

## The Politics of the Federal Bench - 2

### Obama's Appointments Are Expected To Reshape the U.S. Legal Landscape

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Monday, December 8, 2008; Page A01

The federal judiciary is on the verge of a major shift when President-elect Barack Obama's nominees take control of several of the nation's most important appellate courts, legal scholars and political activists say. With the Supreme Court's conservative direction unlikely to change anytime soon, it is the lower courts -- which dispense almost all federal justice -- where [Obama](#) can assert his greatest influence.

The change will be most striking on the Richmond-based [U.S. Court of Appeals](#) for the 4th Circuit, long a conservative bastion and an influential voice on national security cases, where four vacancies will lead to a clear Democratic majority. Democrats are expected to soon gain a narrower plurality on the New York-based 2nd Circuit, vital for business and terrorism cases, a more even split on the influential D.C. appeals court and control of the 3rd Circuit, which covers Pennsylvania and New Jersey.

Although Republican control will probably persist on a majority of appellate courts for at least several years, some experts say that by the end of Obama's term, he and the Democratic Congress will flip the 56 percent majority Republican nominees now exert over those highly influential bodies.

"Obama has a huge opportunity," said Arthur Hellman, a [University of Pittsburgh](#) law professor who is an authority on federal courts. "In a very short time, significant segments of the appellate courts, which are the final authority in all but a tiny handful of cases, will be dominated by Democratic nominees."

The new judges might gradually reshape what many see as a conservative drift in the courts under the Bush administration and issue more moderate-to-liberal rulings in the ideologically charged cases that have fueled the struggle for control of the judiciary. Many judges are independent, and party affiliation is not a perfect predictor of their behavior. Still, studies have shown that Democratic and Republican nominees vote differently on such cultural issues as abortion and gay rights, along with civil rights, environmental law and capital punishment.

The pace of change will depend not only on how long Democrats keep control of the presidency but also on the ideology of Obama's nominees. Although his Cabinet choices have won praise from Republicans as centrist, Obama's past statements indicate a generally liberal judicial philosophy, one that favors Supreme Court justices and other judges who back abortion rights.

"What I do want is a judge who is sympathetic enough to those who are on the outside, those who are vulnerable, those who are powerless, those who can't have access to political power and as a consequence can't protect themselves from being . . . dealt with sometimes unfairly," Obama, a former constitutional law professor, said in a May interview with [CNN](#).

A spokesman for Obama's transition office declined to comment.

Energized by Obama's victory, liberal groups are pressing for nominees to their liking. "The voters have sent a mandate to the new president that we can restore balance to the federal courts, and we're confident that will occur," said Kathryn Kolbert, president of [People for the American Way](#), which has been in touch with transition officials. She vowed to prevent "extremists on the right from hijacking the process."

Conservatives said they are hoping for moderate nominees but worry that "judges will be an issue where Obama throws a lot of crumbs to his political base," said Curt Levey, executive director of the Committee for Justices, which advocates a conservative judiciary. "People are worried. Obama has been unusually unabashed about believing in an activist role for judges."

He called on Republican senators "to play hardball" in resisting Obama's nominees.

Senate Republicans, who retained enough seats in the November elections to filibuster judicial nominees, said they have not settled on a strategy. Democrats, who successfully blocked some of President Bush's 4th Circuit and other appellate nominees, said they will try to win Republicans' support but made it clear that they will push for quick confirmations.

There is just no question about the importance of the appellate courts, because so few decisions get up to the Supreme Court," said a Democratic Senate source who spoke on condition of anonymity because Obama has not been inaugurated.

The Senate confirms presidential nominees to the 179-judge federal circuit courts and the 678-judge [U.S. District Courts](#). The circuit courts of appeals, which cover the nation's 13 federal judicial circuits, decide more than 30,000 cases a year. The Supreme Court takes fewer than 100 new cases each year.

Control of the appellate courts has shifted with the party in power. Republicans controlled 64 percent of appellate judgeships in 1993, but President [Bill Clinton](#), a Democrat, reduced that to 42 percent by 2001. Bush's appointees have restored a 56 percent Republican majority of the total authorized judgeships.

With current and future vacancies and Congress likely to pass a bill to create 14 appellate judgeships, Obama is likely to reduce Republican appointees to 42 percent and boost Democrats from the 36 percent to 58 percent during his first term, said Russell Wheeler, a [Brookings Institution](#) scholar who studies federal courts. The bill would also create 52 federal district judgeships, although those judges are more bound by precedent and party affiliation matters less.

An immediate priority for Democrats will be filling the four vacancies on the 4th Circuit, which covers Virginia, Maryland, West Virginia and the Carolinas and has long been considered one of the nation's most conservative courts. The court has issued forceful conservative rulings, including striking down a law allowing rape victims to sue their attackers, and supported the Bush administration in key national security cases involving terrorism defendants and so-called enemy combatants.

But vacancies have whittled the court's Republican majority to 6-5, with some Republicans faulting the Bush administration for moving too slowly to nominate replacements and others blaming Democratic obstructionism. "Conservatives thought of the 4th Circuit as Shangri-La, and it's very

frustrating that it's on the verge of going to the other side," said Manuel Miranda, chairman of the conservative Third Branch Conference and a former top Republican Senate lawyer.

Democrats will probably also gain control of the 2nd Circuit, which hears important terrorism and business cases, with the nation's financial markets based in New York. It is split 6-6 between Democratic and Republican nominees, with one vacancy. But the judgeship bill sponsored in the last Congress by [Senate Judiciary Committee Chairman Patrick J. Leahy \(D-Vt.\)](#) would give Democrats two more seats to fill.

Senate Democratic sources would not say whether the bill would be reintroduced, but Republicans and legal experts expect it to pass in the next year or two because Obama can appoint the new judges.

The 3rd Circuit, which is divided 6-6, also will move to Democratic control. There are two vacancies and two more positions possibly coming in the judgeship bill.

The smaller 1st Circuit, which mainly covers New England, will gain a narrow Democratic majority if the judgeship bill passes, and the Southern-based 11th Circuit stands to become even more narrowly divided. In the short term, Republicans are expected to keep control of six other circuits, with Democrats slightly expanding their dominance of the one circuit they now control, the California-based 9th Circuit.

But scholars and activists are paying close attention to the U.S. Court of Appeals in the District, which hears appeals of key executive branch rulings and prominent criminal cases, such as the recent corruption trial of Sen. [Ted Stevens](#) (R-Alaska).

The court has six Republican nominees, compared with three Democrats, and two vacancies. "The D.C. Circuit is so influential," said one Democratic Senate aide. "It's out of whack now, and we can restore the balance."

*Staff researcher Meg Smith contributed to this report.*