

The Next War Over the Courts

Conservatives are already fired up about Obama's judicial nominations. Is the White House prepared for the fight?

BY DOUG KENDALL AND SIMON LAZARUS

On March 17, President Barack Obama announced his first judicial nominee: David Hamilton, a 15-year veteran Indiana federal trial judge with the declared support of both Indiana senators, Republican Richard Lugar and Democrat Evan Bayh. With his selection of Hamilton for the 7th Circuit Court of Appeals, Obama fulfilled a promise he reportedly made to Republicans. The previous month, ranking Judiciary Committee Republican Arlen Specter told *Roll Call* that the president had assured him that he would send up nominees “who can get Republican support” and “be acceptable to all sides.”

Hamilton is by all accounts a great pick. A brilliant young judge respected on both sides of the political aisle, his nomination was endorsed by liberal advocacy groups like People for the American Way but also by the president of the Indianapolis lawyers chapter of the Federalist Society, Geoffrey Slaughter, who rated him “an excellent jurist” whose “judicial philosophy is left of center, but well within the mainstream, between the 30-yard lines.”

But you wouldn't learn that from the far-right attack machine; Wendy Long of the Judicial Confirmation Network labeled Hamilton “a hard-left political activist, [whose selection] signals that Obama does intend to push extreme liberals onto the bench and politicize the courts as we've never seen before.” A Republican Judiciary Committee staffer told the *Los Angeles Times* that Hamilton would “not have an easy walk” to confirmation. But the White House did not appear easily discouraged. A “senior administration official” told *Politico* that day: “We are eager to put the confirmation wars behind us—to turn the page and work with senators from both sides of the aisle to achieve at least a bipartisan process.”

The White House is hoping to move nominees through the confirmation gauntlet with relatively little Republican obstruction and to avoid diverting time, energy, and political capital from Obama's top priorities. Indeed, that may happen for Judge Hamilton, given that he has exceptionally broad support and a home-state senator who is one of the few remaining GOP moderates. But his example may not prove persuasive with the typical Senate Republican.

The judicial-nomination wars are back. With 84 vacant and

soon-to-be-open seats on the lower federal courts, as well as potential openings on the Supreme Court at the close of the term, conservatives are primed for a fight over even the most moderate nominees. Early signs indicate that the White House is reluctantly entering this fray with a less-than-fully-baked game plan that could simultaneously undermine the president's chances to change the direction of the federal courts and stall his broader agenda.

REPUBLICAN CAUCUS LEADERS are not about to let Barack Obama turn down the thermostat on the politics of the courts. They see revived warfare over judicial nominations as a tool for firing up their base, undermining Democratic support among working-class cultural conservatives, and tarnishing Obama's basic claim to transcend Washington gridlock and “childish” partisan squabbles. As crusading conservative lawyer Kenneth Starr warned in a Valentine's Day speech in Boston, “Long simmering resentments over Democrats' treatment of President Bush's nominees,” plus then-Senator Obama's (largely symbolic) votes against John Roberts' nomination and against closing off debate on Samuel Alito's nomination, will license Republican senators to withhold “bipartisan help for confirming judges or even an up-or-down vote.” Two weeks later, on March 2, all 41 Republican senators signed a letter confirming Starr's filibuster threat. They vowed not to support “moving forward” on any judicial nominee from their respective home states of whom they do not “approve.” Never mind that only a small handful of Bush's nominees were actually blocked by filibusters and that Republican end-of-term stonewalling was both more relentless and more successful than the Democrats mustered against Bush. Bill Clinton left the White House with 27 appellate court vacancies for his successor to fill, while Bush left only 17.

Right-wing culture warriors have used hyperbolic campaigns against Obama's top Justice Department nominees to pilot-test their smear tactics against his judicial selections. During confirmation proceedings, the Traditional Values Coalition and other like-minded groups branded Deputy Attorney General David Ogden an “outrageous pro-pornography zealot,” distorting Ogden's representation of clients in private practice and ignoring Ogden's argument as assistant attorney general



The Inherited Court: U.S. President-elect Barack Obama and Vice President-elect Joe Biden visited the U.S. Supreme Court in Washington, Jan. 14, 2009. Also pictured are Chief Justice John Roberts Jr. and justices John Paul Stevens, Ruth Bader Ginsburg, Clarence Thomas, and David Souter.

in the Clinton administration in support of the constitutionality of the original Child Online Protection Act. (This law was invalidated unanimously by the Supreme Court.) During Ogden’s Feb. 5 hearing, senior committee members such as Orrin Hatch and Jeff Sessions reinforced this inane caricature, grilling Ogden about, as Sessions put it, “the pornography positions you’ve taken.” Although their filibuster attempt fizzled, Hatch and Sessions mobilized 26 colleagues to cast floor votes against Ogden’s confirmation.

Meanwhile, conservative thought leaders are adding new wrinkles to the right’s yellowing talking points about “liberal activist judges” and liberal “living constitutionalists,” who “make it up as they go along.” In a breathless pre-election *Wall Street Journal* op-ed titled “Obama’s ‘Redistribution’ Constitution,” Northwestern University law professor and Federalist Society co-founder Steven Calabresi pounced on Obama’s statement that judges should have “the heart, the empathy to recognize what it’s like” to be vulnerable and disadvantaged. Calabresi fretted that this “emphasis on empathy in essence requires the appointment of judges committed in advance to violating [their] oath” to administer equal justice to the poor and the rich.

More remarkable was a recent shot at Obama delivered by

none other than the chief justice of the United States, John Roberts. Speaking at the University of Arizona on Feb. 4, Roberts lauded the fact that, since his predecessor, William H. Rehnquist, became chief justice, the once-diverse Supreme Court is now exclusively made up of former appellate judges. Compared with its predecessors, he asserted, the Supreme Court now takes “a more legal perspective and less of a policy perspective.” In the past, he continued, the “practice of constitutional law” was “more in the realm of political science.” Roberts did not single out for criticism anyone who had expressed a contrary view. He didn’t have to. Obama has repeatedly echoed a widespread concern that the Court has become a kind of legal priesthood, too inbred to wisely apply the law to the matters of great social and political magnitude that appear on its docket.

Of course, judicial conservatives are the ones who have most deservedly earned the “activist” label, by gutting an array of statutory protections for workers, consumers, retirees, and minorities. Nevertheless, there is evidence that the right’s caricature of Obama’s view of the Court is gaining traction in potentially influential quarters. On Feb. 18, the *Christian Science Monitor* editorialized that Obama’s admiration for judges with “empathy” means he aims “to use the Constitution for



George Bush
with his White House
Counsel, Harriet Miers

HOW BUSH WON THE WAR FOR THE COURTS

Over the course of his term, President George W. Bush upped the number of Republicans on federal courts by 12 percent. With then-chair of the Judiciary Committee, Sen. Orrin Hatch of Utah, as his hired gun, Bush fought tooth and nail for that advantage. Here's how they did it:

SLIPSHOD STANDARDS Since 1917, presidents have been mailing out blue slips of paper to judicial nominees' home-state senators to invite comment on the nomination. In December 2002, Sen. Hatch announced he would not abide the tradition. No blue slip? No problem.

A LOW BAR President Dwight D. Eisenhower was the first to invite the American Bar Association to screen judicial candidates before their Senate hearing. Bush cut the ABA out of the vetting process, declining its stamp of approval—or disapproval, as he feared.

MAJORITY RULES Under a Judiciary Committee rule, a nominee stays blocked in committee unless at least one minority party member supports a motion to vote on that nominee. In February 2003, Sen. Hatch excised that rule. The committee went on to hold hearings and votes without a lick of cooperation from the minority.

MULTIPLICITY In January 2003, Sen. Hatch did away with the Judiciary Committee's practice of holding hearings on only one controversial nominee at a time, making it impossible to scrutinize the record of each.

END-GAME EGO In the months before a presidential election, the Judiciary Committee freezes the confirmation process to allow the next president to fill the vacancies. As Bush's term drew to a close, Sen. Hatch conveniently denied this tradition.

GOING NUCLEAR Bush left Democrats one defense: the filibuster. But Senate Republicans even angled to rid them of that. The "Nuclear Option" aimed to eliminate the right to filibuster a judicial nominee. The ensuing partisan brawl, which put the Senate on the verge of a constitutional crisis in 2005, ultimately ended with a "compromise" brokered by the "Gang of 14" senators. Three highly conservative circuit court judges were then confirmed. —CAROLYN PETRI

SOURCE: ALLIANCE FOR JUSTICE, JUDICIAL SELECTION DURING THE BUSH ADMINISTRATION, OCTOBER 2008.

social policy," rather than "impartial" application of the law. Other prominent voices, including *Newsweek* columnist Stuart Taylor, have weighed in suggesting Obama should abandon or moderate any ambitions he may have to shape the federal courts to avoid a fight over judges. Such stern warnings by voices perceived as independent and nonpartisan can only embolden conservative Republicans to filibuster Obama's judicial nominees, especially his Supreme Court nominees, and increase the chances that moderate Republicans (and possibly some red-state Democrats) could be cowed into going along.

LEAVING THE RIGHT ALONE to shape the initial debate could severely handicap the president and his allies when the battles begin in earnest. The White House needs a strategy for ensuring blue-state Republican and red-state Democrat opposition to any stonewalling of judicial nominees. Even within the Judiciary Committee, Arlen Specter's support will be needed to break filibusters, because Chair Patrick Leahy has pledged to faithfully apply the committee's rule requiring at least one member of the minority party to join the majority in order to cut off debate. (Former committee chair Orrin Hatch spurned the rule, but Specter, Hatch's successor from 2004 to 2006, reinstated it.)

But the president will not earn that support by negotiating against himself with defensive pledges to name candidates "acceptable to all sides." Signaling that the White House considers bipartisan "consensus" an end in itself, unmoored to any substantive criteria as a credible bottom-line, will incentivize Republican negotiators to make exorbitant demands and keep ratcheting them up. The likely result will either be gridlock, or, worse, de facto capitulation and White House candidate slates scrubbed free of individuals who appear likely, once confirmed, to redirect the currently right-leaning federal judiciary (Democratic appointees occupy a mere 36 percent of the seats on the courts of appeal).

The stakes are high, as the intensely court-focused social conservative and business lobbies will hardly let their senators forget. For the last quarter-century, conservatives have eroded constitutional rights and liberties and slowly gutted hard-won statutory protections for workers, retirees, consumers, women, Americans with disabilities, minorities, safety-net beneficiaries, and the environment. Now that Democrats have control of the executive and legislative branches, they face a window of opportunity to reverse these trends. Indeed, filling vacancies with top-quality jurists will prove essential to ensuring that Obama's own ambitious legislative initiatives, once on the books, do not fall prey to the same sort of willful misinterpretations that the Roberts Court deployed, for example, to upend equal-pay-opportunity guarantees in its notorious 2007 decision in *Lilly Ledbetter v. Goodyear*.

Throughout American history, conservative federal judiciaries have stymied change-minded administrations (and state governments): during the aborted Reconstruction Era following the Civil War; during the early 20th-century Progressive Era; and during the first several years of the New Deal until 1937 when President Franklin Roosevelt finally turned the

LEFT ART / PHOTO CREDIT

Supreme Court and lower federal courts around with new appointments. To avoid a reprise of those dreary episodes, President Obama will have to carefully select judges committed to faithfully interpreting progressive initiatives in line with Congress' intent, and be prepared to muster 60 Senate votes to confirm them.

The White House is right to want to “put the confirmation wars behind us,” but, as long as Republicans count high-decibel strife in their interest, the Obama administration's reliance on behind-the-scenes horse trading with its Senate adversaries is a dead-end strategy. The president must reshape the political environment by changing the terms of the national debate about the courts. He needs to publicly proclaim his own affirmative vision, one that is compelling on the merits, broadly resonant, and capable of rendering obstructionism bad politics for Republicans in competitive states. In the recent past, Democratic presidential candidates have been tongue-tied when forced to address issues about the Constitution and the courts—flummoxed by anxiety that anything they say will displease either court-focused liberal advocacy groups or critical cultural conservative and independent electoral constituencies. In his writings, Senate speeches, and campaign statements, Obama has tried out several new approaches. Some of these are promising. Others, however, appear more like off-the-cuff musings of the law professor he once was—and conservatives have used them as an excuse to pin the “liberal activist” label on him. In addition to his comments on judicial “empathy,” Republican critics have seized on Obama's statements about the “hardest 5 percent of cases” where the law is so indeterminate that judges must rule based on their underlying beliefs. On the day Obama nominated Judge Hamilton, Press Secretary Robert Gibbs unhelpfully fused these two ideas, asserting that judges have their “own empathy and value system” that leads them “to make a conclusion one way or the other,” thereby dampening the administration's otherwise successful attempt to brand Hamilton a moderate with bipartisan support.

WHAT OBAMA NEEDS TO DO is to winnow from his varied statements about the courts a coherent set of persuasive messages and deliver them with what McCain strategist Steve Schmidt admiringly characterized as the “ice-cold discipline” he showed during the presidential campaign.

First, Obama can reclaim the political high ground by stressing that the nation's support for the Constitution should be a source of unity, not division. He has this potent riff down pat—indeed, he invented it, in *The Audacity of Hope*—but neither he nor his administration spokespersons have mentioned it. For all our disagreements on particular legal issues, Obama writes, all Americans, conservative or liberal, embrace the Constitution and the fundamental principles of liberty, equality, and democracy expressed in it. Independents and even some Republicans are likely to nod in agreement with his gentle

put-down of the right's attempt to brand conservative judges “constitutionalists”: “We are *all* constitutionalists.”

Second, Obama can reclaim the constitutional high ground by stressing unequivocally that the role of judges is to interpret the actual provisions, principles, and purposes of the Constitution and laws—not to enact their own policy or political agendas. Embracing this civics-class canon will not merely defuse attacks from the right but greatly strengthen the ability of the administration to take the offensive. Again, it is the conservatives on the current Supreme Court who have been most activist, frequently in ways that could thwart the Obama administration's agenda. (In a recent study by Cass Sunstein—then at Harvard Law, now Obama's White House regulatory czar—ultraconservative Justice Antonin Scalia racked up the most “activist” bona fides by overturning federal-agency decisions opposed by business litigants, while liberal Justice Stephen Breyer proved the most deferential to agency judgments.)

Obama needs to face this potential threat to his agenda head on, challenging conservatives to honor their professed favor for judicial restraint, fidelity to the Constitution, and judges who will, in fact, follow the law as written.

Obama can stress that the text of the Constitution means the *whole* Constitution—not just, as conservatives often seem to assume, the original document as ratified in 1789. The Constitution, after all, includes all the amendments adopted over the last two centuries. In addition to the first 10 amendments (the Bill of Rights adopted in 1791), they include the Reconstruction amendments (numbers 13, 14, and 15), which mandate individual equality and national citizenship as the law of the land and specifically empower Congress to enforce those mandates.

They also include Progressive Era amendments (numbers 16, 17, and 19), which vastly increased the federal government's economic resources and leverage through nationwide income taxation, reinforced democratic rule by requiring popular election of senators, and extended the franchise to women. If the Constitution is a “living” document, it is mainly because We The People have amended it in significant ways over the past 220 years.

Moreover, focusing on text and history actually strengthens the case for interpreting the Constitution to address changing times and contemporary needs. The framers' broad terms were inherently—“originally”—designed to accommodate the unforeseen needs of future generations. As Chief Justice John Marshall famously wrote in 1819, “This is a *Constitution* we are expounding ... intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”

Third, Obama can turn the “activist” canard against the right and make judicial-nominee battles matter to middle American voters by stressing that his nominees will faithfully enforce laws passed by Congress and the states to meet basic needs of ordinary citizens. Obama has come close to getting this message point right. When he endorsed judges with

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“empathy” for vulnerable individuals, he seemed to be trying to remind the public that courts are not only important for their impact on hot-button culture-war issues but also for their impact on issues that matter to ordinary citizens.

His frequent campaign appearances with Lilly Ledbetter—a female worker denied equal pay for years, then denied a remedy in court because her company successfully hid this discrimination from her—conveyed his notion that courts should safeguard American citizens’ day-to-day needs. Ledbetter’s real-life example caught the attention of many people who typically feel little or no connection to political battles about the judiciary. Now, Obama and his allies need to tightly link concern for victims of injustice like Ledbetter with insistence on the primacy of the rule of law. They need to stress that the *Ledbetter* case is about judges who let their solicitude for the convenience of business trump Congress’ aim of bringing robust legal protections to the factory floor. And *Ledbetter* is the tip of an iceberg. As noted by Sen. Patrick Leahy during a June 2008 hearing, in areas of greatest concern to Americans struggling with a worsening economy, such as access to health care, retirement security, workplace fairness, and predatory lending, “in many cases, the Supreme Court has ignored the intent of Congress, oftentimes turning laws on their heads, and making them protections for big business rather than for ordinary citizens.”

Empathy, Obama must clarify, is not a quality separate from or incompatible with the law. To correctly apply remedial laws in accord with their core goals of protecting workers, consumers, retirees, and other vulnerable individuals, judges need the capacity to grasp life circumstances different from and generally much less favorable than their own. That brand of empathy was precisely what was absent from the approach of the five conservative justices who threw Lilly Ledbetter out of court on the basis of a tortured interpretation of statutory fine print that made the equal-pay guarantees of the 1964 Civil Rights Act useless to real-world discrimination victims and defeated Congress’ core goals in crafting that law. And it has been absent from—indeed, scorned in—scores of decisions from the Rehnquist and Roberts courts.

If Obama is successful in claiming the constitutional high ground and branding right-wing judges as the true “activists,” he is likely to reap broader political benefits. In a January 2009 Rasmussen poll, 64 percent of independents and 52 percent of Democrats agreed that Supreme Court decisions should be “guided by what’s written in the Constitution” as opposed to “fairness and justice” (as, predictably, did 79 percent of Republicans). While some progressive observers have questioned the wording of the question, the poll clearly indicates broad support for judges who apply the law “as written”—especially among independent voters influential with moderate Republicans pondering whether to join the effort to stonewall Obama’s judicial nominees. It also shows the potential problems that could lie ahead for Obama: Only 35 percent of the public believes he

will appoint judges who will follow the written Constitution.

Polling by the Mellman Group in September 2008 shows Obama’s path out of this political box. In a survey commissioned by the Constitutional Accountability Center, Mellman tested the conservative sound bite about judicial restraint head-to-head against two versions of the progressive idea that judges must at times stand up to the president and Congress. The version of the progressive message that referenced the Constitution’s Bill of Rights as the basis for judicial protection of individual rights and liberties outperformed a progressive message that made no reference to the Constitution by 22 percent—and beat the conservative judicial restraint argument by a whopping 35 percent. Similarly, a “living constitution” message rooted in “Amendments passed over the past 220 years” outperformed standard progressive messaging about the Constitution “evolving with changing times” by a full 36 percent—and beat the conservative line about judges being bound by the Constitution’s original meaning by 24 percent. Americans of all political stripes love the Constitution, and by making a connection between that document and his goals, Obama will speak to a much broader swath of the public with his message on the future of the federal judiciary.

In the 2008 elections, independent voters were drawn to Barack Obama’s rhetoric on pocketbook issues like health care and fair pay—the kinds of rights at stake in the *Ledbetter* case and in similarly egregious cases concerning denials of redress for unlawfully withheld health-insurance benefits, lethally unsafe medical devices, and fraudulent debt-collection practices, as detailed in Sen. Leahy’s summer 2008 hearings on the impact of the Supreme Court on ordinary Americans. Significantly, in April 2008 and January 2009, six and five Republicans respectively—more than the three who voted for the Obama stim-

ulus plan—defied their caucus and the Chamber of Commerce and voted for the Lilly Ledbetter Fair Pay Restoration Act.

The fight for the future of the courts cannot be finessed, but it can be won—and therefore reinforce, not muddle or thwart, the president’s broader agenda. To do so, Obama and his allies need to take the offensive and propagate a vision that honors Americans’ shared reverence for the Constitution as the basis for cherished freedoms, respects the courts as law-interpreters not policy-makers, and promises judges who faithfully enforce legal protections for ordinary Americans. At one time or another, Obama has acknowledged all the elements of such a vision. Now he just has to put the right pieces together, stay consistently on message, and summon the unmatched eloquence he always seems to find when it is most needed. **TAP**

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