Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?

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In this article, I examine whether divided government has any meaningful impact on the type of judges appointed to the lower federal courts. Specifically, I compare the voting behavior of Clinton judges confirmed before and after the Republicans took majority control of the Senate as well as the voting behavior of judges appointed by President Reagan before and after the Democrats took control of the Senate in the 1980s in order to detect whether judges appointed under divided government are more moderate than those under unified government. Believing that the Senate lacks the resources to have a meaningful impact in shaping judicial ideology on the lower federal courts—as hundreds of judges must be confirmed during the course of a presidential administration—I hypothesize that there is no difference in voting behavior between judges appointed under united and divided government. Consistent with my hypothesis, I find that there is no difference in voting behavior between judges appointed during united and divided government in three critical issue areas: search and seizure cases, race discrimination cases, and federalism cases. This was true of judges appointed during the Clinton and Reagan presidencies, and was true in all three issue areas tested.

Introduction

In this article I look at a discrete issue raised in the context of a larger project on the changing relationship between party politics and the lower federal courts in the modern political era (1964–2000): the effect of a divided government on judicial selection. During the Clinton presidency, the Republican Senate waged a much-publicized battle to block President Clinton's nominees to the lower federal courts, allegedly on ideological

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grounds: that Clinton's nominees were "judicial activists" and thus unfit to serve on the federal bench. This interparty conflict over judicial ideology on the lower federal courts raises two important research questions. Narrowly, did the Senate's confirmation strategy force Clinton to nominate more-moderate judges? More broadly, does a divided government *ever* have a moderating effect on the President's nominees to the lower federal courts? I challenge the common wisdom among judicial scholars that divided government *always* has a moderating effect on the ideological makeup of the federal bench because the President of one party must compromise with an opposing Senate to secure final confirmation of judicial nominees.

Background

After taking control of the Senate in 1995, the Republican majority used its "advice and consent" power under Article II of the U.S. Constitution (Sec. 2) as a weapon to force Clinton to cede unprecedented power over lower federal court appointments. Beginning in 1995, the Republican majority embarked on a campaign to stall confirmation of all Clinton judicial nominees to the lower federal courts on the ground that Clinton, under a Democratic-controlled Senate, had been appointing "judicial activists" (Lewis 1995). Though delay tactics are not uncommon during a presidential election year, as the Senate majority hopes its presidential candidate will prevail at the polls (Goldman 1997), this particular strategy began immediately upon the Republicans capturing the Senate and continued well past Clinton's reelection to office in 1996 (A. Lewis 1997). Moreover, although past Senate majorities under divided governments have confirmed fewer nominees in election years, this Senate shut down most confirmation proceedings for more than two years.[1]

Some Republican leaders pressed for further concessions from the Clinton administration. E.g., at a Republican leadership conference, Senator Phil Gramm (R-TX) offered a resolution that would have given a small number of Republican senators a veto power over nominees to the Federal Appeals Courts, a privilege that had previously been confined to District Court nominations (N. Lewis 1997). Trying another tactic, some Republican

[1] Despite Republican objections to Clinton's nominees, only one candidate, Ronnie White, nominated to the Eastern District Court of Missouri, was *not* confirmed when his nomination was voted upon by the entire Senate chamber (Gerstenzang & Jackson 1999). He was the first judicial nominee since Judge Bork in 1987 not to gain confirmation when voted upon by the full Senate (Gerstenzang & Jackson 1999). White's nomination was rejected by a vote of 54 to 45, the voting going strictly along party lines; led by former Missouri Senator John Ashcroft, conservative Republican leaders charged that White, while serving as a Missouri Supreme Court Justice, was hostile to the death penalty. Among other things, Senator Ashcroft contacted leading law enforcement groups to muster public support for the Republicans' position, a move unheard of in a fight over a lower federal court nominee (Shesgreen & Mannies 1999).

senators sought to lower the number of judgeships on the District of Columbia Court of Appeals, rather than give Clinton the opportunity to fill two vacancies on this pivotal Federal Appeals Court.[2] Democrats charged that such tactics were designed to intimidate the President into ceding significant power to the Republican majority in choosing federal court nominees and in shaping judicial ideology on the lower federal courts.[3]

Such strategy raises serious political and constitutional concerns. At the theoretical level one must ask: What is the proper scope of the Senate's "advice and consent" power as a matter of constitutional interpretation? On this question there has been much debate.[4] Though some argue that the Framers intended little Senate scrutiny of a president's judicial appointments, others point to the sparse text of the Constitution as evidence that the Framers did not intend to so limit the Senate's "advice and consent" power in this context.

At the empirical level, one must ask: Did the Republican Senate majority, capitalizing on a regime of divided government, shift the balance of power to control the ideological makeup of the judges on the lower federal courts? But, what is more important: How much influence does the Senate majority *traditionally* exercise over shaping judicial ideology under a divided government—a political regime the American electorate has put in place for 20 of the past 32 years?[5] In this article I take an important first step in developing a solid foundation for understanding the effect of a divided government on the lower federal courts.

Hypothesis

In order to establish whether a divided government has had a statistically significant impact on the judicial ideology of the lower federal courts, I must parse the influence of the Republican Senate majority aimed at controlling the judicial appointment process from that of the President.

There is little written literature as to the effect of a divided government on judicial ideology, but the common wisdom appears to be that it has a moderating effect on the judicial ideol-

[2] See 143 *Cong. Rec.* S2515-01, S2520-24, 105th Cong., 1st Sess. (1997) (remarks of Senators Jeff Sessions [R-AL], Jon Kyl [R-AZ], Charles Grassley [R-IA] and Strom Thurmond [R-SC]).

[3] 143 Cong. Rec. S2515-01 (same as above) at S2524-26 (remarks of Senator Patrick Leahy [D-VT]).

[4] While many legal scholars have tackled the constitutional interpretation of the Senate's "advice and consent" power as it concerns Supreme Court nominations (Fein 1989; Melone 1991; Silverstein 1994; Tulis 1997), I have uncovered no scholarship that relates to the constitutionality of the Republican majority's strategy directed at usurping the President's power to select lower court judges.

[5] In 20 of the past 32 years, both the Senate and the House have been of the opposite party of the President. However, in 26 of the past 32 years, only the House and the President have been of the opposite party.

ogy of the President's federal court nominees (Goldman 1997).[6] Related research by congressional scholars on the effect of a divided government on the passage of legislation has produced no consensus, however. (Contrast Mayhew 1991 and Sundquist 1992.)

Unlike Supreme Court nominations, which generally occur but once or twice a presidential term, a President may make *hundreds* of lower court appointments in the course of a single term. (This is certainly true for Presidents Ronald Reagan and Bill Clinton—each serving two terms.) In a world of finite resources, even though resources may be mustered to challenge a particular nominee (as was true in the case of Missouri Supreme Court Judge Ronnie White (see n.1), it is simply not realistic to assume that the Senate majority in a divided government has the time, money, or political support of the American people to undertake such a battle with the Executive branch on every lower court nomination. This fact is what probably led Senator Orrin Hatch (R-UT), Chairman of the Senate Judiciary Committee, to remark that "there is no substitute for holding, and exercising, the power to *nominate* Federal judges." Accordingly, I would not expect any statistically significant difference between the voting behavior of judges appointed under a united government and those appointed under a divided government, during the Clinton administration or any other period of a divided government. I thus hypothesize that *there is no meaningful difference in the voting behavior of federal court judges appointed under united or divided governments.*

Methodology

This study focuses on three different categories of cases: (1) search and seizure decisions; (2) race discrimination decisions under Title VII and/or the Reconstruction Civil Rights statutes; and (3) states' rights decisions turning on the Tenth or Eleventh Amendments.[7] These categories of decisions were selected be-

[6] To date, the only published empirical work on this issue concerns the effect that a divided government has on the *time* it takes to confirm a President's judicial nominees under divided government (Harley & Holmes 1997). This study concludes that, due to increased Senate scrutiny when the majority is of a different party than the President, it takes considerably more time to fill vacancies on the lower federal courts. A body of related research considers the Senate's role in the nomination of Supreme Court Justices (Cameron et al. 1990; Ruckman 1993; Segal et al. 1992). However, these studies do not take up the question considered here—whether judicial nominees under a divided government are ideologically more moderate than under a united government. Instead, they merely consider the factors that impact the likelihood that a Supreme Court nominee will be confirmed by the Senate; one of the significant factors in making such predictions is whether the Senate and President are of different parties.

[7] It should be noted that Dormant Commerce Clause cases are not included in the analysis because these cases do not present to a jurist an issue with two diverse ideological paths. These cases generally involve disputes over the right of one state and/or local government entity to regulate commerce in a manner designed to favor local residents over those of another state or municipality. In that sense, the dispute actually involves

cause the legal issues in each present a jurist with a clear choice between two diverse ideological paths, each closely tied to either the Democratic or the Republican Party. For example, in the search and seizure area, the judge must suppress incriminating evidence that unquestionably links the defendant to the crime charged so as to safeguard core constitutional rights to be free from unreasonable search and seizures. Alternatively, the judge must excuse excessive government invasion of privacy so as to ensure that a guilty person does not go free. In other words, it is a basic choice between upholding a criminal defendant's civil liberties or upholding "law and order." The former, "liberal," position is traditionally linked with the Democratic Party—at least before the administration of President Clinton and his "New" Democratic movement (Scherer 2000) and the latter, "conservative," position is traditionally linked with the Republican Party.

The units of analysis are each judge's vote (not the ultimate holding of the case), rendered on a three-judge or *en banc* panel in all cases meeting certain criteria set forth below. The cases included in this study are the entire universe of "non-consensual" decisions (specifically defined later) in the three selected issue areas rendered by the United States Courts of Appeals, including all of the 11 numbered circuits, the District of Columbia Circuit, and the Federal Circuit. All cases were decided between 1 January 1994 and 31 December 1998.[8] Included in the analysis are the votes of circuit court judges in active service, circuit court judges on senior status, and U.S. District Court judges sitting by designation on the Courts of Appeals.[9]

The analysis focuses specifically on "non-consensual" decisions rendered by the Courts of Appeals in the relevant time frame. In order to be considered a "non-consensual" decision, one of two conditions must be met: (1) the appellate panel—be it a regular three-judge panel or an *en banc* panel—rendered a split decision (i.e., there was at least one dissenting vote against

protectionism of one state against another (or one municipality against another), an interest neither Republicans nor Democrats can be said to favor. In contrast, the Commerce Clause cases included in the analysis pit the federal government against state government.

[8] The only exception is the time frame used for the states' rights data set. As I discuss more thoroughly below, the Supreme Court drastically altered the balance of power between state and federal government in a series of federalism decisions, each splitting the Court along ideological lines, beginning with *U.S. v. Lopez* 514 U.S. 549 [1995] (see infra pp. 516–517). Before this time, the Court of Appeals enjoyed little discretion under controlling Supreme Court law to rule in favor of the states' rights position. Thus, analysis of cases prior to the landmark *Lopez* decision in April 1995 would provide little variation between Democrat- and Republican-appointed judges. For this reason, I use a five-year time frame (the same length of time as the other data sets), from 1 January 1996 through 31 December 2000.

[9] Pursuant to statute, Article III District Court judges are often appointed to sit on the Courts of Appeals for limited time periods so as to accommodate a particular Appellate Court's temporary shortage of constitutionally mandated Article III appellate judges. They are commonly referred to as judges "sitting by designation."

the majority ruling); or (2) the appellate panel—in all relevant cases herein, regular three-judge panels—though unanimous in its own decision, reversed or vacated the decision of the District Court judge below.[10]

Search and seizure opinions meeting these criteria contained a total of 937 votes by individual judges suitable for quantitative analysis; these votes were rendered in 309 separate opinions (ten of which were *en banc*). Race discrimination opinions meeting these criteria contained a total of 841 votes, rendered in 281 separate opinions (six of which were *en banc*). States' rights cases meeting these criteria contained a total of 269 votes, rendered in 82 separate opinions (five of which were *en banc*).

I identified the cases comprising this study's three data sets through a series of comprehensive searches on the electronic database WESTLAW. Included in the data set are decisions officially designated by the court for publication in the *Federal Reporter*, as well as decisions not designated by the court for official publication but reprinted in full on the WESTLAW database.

I constructed three models (one for each data set), employing a number of control variables in addition to the two central explanatory variables, appointing presidential cohort under a divided government and appointing presidential cohort under a united government. Below, I detail the variables included in these models. The dependent variable is coded one for a "conservative" vote (i.e., against the criminal defendant's Fourth Amendment rights; against the minority plaintiff's civil rights;

[10] Non-unanimous cases are limited to those in which a dissent is filed by a judge sitting on a Court of Appeals panel; in contrast, non-consensual cases also include unanimous reversals by Court of Appeals panels of District Court decisions. Unlike the Supreme Court, which has the discretion to hear only "close" cases it deems to be of national importance, the Courts of Appeals are the final arbiter of more than 99% of all federal court claims—as all federal court litigants have one appeal as of right. Because the vast majority of these appeals are not "close" cases, but are taken so as to exhaust all possible legal avenues, there is generally only one clear decisional path available to the judges hearing these cases. In other words, the case may be finally adjudicated—and full agreement reached by the appellate panel and the District Court judge—without underlying political ideologies playing a role in the decisionmaking process. In short, fully consensual decisions in the lower federal courts are generally deemed to reflect decisions based on precedent, statutes, or facts (Goldman 1966, 1975). Thus, in order to answer the question—Why do judges vote differently given the same case?—it is necessary to limit the analysis to non-unanimous and/or non-consensual appeals cases. Non-unanimous decisions comprise 36% of the search and seizure cases; 20% of the race discrimination cases; and 45% of the states' rights cases.

Though studies are more often limited to non-unanimous cases only, this is not always the case. Indeed, Sheldon Goldman's (1966:375) seminal work on the U.S. Courts of Appeals also included non-consensual cases. Just as non-unanimous cases serve as a proxy for "close" cases (since one of three judges deciding the same legal question reaches a different legal conclusion), so too do non-consensual cases (where at least one of four judges deciding the same legal question reaches a different legal conclusion). Moreover, some scholars have criticized the practice of using exclusively non-unaminous cases when studying the Courts of Appeals, arguing that this approach is too limited (Atkin & Green 1976; Songer 1982). In other words, some unanimous panel decisions on the Courts of Appeals may, in fact, *not* be the product of clearcut precedent, or even institutional pressure, and as such, should be considered in the analysis (Songer 1982).

and against the supremacy of the federal government's rights) and zero for a "liberal" vote. Coding for the independent variables is available upon request from the author.

In order to test whether the ideology of the Republican Senate majority drove President Clinton to appoint more conservative federal court judges, or whether it was the President's own ideology that was the driving force behind any shifts to the right detected in judicial voting behavior, Models 1 (search and seizure cases), 2 (race discrimination cases) and 3 (states' rights cases) divide Clinton appointees into two categories: (1) judges appointed by Clinton from 1993 to 1994, during which time his own party controlled the Senate; and (2) judges appointed by Clinton from 1995 to 1998, during which time the Republicans controlled the Senate.

For purposes of comparison to another presidency in which we moved from a united to a divided government—but one not infused with the heightened partisanship witnessed over judicial confirmations during the Clinton presidency—Models 1, 2, and 3 also divide President Ronald Reagan's appointees into two categories: (1) judges appointed by Reagan from 1981 to 1986, during which time his own party controlled the Senate; and (2) judges appointed by Reagan from 1987 to 1988, during which time the Democrats controlled the Senate.

These models should allow me to parse the effect, if any, that the Senate majority had in shaping the ideology of the lower federal courts under a divided government. Moreover, since the issue areas chosen are, perhaps, those where issue cleavage between conservative and liberal positions is most pronounced, it is reasonable to conclude that if there is no difference in voting behavior between the united and divided presidential cohorts in these issue areas, there is not likely to be any difference in other issue areas.

My basic model (excluding control variables, which are discussed below) is as follows:

$$\text{Vote} = \beta_0 + \beta_1(\text{appointing presidential cohort of judge under a united government}) + \beta 2\ (\text{appointing presidential cohort of judge under a divided government})$$

Explanation of Dependent Variables

Search and Seizure Data Set

The dependent variable is the vote of each individual judge, either agreeing or disagreeing with the criminal defendant that, by virtue of the government's violation of his or her Fourth Amendment rights, incriminating evidence of the defendant's guilt must be suppressed.

Race Discrimination Data Set

The dependent variable is the vote of each individual judge, either agreeing or disagreeing with the minority plaintiff's position asserted on appeal in a case where the underlying claim is that the plaintiff suffered racial discrimination by virtue of the defendant's conduct.

States' Rights Data Set

The dependent variable is the vote of each individual judge, either agreeing or disagreeing with the plaintiff that the state government's rights prevail over the federal government's rights. In the Tenth Amendment/Commerce Clause cases, this would mean a vote agreeing or disagreeing with the states' rights advocate that the federal government has exceeded its interstate commerce power. In Eleventh Amendment cases, this would mean a vote agreeing or disagreeing with the state that it is immune from suit, and that the federal government cannot properly abrogate such sovereign immunity. Collectively, these two categories of cases are referred throughout as "states' rights" cases.

Explanation of Independent Variables

Scholars have established that a variety of background factors may substantially influence a judge's voting behavior. Most notable is the judge's party affiliation or appointing presidential cohort (Adamany 1969; Epstein et al. 1989; Tate 1981). In addition, studies have consistently shown that judges from the South are more "conservative" than judges from other parts of the country (Carp & Rowland 1983; Songer & Davis 1990). Other researchers have found such factors as a judge's age, prior legal employment, jurisdiction, race, and gender to be statistically significant predictors of how a judge is likely to come down on a particular legal issue (Goldman & Jahnige 1985; Vines 1964). These background factors are often referred to as "attitudinal" measures, seeking to indirectly capture a judge's predisposition to vote in a certain manner given a particular class of case (see generally Segal & Spaeth 1993).

Although most scholars were singularly focused on establishing the effect of various sociopolitical background factors on the judge's decisionmaking process, a few political scientists pursued a different line of inquiry; they focused on whether certain common fact patterns in a given class of cases could predict the final decisions of particular judges (Gibson 1978; Segal 1983, 1986). E.g., rather than asking whether Democratic-appointed jurists were more likely to vote in favor of a criminal defendant's constitutional civil liberties, Segal explored to what extent different

facts in search and seizure cases brought under the Fourth Amendment affected the likelihood that a Supreme Court Justice would vote for or against the criminal defendant. Segal found that search and seizure decisions of the individual Supreme Court Justices studied could be predicted with reasonable accuracy simply by knowing whether certain key facts were present in the given case (Segal 1983, 1986).

In recent years, judicial behaviorists have increasingly recognized that the best models to predict judicial voting behavior are those that synthesize the sociopolitical background models with the fact-based models (George & Epstein 1991; Songer et al. 1994). Accordingly, my models reflect this hybrid approach, with one important exception: They do not include control variables for background factors exclusively under the control of the President when choosing his appointees. Even though race and gender may seem important components of judicial ideology, were my models to control for these factors, I would be detecting the ideological target of the President *after* the background of the judge had been established, as if these characteristics were as exogenously determined as the facts of the case. Instead, my models test for Clinton's ideological target *in spite of* the fact that Clinton made diversity on the federal bench one of the main criteria in nominating judges—and that these "nontraditional" appointees may be more "liberal" than their white, male counterparts.

All independent variables incorporated in the models fall into one of two categories: (1) fact-based variables; and (2) background-based variables. In order to understand fully why particular factual controls were chosen, I review briefly the general legal principles governing each of the three categories of cases.

Fact-Based Variables

Search and Seizure Data Set

Fact-based variables were adapted from the model developed by Segal (1983). The starting point for any search and seizure case is, of course, the text of the Fourth Amendment, which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . " This "reasonableness" standard raises a presumption that before the government can rightfully invade a person's privacy interest, a warrant issued by an impartial magistrate on a showing of probable cause must be obtained (*Coolidge v. New Hampshire* [1971]; *Aguilar v. Texas* [1964]).

The greater the privacy interest—often referred to as an "expectation of privacy"—the more strictly the government will be held to the warrant requirement (*Katz v. United States* [1967]).

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The greatest expectation of privacy is in one's home—adhering to the ancient maxim that a man's home is his castle (*Silverman v. United States* [1961]). Formal arrest of a person also presumptively requires an arrest warrant, though this type of seizure does not command the same heightened protection as one's home receives (*Davis v. Mississippi* [1969]).

Because certain situations make it impossible for the government to obtain a warrant without risking the disappearance of the person or property to be searched, the Supreme Court has carved out certain exceptions to the warrant requirement. Thus, a defendant is accorded less protection from warrantless searches of his or her person, automobile, and luggage (particularly at an airport or border crossing) because of the potential that while the government is seeking its warrant the accused will flee the scene, the car will be driven off, the luggage will be secreted, or the accused will leave the country (*United States v. Ramsey* [1977]; *Chimel v. California* [1969]; *Davis v. Mississippi* [1969]; *Carroll v. United States* [1925]).

Even where an exception to the warrant requirement applies, the government first must have a sufficient quantum of evidence in its possession before it may conduct a search or seizure; that quantum depends on whether the government conducts a full-blown search or seizure (e.g., an arrest), or a limited search or seizure (e.g., a pat-down frisk). Full-blown searches require a heightened showing that a crime is being committed (probable cause), compared with limited searches (reasonable suspicion) (*Terry v. Ohio* [1968]).

The fact-based variables included in Model 1 are as follows:

Location of the Search.

This group of variables designates where the search or seizure took place. For each individual vote, only one of the following places may be designated as the place of the search: (1) home, (2) luggage, (3) automobile, or (4) person. Searches of homes are used as the baseline against which all other places of the searches are measured.

Presence of Warrant.

This variable designates whether the search or seizure took place after a warrant had been issued.

Extent of the Intrusion Against Defendant.

This variable designates whether the search or seizure was of a limited nature or constituted a full-blown search.

Border Search.

This variable designates whether the search and seizure occurred at a point of entry into the United States.

Based on the Supreme Court doctrine discussed above, the highest Fourth Amendment protection (and, consequently, the most pro-defendant voting behavior) is expected for a search of a defendant's home; a search made without a warrant; a full-blown search; and a search not made at the border.

Race Discrimination Data Set: Legal Factors

There are different types of federal statutory claims available to redress race discrimination (Table 5). If the plaintiff is an employee of the defendant, then he or she may choose to bring a Title VII action pursuant to the Civil Rights Act of 1964. In a Title VII action, plaintiff must prove a prima facie case by showing that he or she is a member of a protected class under the statute (e.g., a member of a racial group); that he or she sought and was qualified for an available position, or was employed in a position; that he or she was rejected for that position or suffered adverse employment action; and that the employer continued to seek applicants with plaintiff's qualifications, or hired someone else with plaintiff's qualifications (*McDonnell Douglas Corp. v. Green* [1973]).

For aggrieved parties who are *not* employed by the defendant, they may bring a racial discrimination suit under one or more of the federal Reconstruction Civil Rights Statutes; most often these actions involve 42 U.S.C. §1981 or §1983. But, employees may also assert discrimination claims under these Reconstruction Statutes, and often they assert both types of claims in their lawsuits, increasing their chances of success. Section 1981 goes to discriminatory contract practices, including all phases of an employment contract; Section 1983, with regard to a discrimination action, essentially bars a government entity from discriminating against a person, including government employees. Unlike Title VII and Section 1981, Section 1983 only applies to cases in which the defendant is a state or local government entity, or a person employed by such entity and acting under "color of state law." Sections 1981 and 1983 claims are subject to the same standards of proof governing Title VII actions (*Patterson v. McLean Credit Union* [1989]). Although there may be other types of discrimination claims available to a plaintiff, my analysis is limited to cases raising claims under Title VII and/or the Reconstruction Statutes.

Race Discrimination Data Set: Extra-Legal Factors

There has been much research conducted in the field of judicial politics exploring whether a variety of extra-legal factors in civil cases influences a judge's vote.[11] For instance, Perry (1991) demonstrated that judges are less likely to rule against government defendants than other types of defendants. Similarly, wealthier litigants have a better chance of success than poorer litigants (Lawrence 1990). In cases involving gender discrimination, judges have been found to be more sympathetic to female plaintiffs than male plaintiffs, suggesting a judicial hostility to claims of reverse discrimination (Songer et al. 1994). And, Barker (1967) demonstrated that interest group participation in litigation can have an important effect on the outcome; thus, judges are more likely to rule in favor of class plaintiffs than individual plaintiffs.

The fact-based variables (legal and extra-legal factors) included in Model 2 are as follows:

Federal Claim Asserted in the Lawsuit.

This group of variables designates which type of federal discrimination claim the plaintiff asserts in his or her lawsuit. For each individual vote (for or against the plaintiff alleging race discrimination by the defendant), only one of the following may be designated as the type of federal claim asserted: (1) Title VII; (2) Reconstruction Statutes; or (3) Title VII and the Reconstruction Statutes.

Government Defendant.

This variable designates whether the defendant is a government entity.

White Plaintiff.

This variable designates whether the plaintiff is Caucasian.

Pro Se Plaintiff.

This variable designates whether the plaintiff is represented by counsel.

[11] Extra-legal factors, as I define them, focus on the nature of the litigants, rather than on the facts of the case. In the search and seizure area, such extra-legal factors are, for the most part, constants. The plaintiff is *always* the United States, and the defendant is *always* an individual alleged to have committed a crime. In contrast, civil cases present a variety of plaintiffs (e.g., an individual, a class) as well as a variety of defendants (e.g., an individual, a business, or the government).

Race Plus.

This variable designates whether the plaintiff is alleging multiple types of discrimination.

Class Action.

This variable designates whether the plaintiff is a class or an individual plaintiff.

Based on the controlling law (relating to the legal factors) and prior studies (relating to the extra-legal factors) previously discussed above, I would expect judges to be *less* supportive of the plaintiff's position on appeal where the defendant is a government entity (because judges are government actors as well); the plaintiff is a Caucasian (because judges are hostile to "reverse" discrimination claims); the plaintiff is represented by counsel (because pro se plaintiffs' claims are held to less-rigorous pleading standards); and the plaintiff alleges solely race discrimination (because pleading in the alternative (e.g., race and age discrimination) increases the likelihood of success). Judges are expected to be *more* supportive of the plaintiff's rights on appeal where the plaintiff alleges a joint Title VII/Reconstruction Statute claim (because pleading in the alternative increases the likelihood of success) and the plaintiff is a class (because interest group litigation has a higher chance of success).

States' Rights Data Set

As was true of the search and seizure model, I cannot include many of the extra-legal factors controlled for in the race discrimination model because they are either constants in the states' rights model (e.g., there are no class action cases or pro se plaintiffs) or the facts are not mentioned in the opinions and thus cannot be controlled for (e.g., the race of the plaintiff). Accordingly, fact-based variables are limited strictly to legal facts.

Pursuant to the Eleventh Amendment of the Constitution, all states, as sovereigns separate from the federal government, are immune from suits in federal court commenced by any citizen. Thus, federal courts lack subject matter jurisdiction over such suits unless the state has waived its sovereign immunity, or, alternatively, Congress has effectively abrogated the state's immunity through the enactment of a federal statute (*Edelman v. Jordan* [1974]). In order for Congress to legitimately abrogate state sovereign immunity, it must act pursuant to a valid exercise of power granted in the Constitution allowing it to alter the delicate balance between state and federal government under our system of federalism (*Seminole Tribe of Florida v. Florida* [1996]). The Supreme Court has now held that the Commerce Clause (U.S.

Const., art. I, sec. 8), does not provide Congress with a valid basis to abrogate state sovereign immunity, but that section 5 of the Fourteenth Amendment does (*Seminole Tribe of Florida v. Florida* [1996]). Thus, whether a federal court will entertain a lawsuit brought against a state turns on whether the federal statute that forms the basis of the plaintiff's claim in the underlying suit constitutes a valid abrogation of the state's sovereign immunity.

The Commerce Clause also presents federal courts with thorny issues of constitutional law concerning the balance of power between state and federal government. Pursuant to the Commerce Clause, Congress has the power to regulate "interstate" commerce. The federal government is guilty of violating the Commerce Clause by enacting legislation that regulates the states without any real connection to interstate commerce. When the federal government so acts, it is said to violate the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Until recently, federal courts had given Congress the widest latitude under its interstate commerce power, but in the past few years, the Commerce Clause landscape has significantly changed. For example, in 1995, the Supreme Court held that a federal statute (requiring gun-free school zones) was unconstitutional as going beyond Congress's commerce power as the statute did not substantially relate to interstate commerce—the first time the Court had invalidated a federal statute on this ground in 60 years (*United States v. Lopez* [1995]).

The fact-based variables included in Model 3 are as follows:

Eleventh Amendment Issue.

This variable designates whether the issue on appeal concerns the Eleventh Amendment. Because, to date, the Supreme Court has exhibited more willingness to invalidate federal power over the states under the Eleventh Amendment, courts of appeals judges are expected to be *less* supportive of a claim of states' rights under the Commerce Clause/Tenth Amendment.

Background-Based Variables

Background-based variables are the same for all four models, and include the following:

Appointing Presidential Cohort

This group of variables designates which president appointed the judge rendering a given decision. For each individual vote, only one of the following presidents may be designated as the

appointing presidential cohort: (1) Clinton, under a divided government (1995–98);[12] (2) Clinton, under a united government (1993–94); (2) G.H.W. Bush; (3) Reagan, under a divided government (1987–88); (4) Reagan, under a united government (1981–86); (5) Carter; and (6) Nixon.[13]

Because I am most interested in ideological shifts between the two Clinton cohorts, I use the Clinton cohort united under a government (1993–94) as the baseline by which all other presidential cohorts are measured. Set forth in Tables 1, 2, and 3 are the total number of votes rendered by each presidential cohort, and the number of judges in each cohort, for the search and seizure cases, the race discrimination cases, and the states' rights cases, respectively.[14]

Table 1. Total Votes Cast by Presidential Cohorts in Search and Seizure Data Set

Appointing Presidential Cohort	Percentage of Total Votes Cast	Number of Votes Cast	Number of Judges in Cohort
Clinton (Total)	**14.0**	**132**	**35**
Clinton (1995–98)	5.9	56	16
Clinton (1993–94)	8.1	76	19
Bush	**17.4**	**164**	**47**
Reagan (Total)	**38.2**	**356**	**81**
Reagan (1987–88)	7.4	69	17
Reagan (1981–86)	30.8	287	64
Carter	**24.9**	**234**	**57**
Nixon	**5.5**	**51**	**23**
Total	**100.0**	**937**	**243**

SOURCE: Universe of non-consensual search and seizure decisions, Jan. 1, 1994–Dec. 31, 1998.

Regional Background of Judge.

This group of variables designates in which geographic region of the country the judge rendering a given decision regularly sits on the bench.[15] For each individual vote, only one of the following regions may be designated as the region from which

[12] As explained in note 8, the time frame under study in the states' rights data set includes the years 1996–2000. Accordingly, the Clinton judges appointed under divided government for this data set includes judges appointed in 1999 as well.

[13] Although the relevant cases collected for analysis may include votes of judges appointed by Presidents Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, and Gerald R. Ford, the votes of these presidential cohorts were excluded from the data set because from a practical standpoint, most of these cohorts produced too few votes to gain statistically meaningful analyses.

[14] Because of the time lag between a judge's taking the federal bench and the issuance of his or her first opinion, there were no votes by Clinton judges appointed in 1998 that met the criteria for inclusion in the data set. Although the number of judges in the Clinton cohort may appear small, in fact, it represents 82% of all appellate judges appointed by Clinton in the years 1993–97.

[15] In contrast to race, ethnicity, and gender, regional background is not under the exclusive control of the President in choosing judicial appointees, as nominees are chosen from the home state in which a vacancy arises in a particular circuit. Thus, I include this set of dummy variables in my models.

Table 2. Total Votes Cast by Presidential Cohorts in Race Discrimination Data Set

Appointing Presidential Cohort	Percentage of Total Votes Cast	Number of Votes Cast	Number of Judges in Cohort
Clinton (Total)	**14.0**	**118**	**44**
Clinton (1995–98)	4.6	39	20
Clinton (1993–94)	9.4	79	24
Bush	**21.4**	**179**	**47**
Reagan (Total)	**35.3**	**297**	**86**
Reagan (1987–88)	8.5	71	20
Reagan (1981–86)	26.8	226	66
Carter	**24.9**	**210**	**58**
Nixon	**4.4**	**37**	**20**
Total	**100.0**	**841**	**253**

SOURCE: Universe of non-consensual race discrimination decisions, Jan. 1, 1994–Dec. 31, 1998.

Table 3. Total Votes Cast by Presidential Cohorts in States' Rights Data Set

Appointing Presidential Cohort	Percentage of Total Votes Cast	Number of Votes Cast	Number of Judges in Cohort
Clinton (Total)	**15.1**	**49**	**32**
Clinton (1995–98)	8.5	23	14
Clinton (1993–94)	6.6	26	18
Bush	**22.3**	**60**	**29**
Reagan (Total)	**37.1**	**100**	**51**
Reagan (1987–88)	6.3	17	9
Reagan (1981–86)	30.8	83	42
Carter	**18.3**	**49**	**28**
Nixon	**4.2**	**11**	**6**
Total	**100.0**	**269**	**146**

SOURCE: Universe of non-consensual states' rights decisions, Jan. 1, 1996–Dec. 31, 2000.

the judge hails: (1) Southern; (2) Eastern; (3) Midwestern; (4) Western.[16] Based on consistent findings of prior studies, Southern judges are expected to render the most "conservative" voting behavior (i.e., most anti-criminal in the search and seizure area, most anti-minority in the race discrimination area and anti-federal government in the states' rights area). Accordingly, the Southern region is used as the baseline against which all other geographic regions are measured.

Sitting by Designation.

This variable designates whether the judge rendering a given decision regularly sits on the Court of Appeals.

[16] Unfortunately, not all circuits break down neatly into regions: Kentucky, Tennessee, and Arkansas are included in the Midwest, but Kansas and Oklahoma are included in the West. Because only 12 of 218 judges in my data set hail from these states, however, I would anticipate only negligible changes in my results were regions coded differently.

Results

Because ordinary least squares regression is inappropriate where, as here, the dependent variable is measured dichotomously, I estimated the parameters for the independent variables by logit, a maximum-likelihood estimation technique (Aldrich & Nelson 1984). The logit coefficients represent the estimates for the parameters of a model's independent variables in terms of the contribution each makes to the probability that the dependent variable falls into one of the designated categories (pro-criminal defendant/anti-criminal defendant). For each independent variable, a maximum-likelihood estimate (MLE) is calculated, along with its standard error (SE). The MLEs divided by the SEs have a Z distribution, and, thus, may be used for tests of significance. The results of Models 1 (search and seizure), 2 (race discrimination), and 3 (states' rights) are set forth in Tables 4, 5, and 6, respectively.

Table 4. Logit Coefficients for the Likelihood of an Anti-Criminal Rights Vote in Non-Consensual Search and Seizure Cases, 1 January 1994–31 December 1998

	MODEL 1		
	MLE	SE	Exponential (B)
Constant	0.06	0.28	NA
Background-Based Variables			
Appointing Presidential Cohort of Judge Compared to President Clinton Appointees (1993–94)			
Clinton appointees (1995–98)	–0.31	0.37	0.73
Bush appointees	0.25	0.29	1.28
Reagan appointees (1987–88)	0.31	0.34	1.36
Reagan appointees (1981–86)	0.52*	0.27	1.68
Carter appointees	–1.03***	0.28	0.36
Nixon appointees	0.18	0.37	1.20
Regional Background of Judge Compared to Southern Judge			
Eastern	–0.72**	0.27	0.48
Midwestern	–0.42*	0.19	0.65
Western	–0.75***	0.20	0.50
Sitting by Designation	0.06	0.28	1.06
Fact-Based Variables			
Location of Search Compared to Search of Home			
Search of luggage	0.52*	0.24	1.69
Search of automobile	0.29	0.22	1.30
Search of person	0.20	0.22	1.23
Presence of Warrant	0.85***	0.23	2.33
Extent of Intrusion	0.22	0.16	1.25
Border Search	–0.04	0.27	1.04

*p. < 0.05; **p. < 0.01; ***p. < 0.001
Total N = 937
Likelihood Ratio Test (16 d.f.) = 105.10; significant at 0.000
% correctly predicted = 64.56%
% correctly predicted in null model = 51.5%
SOURCE: Universe of non-consensual search and seizure decisions, Jan. 1, 1994–Dec. 31, 1998.

Table 5. Logit Coefficients for the Likelihood of an Anti-Minority Vote in Non-Consensual Race Discrimination Cases, 1 January 1994–31 December 1998

	MODEL 2		
	MLE	SE	Exponential (B)
Constant	−0.67*	0.34	NA
Background-Based Independent Variables			
Appointing Presidential Cohort of Judge Compared to President Clinton Appointees (1993–94)			
Clinton appointees (1995–98)	−0.95	0.59	0.38
Bush appointees	0.83**	0.31	2.31
Reagan appointees (1987–88)	0.97**	0.37	2.63
Reagan appointees (1981–86)	0.99***	0.30	2.69
Carter appointees	−0.23	0.32	0.80
Nixon appointees	0.60	0.47	1.83
Regional Background of Judge Compared to Southern Judge			
Eastern	−0.26	0.22	0.77
Midwestern	−0.62**	0.22	0.54
Western	−0.62**	0.24	0.54
Sitting by Designation	−0.46	0.37	0.63
Fact-Based Independent Variables			
Single Federal Statutory Claim Compared to Joint Title VII/Reconstruction Statutory Claim			
Title VII	−0.36	0.27	0.70
Reconstruction statute(s)	−0.11	0.24	0.89
Government Defendant	−0.03	0.17	0.97
White Plaintiff	0.71***	0.21	2.04
Pro Se Plaintiff	−2.66***	0.73	0.07
Race Plus Other Claim	0.55*	0.24	1.74
Class Action	1.96***	0.48	4.06

*p. < 0.05; **p. < 0.01; ***p.< 0.001
Total N = 841
Likelihood Ratio Test (17 d.f.) = 149.48; significant at 0.000
% correctly predicted = 70.37%
% correctly predicted in null model = 64.80%
SOURCE: Universe of non-consensual race discrimination decisions, Jan. 1, 1994–Dec. 31, 1998.

Before discussing my results, I must first address whether autocorrelation renders regression analysis meaningless, as each data set contains individual judges casting multiple votes. Unfortunately, because of the unique circumstances presented in data involving judicial voting behavior, there is, to date, no simple method by which to answer this question. Indeed, I could find no published study of judicial voting behavior where this issue was even raised, let alone resolved.

Although one easy solution would be to include a dummy variable for each judge, to do so would result in the loss of a *significant* number of degrees of freedom because each data set includes the votes of between 181 and 253 *different* judges.[17] Without question, standard diagnostic tests for time series data are inappropriate; if anything, the potential autocorrelation

[17] In fact, there is some research that suggests that a fixed effect estimator is *not* appropriate in this context because, in data sets similar to mine, the effect is not truly fixed (Beck & Katz 2000).

Table 6. Logit Coefficients for the Likelihood of an Anti-Federal Government Vote in Non-Consensual States' Rights Cases, 1 January 1996–31 December 2000

	MODEL 3		
	MLE	SE	Exponential (B)
Constant	−0.65	0.49	NA
Background-Based Variables			
Appointing Presidential Cohort of Judge Compared to President Clinton Appointees (1993–94)			
Clinton appointees (1995–98)	−0.10	0.68	0.90
Bush appointees	1.55**	0.54	4.70
Reagan appointees (1987–88)	1.39*	0.70	4.00
Reagan appointees (1981–86)	1.16*	0.52	3.19
Carter appointees	−0.21	0.57	0.81
Nixon appointees	3.11**	1.15	22.50
Regional Background of Judge Compared to Southern Judge			
Eastern	−1.05**	0.42	0.35
Midwestern	−0.69**	0.33	0.50
Western	−0.75	0.52	0.47
Sitting by Designation	−0.64	0.75	0.52
Fact-Based Variables			
Eleventh Amendment	0.66*	0.28	1.94

*p < 0.05; **p < .01; ***p < 0.001
Total N = 269
Likelihood Ratio Test (11 d.f.) = 54.19; significant at 0.000
% correctly predicted = 71.00%
% correctly predicted in null model = 50.60%
SOURCE: Universe of non-consensual states' rights decisions, Jan. 1, 1996–Dec. 31, 2000.

problem more closely resembles spatial autocorrelation than serial autocorrelation. Nor are statistical methods designed to correct autocorrelation for panel data (such as is available on STATA) applicable because many judges in my data set rendered only one decision.[18] Nevertheless, there are several reasons why I believe autocorrelation does not undermine my results. In short, I must satisfy myself that I am not overestimating the impact of judges who voted multiple times versus judges who voted only one time. Accordingly, I performed several preliminary diagnostic tests to detect whether there is even an indication that autocorrelation is a potential problem, and all such tests suggest it is not.

First, I introduced a dummy variable for judges who voted one time, and judges who voted multiple times. This variable is intended to detect whether there is something unique about the

[18] My attempt to find another type of data set with a similar problem to the one my data sets present led me to consider research where congressional roll call voting is the dependent variable. As in my judicial data, one would have multiple votes by the same congressperson. There is a program available using STATA that is intended to take care of this problem when using panel data, used by congressional scholars when roll call votes serve as the dependent variable. This program proved not to be a viable solution because, unlike panel data or congressional roll call voting data—in which every congressperson has multiple votes—my data contain many judges who had only one vote. Thus, the STATA program automatically eliminates these single-judge votes from the analysis, and to eliminate such votes would produce a biased sample.

voting behavior of judges who voted multiple times versus those who voted only once. As expected, there is nothing distinct about judges who end up voting multiple times from those who vote one time. This is not surprising, as cases are assigned to individual judges randomly within each circuit.[19] Second, I introduced a dummy variable for judges' first votes versus their other votes. This variable is intended to detect whether there is something unique about a judge's first vote versus his or her second vote, third vote, etc. Again, there is no statistical difference in a judge's voting behavior upon casting his or her first vote versus later votes. Third, I weighted each observation by the number of total votes per judge. Because this method eliminated two-thirds of my data, those presidential cohort coefficients that were previously significant were now not statistically significant. But, all coefficients were qualitatively similar to those of my principal models; they had the same signs as compared to my principal models, and, with the exception of one coefficient in the race discrimination model, nearly the same magnitude (within the 95% confidence interval) as those obtained on the coefficients with no weights.[20]

In sum, because none of these preliminary diagnostic tests even *hint* at an autocorrelation problem with my data, I have concluded that more-complex methods to correct for spatial autocorrelation (such as constructing a matrix that treats the votes of the same judge as "neighbors," one type of fixed-effect estimator) were not warranted in this case.[21]

Turning to my results, consistent with my hypothesis, there is no meaningful difference in the voting behavior between the two Clinton cohorts (judges appointed under divided and united

[19] In contrast, cases are not randomly assigned to circuits because venue and jurisdiction requirements may mean that certain circuits are more likely to hear certain types of cases. E.g., in circuits bordering Mexico, there may be a greater likelihood to hear search and seizure cases turning on the border exception to the Fourth Amendment. Alternatively, some plaintiffs, when multiple venues are legally available, may engage in "forum shopping." It is precisely for this reason that fact control variables are included in the models, i.e., to hold variations in case-specific facts constant across all cases nationwide, as well as from judge to judge inter- and intra-circuit.

[20] That coefficient had the same sign and roughly the same magnitude, but fell outside the 95% confidence interval.

[21] Another potential methodology issue is implicated by virtue of my using the judge's individual vote as the unit of analysis (contrast Gibson 1999 and Giles & Zorn 2000). Although I have chosen to use the judge as my unit of analysis, I also ran my data, as Giles and Zorn suggest, using robust standard errors, so as to correct for potential heteroscedasticity problems that may arise from the fact that each judge in the data set does not have the same number of votes included in the analysis. However, this alternative computation of the standard errors does not change my results in any meaningful way. With only one exception, all coefficients found to be significant using regular standard errors were also found significant using robust standard errors. The one exception is the coefficient for the Reagan divided government cohort in the states' rights data set. Nevertheless, the important finding there—that there is no statistical difference between the two Reagan cohorts at the 0.05 level—remains true. The only change was that the Reagan divided government cohort was only statistically significant at a 0.06 level when compared to the *Clinton* baseline cohort.

government) in any of the three models. In other words, the variable for the Clinton cohort under a divided government (1995–98) is not statistically significant when compared to the variable for the Clinton cohort under a united government (1993–94) in Models 1, 2, or 3.

With respect to the search and seizure cases (Model 1), holding everything else constant, the odds of an anti-criminal rights vote given a Clinton appointee in the years 1995–98 is 0.73 times the odds of an anti-criminal rights vote given a Clinton appointee from 1993 to 1994. With respect to the race discrimination cases, holding everything else constant, the odds of an anti-minority rights vote given a Clinton appointee in the years 1995–98 is 0.38 times the odds of an anti-minority rights vote given a Clinton appointee from 1993 to 1994. With respect to the states' rights cases, holding everything else constant, the odds of an anti-federal government vote given a Clinton appointee in the years 1995–98 is 0.90 times the odds of an anti-federal government vote given a Clinton appointee from 1993 to 1994. Oddly enough, what this means is that Clinton judges appointed under a unified government are *more* conservative than those appointed under a divided government. Because none of these coefficients are statistically significant, however, this result may well be due to random variation.

In sum, despite the Republican Senate majority's public outcry about the alleged "judicial activism" of Clinton's choices for the federal bench, and its confirmation strategy allegedly designed to keep these "activists" off the bench, *the Republican's takeover of the Senate in 1995 has had no statistically significant impact in shifting the ideology of Clinton's lower federal court appointments.* And, consistent with Clinton's "New" Democrat ideology, we see a marked shift to the center in the ideology of Clinton-appointed judges on the single most critical issue on which Clinton himself has moved the Democratic Party to the center—criminal law enforcement. Accordingly, there is no statistical difference in voting behavior between Clinton's appointees and those of Republican Presidents George H. W. Bush and Richard M. Nixon in the search and seizure cases.

Turning to the two Reagan cohorts, we see similar results. Like the two Clinton cohorts, there is no statistically significant difference in the voting behavior of the two Reagan cohorts in any of the three data sets (which is gleaned through examination of the standard errors for the two Reagan variables).[22] With respect to the search and seizure cases (Table 4), holding everything else constant, the odds of an anti-criminal rights vote given

[22] To further confirm that there is no statistically significant difference between the two Reagan cohorts, I also ran separate models using the Reagan 1981–86 cohort as the baseline measurement. As expected, the Reagan 1987–88 coefficients were not significantly different statistically than the baseline Reagan variables.

a Reagan appointee in the years 1981–86 is 1.23 times the odds of an anti-criminal rights vote given a Reagan appointee from the years 1987–88. With respect to the race discrimination cases (Table 5), holding everything else constant, the odds of an anti-minority rights vote given a Reagan appointee in the years 1981–86 is 1.02 times the odds of an anti-minority rights vote given a Reagan appointee from the years 1987–88. With respect to the states' rights cases (Table 6), the odds of an anti-federal government vote, given a Reagan appointee in the years 1981–86 is 0.79 times the odds of an anti-federal government vote given a Reagan appointee from the years 1987–88.

In order to better understand the magnitude of the logit coefficients, I have also calculated the estimated probabilities of a "conservative" vote—i.e., an anti-criminal rights vote in the search and seizure cases, an anti-minority rights vote in the race discrimination cases, and an anti-federal government vote in the states' rights cases—for each of the presidential cohorts contained in Models 1 through 3. These are set forth in Table 7 (search and seizure model), Table 8 (race discrimination model), and Table 9 (states' rights model). For each model, I have constructed a hypothetical scenario using the median value each variable assumed in the data. And, as all variables are di-

Table 7. Estimated Probabilities of Anti-Criminal Rights Vote, Given a Search of the Home, Without a Warrant, by a Judge from the Midwest

Presidential Cohort	Probability of Anti-Criminal Rights Vote (%)
Clinton (1995–98)*	33.85
Clinton (1993–94)*	41.09
Bush*	47.25
Reagan (1987–88)*	47.00
Reagan (1981–86)	53.99
Carter	19.94
Nixon*	45.51

*No statistical difference from Clinton (1993–94)

SOURCE: Universe of non-consensual search and seizure decisions, Jan. 1, 1994–Dec. 31, 1998.

Table 8. Estimated Probabilities of Anti-Minority Rights Vote, Given a Case with a Black Plaintiff, Alleging Solely Race Discrimination Under Title VII, by a Judge from the Midwest

Presidential Cohort	Probability of Anti-Minority Rights Vote (%)
Clinton (1995–98)*	6.91
Clinton (1993–94)*	16.11
Bush	30.57
Reagan (1987–88)	33.62
Reagan (1981–86)	34.07
Carter*	13.24
Nixon*	25.92

*No statistical difference from Clinton (1993–94)

SOURCE: Universe of non-consensual race discrimination decisions, Jan. 1, 1994–Dec. 31, 1998.

Table 9. Estimated Probabilities of an Anti-Federal Government Vote, Given a Commerce Clause Challenge by a Judge from the South

Presidential Cohort	Probability of Anti-Minority Vote (%)
Clinton (1995–98)*	32.08
Clinton (1993–94)*	34.30
Bush	71.09
Reagan (1987–88)	67.48
Reagan (1981–86)	62.48
Carter*	29.73
Nixon	92.13

*No statistical difference from Clinton (1993–94)
SOURCE: Universe of non-consensual states' rights decisions, Jan. 1, 1996–Dec. 31, 2000.

chotomous, these median values also represent the most common facts among the cases in the data sets.

For search and seizure cases, the probability that a Clinton judge appointed under a divided government will vote against the criminal defendant's position is 33.85%, while the probability that a Clinton judge appointed under a united government will vote against the defendant is 41.09%—a difference of 7.24 percentage points. Similarly, for race discrimination cases there is a 9.20 percentage point difference between the two Clinton cohorts. The probability that a Clinton judge appointed under a divided government will vote against the minority's position is 6.91%, while the probability that a Clinton judge appointed under a united government will vote against the defendant is 16.11%. In the states' rights cases, the probability that a Clinton judge appointed under a divided government will vote against the federal government is 32.08%, while under a united government, the probability of an anti-federal government vote is 34.30%—a difference of 2.22 percentage points.

Nor is there much difference in probabilities between the two Reagan cohorts. In search and seizure cases, the probability that a Reagan judge appointed under a divided government will vote against the criminal defendant is 47.00%, while the probability that a Reagan judge appointed under a united government will vote against the criminal defendant is 53.99%—a difference of 6.99 percentage points. In race discrimination cases, the probability that a Reagan judge appointed under a divided government will vote against the minority rights' position is 33.62%, while the probability that a Reagan judge appointed under a united government will vote against the defendant is 34.07%—a difference of 0.45 percentage points. In states' rights cases, the probability that a Reagan judge appointed under a united government will vote against upholding the federal government's rights is 62.48%, and under a divided government the percentage rises to 67.48%—a difference of only 5.00 percentage points.

Finally, some discussion as to the predictive power of the legal variables included in the models is warranted. In Model 1, the search and seizure model, only two legal variables were statistically significant predictors of judicial voting behavior: the presence of a warrant and a search of luggage (when compared to a search of the home). As expected, judges are much more likely to rule against the criminal defendant when a search is made pursuant to a warrant. And, as expected, judges are much more likely to uphold a search of luggage than of a person's home. Unlike Segal's study of Supreme Court voting behavior in 1970s search and seizure cases, the extent of the government's intrusion into a person's privacy (full-blown search or limited search) seems to carry no weight. Nor is there any difference in searches made at the border, although much of this measurement is likely captured by the luggage variable (not included in Segal's model), since most luggage searches included in the data set took place in the course of travel at a point of entry into the United States.

In Model 2, the race discrimination study, four extra-legal variables were found statistically significant: the presence of a white plaintiff (i.e., a reverse discrimination case), the presence of a pro se plaintiff, the assertion of multiple types of discrimination, and the presence of a plaintiff class. Contrary to expectation, judges were more likely to rule against class plaintiffs than individual plaintiffs. This result may reflect the fact that most class action cases included in the data involved the lower courts' consideration of the continued viability of consent decrees requiring certain hiring or promotion quotas; such decrees were originally entered at a time when Supreme Court case law was much more favorable to the use of such racial preferences, but required dismantling under current precedent. All of the other significant coefficients are in the expected direction. Surprisingly, judges were not found to be more sympathetic to government defendants than to other types of defendants (e.g., business defendants). And, finally, as expected, there is no statistically significant difference in a plaintiff's likelihood to prevail based on the type of race discrimination claim asserted (Title VII versus Sections 1981, 1983).

In Model 3, the states' rights cases, the only legal variable tested proved statistically significant. Like their Supreme Court counterparts, Courts of Appeals judges are more inclined to rule in favor of states' rights under the Eleventh Amendment than under the Tenth Amendment.

Conclusion

Models 1, 2, and 3 support the notion that it is the President—and not the Senate majority—that is the driving force behind shaping judicial ideology on the lower federal courts during a period of divided government. This conclusion may be drawn from the fact that two different presidential judicial cohorts—Republican President Reagan's and Democratic President Clinton's—underwent no change in overall judicial ideology despite a dramatic shift in the ideology of the Senate in the middle of each president's term—one going from Republican to Democrat (in 1987), one going from Democrat to Republican (in 1995). In other words, the judicial ideology of a President's court appointees to the federal bench remain the same whether the Senate is controlled by his own party or that of the opposition. This finding was even true in the Clinton administration, when the Republican majority was particularly vocal in its opposition to the judicial ideology of Clinton's choices for the lower federal courts.

I think this finding, though surprising to some, can be explained in terms of Senate resources. In short, the Senate lacks the necessary resources to wage the kind of partisan battle with the President, as they did in the case of Ronnie White, on each and every lower court nominee. But, that, it seems, is precisely what it would take if the Senate is to achieve any *meaningful* shift in the overall ideology of the federal bench—away from the President's and his party's ideology and toward the Senate majority party's preferred ideology. Mere partisan threats and rhetoric do not, it seems, carry enough weight to force the President's hand. This fact raises an important issue, which I will take up in the next phase of my larger research project on party politics and the lower federal courts.

If the Senate lacks the resources to have a meaningful impact on the ideology of the lower federal courts under a divided government, then perhaps the Senate Republican majority—or at least some of its more-conservative members who led the fight against Clinton's judicial nominations—had another motive for waging its public battle over judicial ideology with Democratic leaders. One must assume that their actions were rational. Thus, e.g., were certain conservative Senators really just concerned with energizing their conservative voter base—the only sector of the electorate with whom the issue of judicial ideology is conceivably salient—rather than actually challenging Clinton's choices for lower federal court appointments? This was the allegation of a spokesman for Senator Patrick Leahy (D-VT), then the Ranking Democratic Member of the Judiciary Committee, who stated, "They [the Republican majority] tried to shut down the executive branch, and that didn't work. So they are aiming at judges, who are an easier target, and at the same time throwing red meat

to their right wing" (Price 1998:A1). And, did such tactics, in fact, energize the Republican's conservative base? To the extent that such a strategy existed, it would mark a critical change in the way lower federal court appointments are used for partisan purposes—clearly no longer viewed as mere patronage appointments. To the extent that such a strategy worked, we can expect it to be replicated in future partisan conflicts under a divided government, ushering in a new era in the relationship between the lower federal courts and party politics.

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