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THE OBAMA ADMINISTRATION: SETTING UP A GOVERNMENT

Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?

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Abstract

This essay speculates on what an Obama judiciary might look like and how the selection process is likely to play out. This is presented against the backdrop of past experience. First, the essay traces the demographic diversification of the federal bench from the presidencies of Franklin Roosevelt through George W. Bush. Second, this essay considers ideological diversity and presents voting data from the first three completed terms of the Roberts Court. Third, the essay considers the selection process, including confirmation of lower-court judges by the Senate. It concludes that President Obama can be expected to promote further gender, race, and ethnic diversification as well as to seek to moderate the current ideological imbalance on the courts. He will likely keep the existing institutional apparatus of judicial selection and will restore the American Bar Association to the role it had prior to George W. Bush's presidency. Confirmation may well prove to be a challenge in a Senate that is not filibuster-proof.

KEYWORDS: federal judicial selection, federal judiciary, Supreme Court, appeals courts, district courts

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Those of us who study and take an interest in judicial selection politics are not timid when it comes to speculating how President Barack Obama will use his appointment power to reshape the federal judiciary (Clayton & Christensen 2008). Indeed, given that the President is a former professor of constitutional law, it is not unreasonable to expect that he will take a hands-on approach. I would like to provide my own speculation as to what I think an Obama judiciary will look like and how the selection process is likely to be played out and I will do this within a broader historical context.

Demographic Diversity

It seems a safe bet that appointments to all levels of the federal judiciary will in the aggregate be a diverse group. Non-traditional appointees (that is, those who are not white males) will almost surely constitute a majority of appointments. The diversification of the federal bench has actually been slow and long in coming, as Table 1 demonstrates. Women and minorities had long been victims of discrimination and faced tremendous barriers in achieving educational opportunities, including entry into law schools and the legal profession. Well-qualified potential nominees faced pervasive sexism and racism (Goldman 1997).

Table 1: Non-Traditional Lifetime Judicial Appointees to Federal Courts of General Jurisdiction by Presidential Administration from FDR through George W. Bush

President	Women		African American		Hispanic American		Asian American	
	#	%*	#	%*	#	%*	#	%*
F. Roosevelt	1	0.5	---	---	---	---	---	---
Truman	1	0.8	1	0.8	---	---	---	---
Eisenhower	---	---	---	---	---	---	---	---
Kennedy	1	0.8	3	2.4	1	0.8	1	0.8
Johnson	3	1.8	10	5.9	3	1.8	---	---
Nixon	1	0.4	6	2.6	2	0.9	1	0.4
Ford	1	1.5	3	4.6	1	1.5	2	3.1
Carter	40	15.5	37	14.3	16	6.2	2	0.8
Reagan	29	7.8	7	1.9	15	4.0	2	0.5
G.H.W. Bush	36	19.3	13	7.0	8	4.3	---	---
Clinton	108	29.3	61	16.6	25	6.8	5	1.4
W. Bush	69	21.4	24	7.5	29	9.0	3	0.9

* Percentage of total number of appointees to lifetime judgeships on courts of general jurisdiction (U.S. District courts, U.S. Appeals courts, and U.S. Supreme Court).

Women

Until the Carter presidency, non-traditional appointees were few and far-between. The first woman appointed to a lifetime federal judgeship on a court of general jurisdiction was Florence Allen, appointed by Franklin D. Roosevelt in 1934 to the U.S. Court of Appeals for the Sixth Circuit. No other woman was appointed to the federal bench until Harry Truman's appointment of Burnita Shelton Matthews to the federal district court for the District of Columbia in 1949, the first woman to serve on the district court bench. It took 12 years for another woman to be appointed a federal district court judge, Sarah T. Hughes, Kennedy's only woman appointee to the federal courts. As for the appeals courts, after Florence Allen's appointment in 1934, it took 34 years before another woman was named, Shirley Hufstедler, appointed by Lyndon Johnson to the Ninth Circuit. Johnson also named two women to federal district courts. Presidents Nixon and Ford each named one woman to the federal district bench but none to the appeals courts.

Jimmy Carter's presidency was the breakthrough administration for nontraditional appointments. Carter appointments of 40 women to lifetime federal judgeships on courts of general jurisdiction (29 to the district courts, 11 to the appeals courts) was not tokenism. Had he been given an opportunity to fill a vacancy on the Supreme Court, he would also have named a woman (Goldman 1997, 271). Ronald Reagan, however, had that opportunity and did name the first woman to the Supreme Court, fulfilling a pledge he made during the presidential campaign of 1980. Sandra Day O'Connor thus began a distinguished twenty-five-year career on the Court. Although Reagan's overall record of women appointments pales beside Carter's record (24 to the district bench and 4 to the appeals courts), it nevertheless constituted an historic breakthrough for a Republican administration.

George H.W. Bush approximated Carter's record of female appointments—29 to the district bench and 7 to the appeals courts—setting a new Republican record. But it was Democrat Bill Clinton who raised the bar. Clinton appointed 87 women to the district bench, 20 to the appeals courts, and the second woman to the Supreme Court, Ruth Bader Ginsburg. Women constituted 29.3% of the total number of Clinton appointments to lifetime judgeships on courts of general jurisdiction. George W. Bush did not come close, yet he surpassed every other president before Clinton. Bush named 54 to the district courts, and 15 to the appeals courts, constituting 21.4% of his total judicial appointments. And note that Bush nominated a woman, his White House Counsel, Harriet Miers, to replace Sandra Day O'Connor in 2005, though the nomination was withdrawn after heavy conservative opposition.

It would be deeply surprising if President Obama did not at least match the Clinton record of female appointments. My own hunch is that by the end of his

presidency, he will have exceeded that record. Furthermore, if given the opportunity, he will name at least one woman to the Supreme Court, thus restoring the place of a second woman on the Court.

African Americans

African Americans likewise fared poorly prior to the Carter Administration. The first African American to be appointed to a lifetime position on a court of general jurisdiction was William Henry Hastie, named by Harry Truman to the U.S. Court of Appeals for the Third Circuit in 1949. The second African American named to the circuit bench was Thurgood Marshall in 1961, appointed by John F. Kennedy. Kennedy also named the first African American, James B. Parsons, to a lifetime federal district court position to the Northern District of Illinois in 1961. JFK would name one other African American to the district bench, and LBJ would name seven. Johnson also named two to the appeals courts and, of course, was responsible for the historic appointment of Thurgood Marshall, the first African American appointed to the Supreme Court. Johnson's appointments should be considered an historic milestone for African Americans.

Richard Nixon then named six African Americans to the district bench, and Gerald Ford named three. Neither Nixon nor Ford named any to the appeals courts. No president through Ford gave more than 6 percent of their total judicial appointments to African Americans (Table 1).

Jimmy Carter's was the breakthrough presidency for the appointment of African Americans to the federal bench. Carter named a total of 37 (28 to the district bench and 9 to the appeals courts) for an overall percentage of 14.3% of his judicial appointees. Ronald Reagan then appointed far fewer—six to the district courts and only one to an appeals court. The overall proportion of African-American appointees by Reagan was 1.9%, an even lower percentage than that of Richard Nixon at 2.6%.

President George H.W. Bush's record of African-American appointments was considerably better—10 to the district bench, 2 to the appeals courts, and, of course, the second African American named to the Supreme Court in Clarence Thomas—which represented 7% of his total appointments. Yet this record still paled by comparison to Carter's. It remained for Bill Clinton to raise the bar once again, albeit only proportionally slightly higher than Carter, with his appointment of 53 African Americans to the district bench and 8 to the appeals courts, constituting 16.6% of his total appointments. George W. Bush's record of African-American appointments was then a far cry from Clinton's, with a total of 24 (18 to the district courts and 6 to the appeals courts). His total proportion of African-American appointees was 7.5 percent.

It again seems a safe prediction that President Obama will exceed, perhaps significantly, even Clinton's historic proportion of African-American appointments. He is likely to make a special effort to name an African American to the Supreme Court, in part to counter the arch conservatism of Clarence Thomas. Obama will have a large number of exceptionally qualified African-American lawyers and judges from whom to choose, including Eric Holder, his Attorney General, or Deval Patrick, Massachusetts Governor.

Hispanics

Americans of hispanic ethnicity also fared poorly prior to the Carter presidency. One unintentional exception was Harold R. Medina, a New York City lawyer, who was appointed to the federal district court by Harry Truman and later elevated by him to the Second Circuit Court of Appeals. Medina's father was indeed Mexican American. But Medina was not raised as a latino or identified with the hispanic community, and he was not perceived by the public (or the Truman administration) as having hispanic origins. Even Medina's obituary in the New York Times failed to mention his hispanic heritage (March 16, 1990 B-7). And the database maintained by the Federal Judicial History office lists him as "white" under race or ethnicity. Medina is therefore not included in the figures for hispanics in Table 1.

The first acknowledged hispanic given a lifetime appointment to the federal bench was Reynaldo B. Garza, a Mexican American from Texas, appointed to the district court by John Kennedy. Lyndon Johnson named another hispanic, Manuel L. Real, to the district court in California, along with two Puerto Ricans to the first two lifetime federal district judgeships in Puerto Rico. Richard Nixon named two hispanics and Gerald Ford one, all to the district bench. No acknowledged individual of hispanic heritage was named to the appeals court until the Carter presidency.

Jimmy Carter's number and proportion of hispanic judicial appointees exceeded those of his predecessors. He named 14 to the district bench and 2 to the appeals courts, the first two recognized hispanics so named. The proportion of all Carter appointees with an hispanic heritage was 6.2 percent. Ronald Reagan also appointed 14 hispanics to the district courts, though only one to the appeals bench. Because Reagan's total number of judicial appointees exceeded Carter's, the proportion of Reagan's judges with an hispanic background was only four percent, nevertheless a record for a Republican president. Reagan's successor, the first George Bush, named six to the district courts and two to appeals courts for an overall proportion of 4.3 percent, little better than Reagan's record.

Bill Clinton's record of hispanic judicial appointments was 18 to the district bench and 7 to the appeals courts for an overall proportion of 6.8 percent,

only slightly better in terms of percentages than Carter. Interestingly, George W. Bush, exceeded the Clinton record and named 26 to the district courts and 3 to the appeals courts for an overall proportion of 9.0 percent, an historic proportion. The hispanic vote was important to Bush's victories in 2000 and 2004, and the selection of highly qualified jurists with hispanic heritage was one way of rewarding a vital component of Bush's electoral coalition.

But George W. Bush did not appoint an hispanic to the Supreme Court, an appointment that had been anticipated. There was speculation that Bush had sought to groom Alberto Gonzales for the Supreme Court by placing him first as White House Counsel and then as Attorney General. Indeed, when Bush was Governor of Texas, he had named Gonzales to the Texas Supreme Court. But controversy ensnared Gonzales over his role in a variety of questionable actions following the terrorist attacks of September 11, 2001, as well as over his alleged role in politicizing the Justice Department, including the U.S. Attorney's office. By the time that vacancies opened up on the Supreme Court during the summer of 2005, Gonzales was unconfirmable.

But Alberto Gonzales was not the only hispanic that the Bush Administration likely sought to groom for the high court. Bush tried to place Miguel Estrada on the U.S. Court of Appeals for the District of Columbia Circuit, but Democrats in the Senate blocked the nomination because of Estrada's alleged political extremism. Thus Estrada was prevented from going on the D.C. Circuit, which has been a stepping stone to the Supreme Court. (On the current Court, Justices Scalia, Thomas, Ginsburg, and Roberts all served on the D.C. Circuit before their nominations).

Barack Obama can be expected to name a record number and proportion of hispanics to the federal courts, particularly given the importance of the hispanic vote to Obama's election. He can also be expected to name the first hispanic to the Supreme Court. One leading candidate to fill a vacancy, and the presumptive front-runner, is Second Circuit Judge Sonia Sotomayor. Judge Sotomayor is a well regarded, politically moderate jurist who was first appointed to the federal district court in New York in 1991 by the first President Bush and promoted to the Second Circuit in 1997 by Bill Clinton. Her appointment would simultaneously restore the number of women on the Court to two. Were Justice Ruth Bader Ginsburg to retire, there would be added urgency to replace the only woman on the Court with another woman. Thus an hispanic woman might be the most logical choice, allowing Obama to satisfy two important constituencies with one appointment. To be sure, there are a number of other highly qualified hispanic jurists, female and male, who could well emerge on a short list of candidates.

Asian Americans

Asian Americans have rarely been appointed to the federal bench, as Table 1 attests. Dwight Eisenhower nominated an individual with native Hawaiian ancestry shortly before he left office. John Kennedy resubmitted that nomination, of C. Nils Tavares to a federal district court position in Hawaii. Because his mother was a native Hawaiian, Tavares became the first person of Asian ancestry to occupy a lifetime federal judgeship. Richard Nixon named the first Asian American to an appeals court, Herbert Y.C. Choy to the Ninth Circuit. Gerald Ford named two to the district court bench. Jimmy Carter named one to the district bench and one to an appeals court. Ronald Reagan named two to the district bench, while the first President Bush did not name any Asian American. Bill Clinton then named four to the district bench and one to an appeals court. George W. Bush named 3 to the district court bench.

It is highly likely that President Obama will add to the number of Asian Americans on the federal bench, perhaps significantly. It is also a distinct possibility that he might name Harold Koh, the Asian American Dean of Yale Law School and a distinguished legal scholar, to the Supreme Court, although the President might first groom him with an appeals court judgeship. In sum, we can expect nontraditional appointments to constitute a majority of Barack Obama's judges. Gender and ethnic diversity is a given from this most diverse presidential administration in our history. Moreover, there are numerous highly qualified women and minorities available to fill the prestigious federal judgeships that an Obama administration will be able to name.

Ideological Diversity

Judging is an art and not a science, so that there are always some cases in which the precedents, statutes, and even interpretation of the federal constitution are open to varying, if not conflicting, interpretations and outcomes. How judges (and justices of the Supreme Court) use their discretion in such instances is grist for judicial politics scholars. In turn, scholarship over the years has identified differences in how judges use their discretion. Most appointees of Democratic presidents have been found to use their discretion in ways suggesting that they are more sympathetic than most Republican appointees to liberal positions on individual rights and liberties as well as the responsibility of government to provide for social welfare and to regulate the economy. This is particularly so when administrations have deliberately screened judicial candidates to rule out those with ideological propensities and judicial philosophies inconsistent with those of the President.

In recent decades, starting with the Reagan Administration, ideological/philosophical screening has been *de rigueur* for Republican administrations (Goldman 1997, 285-345; Goldman 1991, 1993, 1995; Goldman & Slotnick 1997, 1999; Goldman et. al. 2001, 2003, 2005, 2007). As a result, the lower court appointees of Reagan and both presidents Bush have been, on the whole, more conservative in the exercise of their discretion than have the appointees of Democratic presidents.¹ Republican administrations have stated their opposition to appointing “judicial activists” to the courts, and by this they mean liberal judicial activism.

Liberal judicial activism suggests a generous interpretation of individual rights and a willingness to strike down anti-civil libertarian actions of government. Republican administrations, on the other hand, have no problem with conservative judicial activism (although they do not publicly admit that), which means striking down federal government programs and actions that violate conservative principles, including regulation of the economy in ways that either interfere with the free market or threaten principles of federalism (Tushnet 2006; Keck 2004).

After eight years of George W. Bush appointments, the ideological mix on the federal courts is thought to have sharply tipped to the conservative end of the ideological spectrum. This is most dramatically illustrated by the sharp divisions on the Supreme Court where Bush appointees Associate Justice Samuel Alito and Chief Justice John Roberts have helped push the Court to an even more conservative place and whose support of civil liberties claims is relatively low. Table 2 presents the Civil Liberty Support Scores of the Roberts Court justices over the past three terms. The Bush appointees are also thought to have pushed a number of circuits further to the right, including the Fourth, Fifth, and District of Columbia circuits.

In contrast, one can expect the Obama Administration to avoid conservative activists for appointment at all court levels. We can anticipate some appointment of Republicans, particularly at the district court level, to accommodate some Republican senators. Those appointees are likely to be more moderate conservatives. The Administration is likely to be wary of appointing conservative activists to the appeals courts and will likely seek to redress imbalances on a number of circuits by appointment of highly qualified political moderates or liberals, who in almost all cases can be expected to be Democrats or

¹ Carp & Manning (2009) report that the Reagan appointees to the federal district courts supported the liberal position in 35.5% of their decisions. G.H.W. Bush appointees supported the liberal position in 35.7% of their decisions. And George W. Bush’s appointees’ liberal support was 32.4%. By contrast, Lyndon Johnson’s appointees supported the liberal position in 51.7% of their decisions, Carter’s appointees 50.5%, and Clinton’s appointees 43.6%. With reference to the courts of appeals, see Haire, Humphries, & Songer (2001). In general, see Carp, Stidham, & Manning (2007 chap. 13).

Independents. In particular, we can expect the Administration to use its appointment power to increase the ideological/philosophical diversity on such courts as the Fourth, Fifth, and the District of Columbia circuits.

Table 2: The Roberts Court and Support for the Civil Liberties Claim in Non-Unanimous Decisions (2005-2006, 2006-2007, and 2007-2008 Terms)

Justice	Total # of Votes in Civil Liberties decisions	Total # of Votes Supporting Civil Liberties Claims	% of Votes Supporting Civil Liberties
Ginsburg	83	67	80.7
Stevens	83	65	78.3
Souter	83	64	77.1
Breyer	81	60	74.1
Kennedy	83	33	39.8
Roberts	80	18	22.5
Scalia	82	18	22.0
Alito	76	13	17.1
Thomas	83	8	9.6
COURT	83	34	41.0

As of February 27, 2009, there were 50 vacancies on the district courts and 15 on the appeals courts. Furthermore, 13 current district court judges and 1 appeals court judge have indicated that they will leave active service in 2009 or 2010. The impact of the Obama Administration on the lower federal courts will be even greater when a new judgeships bill is enacted creating dozens of new positions on the district and appeals courts that the President will be able to fill.

Barack Obama, like Bill Clinton before him, taught constitutional law and has a special appreciation of the impact that intellectual leadership can have on a court. Obama will likely seek to appoint to the circuit courts and to the Supreme Court those who have the potential to provide intellectual leadership. He may look to law school professors in some instances. Thus he might, for example, look to Harvard Law School Professor Cass Sunstein, now a member of the Administration, for a position on the D.C. Circuit, possibly in anticipation of filling a vacancy on the Supreme Court.

At the Supreme Court level, assuming the replacements will be for members of the more liberal wing of the Court, the Obama appointments are likely to be those who maintain the current ideological/philosophical division on the Court. If Obama is able to replace one of the justices in the more conservative

wing of the Court with a more liberal jurist, the balance, of course, will change. In other words, with Obama's judicial appointments, the lower federal courts will change in terms of their ideological/ philosophical as well as their partisan mix. With the Supreme Court, it seems likely that the only opportunities Obama will have will be to maintain the current ideological/ philosophical mix on the Court.

The Selection Process

The machinery of judicial selection that was put in place by the Reagan Administration and continued with a modification under George H.W. Bush, but reverted back to the Reagan model during Clinton and Bush II, is likely to remain the same during Obama's presidency. That machinery worked well for Clinton, and there is no reason that it should not work well for Obama.

What the Reagan administration did was to establish within the Justice Department a separate office, the Office of Legal Policy (OLP), led by an Assistant Attorney General, with the responsibility for processing and coordinating judicial selection. The White House Counsel's office, which under President Jimmy Carter, had begun to be actively involved with judicial selection, was under Reagan more formally involved with selection. The Reagan Administration created a joint White House-Justice Department Judicial Selection Committee chaired by the White House Counsel and whose membership included key Justice Department and White House personnel. It was this committee that made nomination recommendations to the President.

Bush I retained the joint White House-Justice Department Judicial Selection Committee but changed the name of OLP to the Office of Policy Development (OPD). Judicial selection was removed from the newly named office and placed with the Attorney General's office, where judicial selection had been conducted prior to the Reagan Administration. That reversion did not work well, particularly when the Bush I Administration had a windfall of 85 new judgeships to fill as a result of the passage of the Federal Judgeships Act of 1990 but was institutionally unable to handle this fully (Goldman 1993, 285-286). Consequently when Bill Clinton became President, judicial selection in the Justice Department was returned to OPD. When Bush II became president, that office's name reverted to the Office of Legal Policy, the original name given to it by the Reagan Administration.

Meetings of the Judicial Selection Committee occur weekly or as needed. The Committee's primary function is to discuss both the politics of the selection process and the politics of confirmation, focusing on possible individual nominees. When the Committee decides that a potential nominee warrants a detailed investigation to determine whether his or her nomination should be pursued further, the president personally makes the decision whether or not to go

forward. Once the president approves further investigation of the potential nominee, a two-pronged vetting process ensues.

Externally, the FBI conducts an extensive investigation. Within the administration, the vetting process includes evaluation of the candidate's judicial record if the candidate has served or serves in a judicial capacity, as well as checking with a variety of lawyers, judges, public officials, and party leaders. Additionally, and this is a crucial part of the vetting process, candidates are brought to Washington to be interviewed personally by members of the White House Counsel's office and the Justice Department. When the investigation is completed, the Judicial Selection Committee makes its recommendation to the president, who makes the final decision whether to go ahead with formal nomination of the candidate.

There is generally a division of labor between the Justice Department and White House Counsel's Office, with OLP focusing on district court nominees and the Counsel's Office on appeals court nominees. The White House Counsel's office consults and negotiates with senators about specific nominees or potential nominees. Here, Bush II was faulted for not consulting with Democratic senators from the states where the judicial position was to be filled. This sometimes resulted in delays in the confirmation process, if not outright obstruction. The Obama Administration, and Obama himself as a former senator, will undoubtedly be sensitive to the need for consultation, and it is likely that Republican senators will be a part of the process particularly concerning appointments to the district courts.

In general, following tradition, we can expect the Administration to give special deference to the district court recommendations from home state senators, especially Democratic Party senators. Senators from states that do not have judicial selection committees or commissions will likely be encouraged to create them, as both a screening device to determine the best qualified applicants and to assure that those without political connections, including women and minorities, will be fairly considered.

At the outset of his administration, George W. Bush ended the formal role played by the American Bar Association in the rating of judicial candidates before final decisions on nominations were made by the President. The ABA had played this consultative role for the previous half century. Before Bush II, the ABA Standing Committee on Federal Judiciary as it was known then (now it is named "the ABA Standing Committee on the Federal Judiciary" with "the" before "Federal Judiciary") would be given the name or names of the leading contenders for a specific judicial nomination.

The ABA committee would conduct an informal investigation, interviewing lawyers and judges from the locality where the candidate practiced or was serving as a judge, and report its preliminary rating to the Justice

Department. A “Not Qualified” rating was seen as a red flag that required more searching inquiry by the Administration. Often, such a preliminary rating resulted in the abandonment of the candidacy. George W. Bush eliminated the ABA's formal participation in the pre-nomination stages of judicial selection. The ABA thus discovered the names of nominees from Justice officials only when those names were officially sent to the Senate.

The ABA committee would then conduct its investigation and send its ratings to the Chair of the Senate Judiciary Committee and members of the Senate committee. Because Democrats insisted on having the ABA ratings before proceeding with a hearing, shutting the ABA out of its nearly half-century role in the pre-nomination process resulted in lengthening the confirmation process, as the Senate Judiciary Committee would still not proceed until it had the ABA ratings. It was reasonable to expect that the Obama Administration would restore the ABA's traditional role, a move likely to be applauded by those advocating a more open selection process. In fact this happened as this article was about to go to press.

Over the past two decades, the judicial confirmation process has become heavily politicized, with active lobbying of senators by conservative and liberal groups (Bell 2002; Scherer 2005; Scherer, Bartels & Steigerwalt 2008). Senators have placed holds on nominations, conducted filibusters, and employed various delaying tactics. This has most notably been the case with appeals court nominees, but district court nominees were also affected. The Democrats were furious with Republican obstruction and delay of Clinton judicial nominees. Particularly during Clinton's second term, dozens of judicial nominations were delayed or killed (Goldman 2005, 871-909). Democrats exacted payback during George W. Bush's presidency, especially when the nominees were seen as excessively ideological and/or partisan. Table 3 shows the result of increasing partisanship in the confirmation process, in the proportion of each President's nominees who were confirmed by each Congress.

Now the Obama Administration will have to determine to what extent it wishes, and/or believes it is necessary, to accommodate Senate Republicans. It is likely that the Obama Administration will consult with Senator Arlen Specter, the ranking Republican on the Senate Judiciary Committee, particularly when making nominations to the appeals courts. This does not mean that Republicans will be able to veto a potential nominee, but it does mean that the Obama Administration will have a better idea what to expect during the confirmation process and whether the President will need to expend political capital to see his nominees confirmed.

With Democrats in solid control of the Senate, the Administration will likely move swiftly to fill judicial vacancies, well realizing that the midterm elections in 2010 could possibly reduce the number of Democratic senators, thus

making confirmation more of a challenge. The confirmation rate for Obama's nominees will likely approximate that during the first two years of Clinton's presidency when Democrats controlled the Senate. But whatever is in store for President Obama, one prediction is a safe one: Obama will seek to reverse the conservative tide on the federal courts and restore an ideological and political balance. He will thereby leave his mark on the judiciary and with that the course of American law.

Table 3: Number and percentage of nominees confirmed by full Senate

Congress	District Courts	Appeals Courts
95th (1977-78)	48/49 (97.9%)	12/12 (100%)
96th (1979-80)	154/168 (91.7%)	44/48 (91.7%)
97th (1981-82)	68/69 (98.6%)	19/19 (100%)
98th (1983-84)	61/75 (81.3%)	12/15 (80.0%)
99th (1985-86)	95/100 (95.0%)	32/32 (100%)
100th (1987-88)	66/78 (84.6%)	15/23 (65.2%)
101st (1989-90)	48/50 (96.0%)	18/19 (94.7%)
102nd (1991-92)	100/143 (69.9%)	19/30 (63.3%)
103rd (1993-94)	107/118 (90.7%)	18/21 (85.7%)
104th (1995-96)	62/85 (72.9%)	11/19 (57.9%)
105th (1997-98)	79/94 (84.0%)	19/28 (67.9%)
106th (1999-00)	57/83 (68.7%)	13/32 (40.6%)
107th (2001-02)	83/98 (84.7%)	16/31 (51.6%)
108th (2003-04)	85/94 (90.4%)	18/34 (52.9%)
109th (2005-06)	35/64 (54.7%)	15/26 (57.7%)
110th (2007-08)	58/79 (73.4%)	10/22 (45.5%)

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