Legal Affairs

The Court(s) and the Election

The Supreme Court is always a campaign focus. But the next president's most important effect on the legal system may involve the ideology, race and gender of his relatively anonymous appointees to the federal appellate courts.

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Illustration by Mark Fredrickson

"(T)he stakes in the election, for the Supreme Court and all who live by its rulings, are very, very high." Or so writes The New Yorker's Jeffrey Toobin.

Mr. Toobin is in good company with this pronouncement. The economy has its ups and downs; security threats may come and go; but as far as presidential issues go, the Supreme Court is forever. In virtually all modern-day presidential elections, commentators and candidates alike have trotted out the Court to suit their own partisan purposes. For Democrats, the perennial battle cry is that new (Republican) appointees will overturn the "super-duper" precedent that is Roe v. Wade. For Republicans, it is the threat of "judicial activists" (read: liberal justices we don't like) legalizing gay marriage and generally running roughshod over the law.

These themes run through the current election season, of course. But more important, or more frightening depending on your perspective, may be the next president's impact on the U.S. Courts of Appeals.

Sure, these courts are invisible to most voters. As Jesse Helms once said, "You go out on the street of Raleigh, North Carolina, and ask 100 people, 'Do you give a damn who is on the 4th Circuit Court of Appeals?' They'll say, 'What's that?'" And yet, the judges on the 4th Circuit, along with the nearly 160 on the other circuit courts, have become enormously important. Given the Supreme Court's declining caseload — down from 150 cases or so in the early 1980s to fewer than 75 in recent terms — the circuits are now The Deciders in the vast majority of federal lawsuits.

If the judges sitting on these courts always resolved disputes on the basis of legal factors, such as precedent, the next president wouldn't have much of an impact. Judges appointed by President Obama or President McCain essentially would be fungible. But because precedent often cannot provide an authoritative answer, that notion does not always or even usually hold. Instead, research by political scientists, legal academics and even the nation's foremost federal circuit court judge — Richard A. Posner — points to several ideological and, possibly, personal biases that impinge on judicial decision making.

Let's start with ideology. A landmark series of studies conducted by Sheldon Goldman in the 1960s and 1970s indicated that federal circuit court judges who affiliated with the Democratic Party were, relative to Republican judges, far more likely to vote for defendants in criminal cases, for litigants alleging a violation of their civil rights and for employees with gripes against their
employers. In short, in the majority of legal areas Goldman considered, Democratic federal judges were, to a statistically significant degree, more liberal than their Republican colleagues.

More recent studies confirm Goldman's findings. An examination of more than 19,000 votes cast by court of appeals judges conducted by renowned legal scholar Cass Sunstein and his co-authors unearthed "strong evidence" of partisan voting. In affirmative action cases, for example, judges appointed by Republican presidents rarely voted to uphold the plan at issue — doing so in fewer than one out of every two disputes. By stark contrast, Democratic appointees supported the plan in three out of every four cases. In an equally exhaustive and sophisticated study, Judge Posner and his colleague William Landes not only show that judges appointed by Republicans are more conservative than Democratic appointees, but they also demonstrate that those elevated to the circuits by the most recent Republican presidents, Reagan and the Bushes, cast significantly fewer liberal votes.

So the appointing president matters — and matters a lot. To put it in concrete terms, if we were able to identify two circuit court judges who were identical in all respects except that one was a Democrat and the other a Republican, and we asked both to decide a case presenting the same legal issue, we would predict different outcomes. If the case involved, say, an industry attack on a labor regulation, we would expect the Democrat to rule in favor of the government and the Republican in favor of the business. If it were an employment discrimination suit, ditto. We would guess that the Democrat would favor the plaintiff, and the Republican, the employer. In both instances, research strongly suggests that our prediction would be right far more often than wrong.

Given the importance of partisan affiliation, where do the Courts of Appeals stand at the moment? With only one Democratic presidential administration since 1980, many of these courts lean heavily Republican. Of the 17 active federal appellate court judges on the 5th Circuit (which covers Texas, Louisiana and Mississippi), Democratic presidents appointed just four. A similar disparity exists in the 8th Circuit (covering seven states in the Midwest), where Republicans appointed nine of the 11 active judges. Other circuits are far more evenly divided, including the 1st (New England), 2nd (Northeast), 3rd (Delaware, New Jersey, Pennsylvania and the Virgin Islands) and 4th (Southeast).

Appointments by the next president could make a big difference in a wide range of disputes, regardless of who he is. This is obvious in the case of, say, the 2nd Circuit, currently composed of six judges appointed by the Bushes and six by Bill Clinton. But even for the 5th Circuit and other imbalanced circuits, an influx of Barack Obama or John McCain appointees could shift the outcomes in a fraction of cases. The same research that shows partisan voting on the part of appellate court judges also indicates the presence of "panel effects." Judges on courts of appeals hear cases in panels of three, and these studies indicate that judges who decide cases together can influence one another and deter the authorship of costly dissenting opinions. This means that when a Republican appointee serves with two Democratic appointees, the Republican is, in many areas of the law, more likely to cast a liberal vote than she or he otherwise would be. The same holds for judges appointed by Democrats. When sitting with Republicans, they are far more likely to support a conservative outcome.

The implication here is obvious: Even if the next president cannot shift the partisan composition of a circuit, he can affect at least some of its decisions — assuming he has the opportunity to
replace a few judges from the opposing party.

In the unlikely event that this assumption does not hold and only appointees from his own party retire, President Obama or President McCain could still influence the direction of circuit court decisions, though in a smaller set of cases. Just as Republican and Democratic appointees vote differently, so do black and white judges and male and female judges. When it comes to adjudicating cases involving the Voting Rights Act of 1965, a new study by Adam Cox and Thomas Miles indicates that black judges are 30 percent more likely to vote in favor of liability than judges who are not black. And, in line with the research on partisanship, Cox and Miles unearth large racial panel effects. When white judges sit on a panel with black judges, the odds of the whites finding in favor of liability jump precipitously.

Likewise, female circuit court judges — regardless of their ideology or partisan affiliation — are far more plaintiff-friendly in sex-based employment discrimination cases than their male counterparts. Or at least, this is the conclusion we reached in a study of cases decided by the 12 U.S. Courts of Appeals between 1995 and 2002. In attempting to approximate an experimental setting — though with actual cases — we matched two judges who were as close as possible on all the relevant characteristics (such as age and ideology), except that one was a male and the other a female. We then compared their voting on cases presenting similar facts and decided the same year.

The results are telling. We found that female judges are about 10 percentage points more likely to decide in favor of the party alleging discrimination than male judges. Similarly, and perhaps more importantly, we learned that the presence of a female judge on a panel causes male judges to decide in a way that they normally would not — in favor of rights litigants. On the other hand, we unearthed no evidence of women having a similarly persuasive effect in other areas of the law, including campaign finance and environmental litigation. The suggestion here is that males defer to their female colleagues in an area in which the females may have unique expertise or information — sex discrimination in employment — but not in areas in which they may not.

Substantively speaking, our results have important implications for circuit court outcomes. Think about it this way: For moderate male judges, the likelihood of a pro-plaintiff vote increases by almost 85 percent when sitting with a female judge. These effects are so persistent and consistent that it is quite possible that Bill Clinton was able to increase pro-plaintiff decisions coming out of the circuits merely by appointing 20 female judges — about a third of all his appointees to the circuits. Should he choose to follow Clinton's example, Obama could have much the same effect. Conversely, McCain, even if he lacks the opportunity to replace Democrats with Republicans, could lower the number of decisions favoring plaintiffs in sex-based employment discrimination cases simply by appointing fewer women.

We could go on and develop other plausible appointment scenarios; the research is that wide and deep. But it is the larger point that should not be missed. At stake in this election are the federal courts, not only The Nine.

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