times*, October 17, 2004, D15.
- Jacobs, Lawrence R., and Robert Y. Shapiro. 2000. *Politicians Don't Pander: Political Manipulation and the Loss of Democratic Responsiveness*. Chicago: University of Chicago Press.

- Keck, Thomas M. 2004. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. Chicago: University of Chicago Press.
- Kohut, Andrew. 2005. "A Political Victory That Wasn't." *New York Times*, March 23, 2005.
- Kuo, David. 2007. *Tempting Faith: An Inside Story of Political Seduction*. New York: Free Press.
- Kuo, David, and John J. DiIulio Jr. 2008. "The Faith to Outlast Politics." *New York Times*, January 29, 2008, A28.
- Labaton, Stephen. 2005. "Quick Early Gains Embolden Business Lobby." *New York Times*, February 17, 2005, C1.
- Lewis, Neil. 2000. "The 2000 Campaign: The Judiciary." *New York Times*, October 8, 2000.
- Luntz, Frank. 2006. *Words That Work: It's Not What You Say, It's What People Hear*. New York: Hyperion.
- Meyer, Eugene. 2002. Telephone interview with Nancy Scherer. Tape recording, July 30. East Hampton, NY.
- Milbank, Dana. 2004. "A New Problem, or the Wrong Word." *Washington Post*, September 7, 2004, A06.
- Nagourney, Adam, and Megan Thee. 2008. "Poll Finds Obama Gaining Support and McCain Weakened in Bailout Crisis." *New York Times*, October 2, 2008.
- National Organization for Women. 2005. "Save the Supreme Court—Save Women's Lives." Available at www.now.org/issues/judicial/supreme/womannominee.html.
- Obama, Barack. 2010a. "Obama Introduces Sotomayor." *Blog of the Legal Times*, May 26, 2009. Available at <http://legaltimes.typepad.com/bit/2009/05/transcript-obama-introduces-sotomayor.html>.
- . 2010b. "Remarks by the President in the State of the Union Address." January 27, 2010. Available at www.whitehouse.gov/the-press-office/remarks-president-state-union-address.
- O'Beirne, Kate. 2005. "Set-Aside Set-to: If You're Going to Practice Affirmative Action on the Court. . ." *National Review*, November 7, 2005.
- Plous, Scott. 1996. "Ten Myths about Affirmative Action." *J. Soc. Issues* 52, no. 4: 25, 27.
- Purdham, Todd S. 2005. "In Pursuit of Conservative Stamp, President Nominates Roberts." *New York Times*, July 20, 2005.
- Quinnipiac University Polling Institute. 2009. "New Poll: Overwhelming Opposition to Race Preferences." Available at www.discriminations.us/2009/06/.
- Reagan, Ronald. 1981. "First Inaugural Address." Washington, D.C., January 20, 1981. Available at www.americanrhetoric.com/speeches/ronaldreagandfirstinaugural.html.
- Reeve, Elspeth. 2010. "Is Obama Just Stringing Gay Rights Supporters Along?" *National Journal*, October 28, 2010. Available at www.nationaljournal.com/dailyfray/is-obama-just-stringing-gay-rights-activists-along-20101028.
- Reichmann, Nan. 2005. "Bush Nominates Conservative Roberts for Supreme Court." Associated Press, July 19, 2005.
- Reid, Harry. 2005. "From Energy to Katrina Relief, Reid Says Together We Can Do Better." Statement on the Senate floor. October 4, 2005. Available at <http://democrats.senate.gov/2005/10/04/>.

- Republican Party. 2000. Republican Party Platform of 2000. July 31, 2000. Available at www.presidency.ucsb.edu/ws/index.php?pid=25849#axzz1VJbw9IF1.
- . 2008. Republican Party Platform 2008. Available at www.gop.com/2008Platform/.
- Rosen, Jeffrey. 2006. *The Most Democratic Branch*. New York: Oxford University Press.
- Rove, Karl. 2005. "Our Courts Are in Crisis." Address to the Federalist Society, Washington, D.C., November 10, 2005. Available at www.americanrhetoric.com/speeches/karlrovedefederalist.html.
- Savage, Charlie. 2005. "Miers Has Backed Wide Executive Role." *Boston Globe*, October 5, 2005.
- Savage, Charlie, and Sheryl Gay Stolberg. 2011. "In Shift, U.S. Says Marriage Act Blocks Gay Rights." *New York Times*, February 23, 2011.
- Scherer, Nancy. 2005. *Scoring Points: Politicians, Activists and the Lower Federal Court Appointment Process*. Stanford: Stanford University Press.
- . 2011. "Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Courts Possible?" *Northwestern Law Journal* 105:1–47.
- Scherer, Nancy, and Banks Miller. 2009. "The Federalist Society's Influence on the Federal Judiciary." *Political Research Quarterly* 62:366–78.
- Shelton, Melinda L., and Diane Minor. 1995. "Poll Supports NOW's Affirmative Action Position." Available at www.now.org/nnt/05-95/poll.html.
- Stern, Seth. 2010. "Bench-Clearing Brawl Continues." *CQ Weekly*, September 27, 2010, 2212–14.
- Stolberg, Sheryl Gay. 2010. "One Battle Finished, Activists Shift Sights." *New York Times*, December 20, 2010.
- Teles, Steven. 2008. *The Rise of the Conservative Legal Movement*. Princeton, NJ: Princeton University Press.
- Toner, Robin, and Marjorie Connelly. 2005. "Bush's Support on Major Issues Tumbles in Polls." *New York Times*, June 17, 2005.
- Towers Perrin Tillinghast. 2006. *2006 Update on Tort Cost Trends*.
- "2000 Unofficial Debate Transcript," First Gore-Bush Presidential Debate, University of Massachusetts–Boston, Boston, Massachusetts, October 3, 2000. Available at Commission on Presidential Debates website: www.debates.org/index.php?page=october-3-2000-transcript.
- "2000 Unofficial Debate Transcript," Second Gore-Bush Presidential Debate, Wake Forest University, Winston-Salem, North Carolina, October 11, 2000. Available at Commission on Presidential Debates website: www.debates.org/index.php?page=october-11-2000-debate-transcript.
- "2004 Debate Transcript," Second Bush-Kerry Presidential Debate, Washington University, St. Louis, Missouri, October 8, 2004. Available at Commission on Presidential Debates website: www.debates.org/index.php?page=october-8-2004-debate-transcript.
- Washington, Wayne. 2003. "Bush Lifts Steel Import Tariffs Industry Angry; Trade War Averted." *Boston Globe*, December 5, 2003, A1.
- Washington Times. 2003. "Hispanics Tune Out Estrada Filibuster." *Washington Times*, June 19, 2003. Available at www.washtimes.com/news/2003/jun/19/20030619-4622/.

- Whelan, Edwin. 2008. "Obama's Constitution: The Rhetoric and Reality." *Weekly Standard* 13, no. 26 (March 17, 2008). Available at www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp.
- Zogby American Survey. 2005. "Bush Job Approval Hits 41%—All Time Low; Would Lose to Every Modern President; Public Rates All Levels of Government Poorly in Katrina Handling; Red Cross Rated Higher than Federal Government, 69%–17%" (September 5). Available at www.zogby.com/news/2005/09/08/.

A Feint to the Center, a Move Backward

Bush's Clear Skies Initiative and the Politics of Policymaking

David Emer

"In one respect, possibly no president in American history has surpassed George W. Bush," writes David Mayhew in his concluding chapter. Mayhew continues, "Bush stood out as an eyes-open promoter of a policy menu targeting, on the one hand, 'the party base' but also, on the other hand, 'the center' or 'the median voter' or voters who might 'expand the party coalition'" (see chap. 13).

The politics and policy of Clear Skies were part of the "difficult, dissonant game" where party leaders attempted to balance the views of base and median voters to win elections. Levin, DiSalvo, and Emer explain in the introduction that parties navigate the tensions between their base and the political center to try to maintain the election support of both groups. These groups, by their nature, have differing or conflicting policy preferences. The following partisan statement, made by President George W. Bush in a closed-door meeting with congressional Republicans, is an example of policy targeting. The president said, "We need clear-skies legislation, so that we can say our party has led to reasonable, sane environmental policy."¹ The intent is to use a major presidential policy initiative as a way to gain votes for the party.