



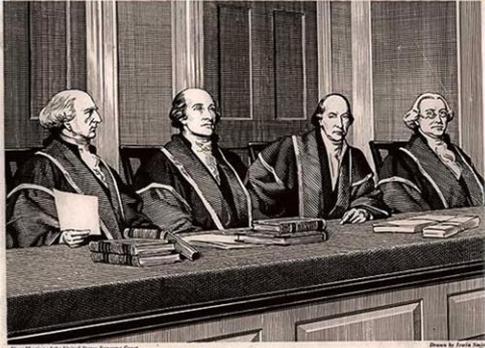
The Courts and The Judiciary

Part II

The interpretation of the law is the proper and peculiar province of the courts. A constitution is, and must be regarded by judges as, fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Alexander Hamilton
Federalist Papers No. 78

Traditional Period: The Early Court

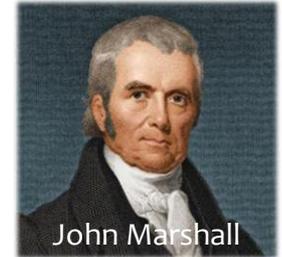


- **First session of the Supreme Court**, in the Merchants Exchange Building in NYC, had to be adjourned until the next day when a quorum of the justices failed to show up.
- First term ended after 10 days, with no cases on the docket, a few procedural matters decided and 26 attorneys admitted to the national bar.
- Decided relatively few cases. Perhaps most important legacy was refusal to issue advisory opinion sought by Washington, establishing **precedent that Court only hears cases and controversies**.
- Under Chief Justice John Jay, Court not co-equal but did assert itself. Attempted to establish itself as an independent, nonpolitical branch.
- Tried to advance principles of nationalism and maintain national government's supremacy over states.

Traditional Period: The Marshall Court (1801-1835)



- Chief Justice: John Marshall: *It is emphatically the province and duty of the Judicial Department to say what the law is.*
- major court cases: *Marbury v. Madison* (1803), *Fletcher v. Peck* (1810), *Dartmouth College v. Woodward* (1819), *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824)
- defining characteristics:
 - established Court's role in governmental process
 - **strong Court support for national powers** (especially commerce) over states' rights
 - use of ***Opinions of the Court***, rather than opinions written by each justice
 - beginning of systematic reporting of Court opinions
 - Despite the importance of its opinions interpreting the Constitution, the business of the Court continued to involve **private law issues** (maritime, property, contracts).

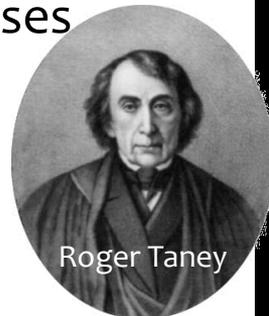


John Marshall

Traditional Period: Taney and Civil War Courts (1836-1888)

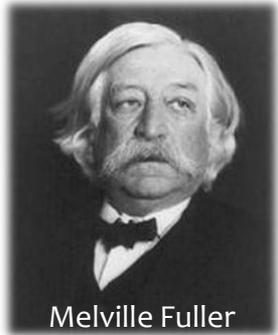


- Chief Justices: Roger Taney (1836-1864), Salmon Chase (1864-1873), Morrison Waite (1874-1888)
- major court cases: *Dred Scott v. Sandford* (1857), *Mississippi v. Johnson* (1867), *Texas v. White* (1869), *Munn v. Illinois* (1876)
- defining characteristics:
 - continued assertion of **national power over states** (with some accommodation for state police powers)
 - growing North-South splits on Court
 - Court **showdowns with Congress** at beginning and end of Civil War
 - growth of Court's caseload, with majority of post-Civil War cases involving private law issues and war litigation
 - Congress **fixed Court size at nine.**



Roger Taney

Transitional Period: Conservative Courts (1889-1937)



Melville Fuller

- Chief Justices: Melville Fuller (1888-1910), Edward White (1910-1921), William Howard Taft (1921-1930), Charles Evans Hughes (1930-1937)
- major court cases: *Plessy v. Ferguson* (1896), *Weeks v. US* (1914), *Schenck v. US* (1919), *Debs v. US* (1919), *Gitlow v. NY* (1925), *US v. Butler* (1933), *Schechter Poultry v. US* (1935)
- defining characteristics:
 - But for a brief period reflecting progressivism, Court tended to **protect business interests** over governmental police powers.
 - Court set civil rights policy of **separate but equal**.

Transitional Period: Conservative Courts (1889-1937)



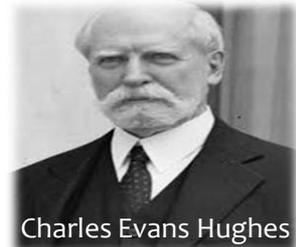
- defining characteristics:
 - Congress relieved justices of circuit-riding duty.
 - Congress, in 1925 Judiciary Act, gave Court **greater discretion over its docket**.
 - some important construction of Bill of Rights guarantees (protection after WW I)
 - **showdown with FDR over New Deal legislation**: Court continued to strike down New Deal leading the president to propose a **Court-packing** plan (increase size of Court and appoint pro-FDR justices to new seats).



Modern Period: Roosevelt and WWII Courts (1937-1953)



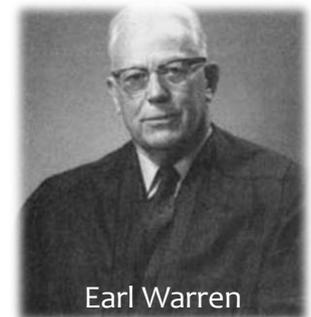
- Chief Justices: Charles Evans Hughes (1937-1941), Harlan Fiske Stone (1941- 1946), Fred Vinson (1946- 1953)
- major court cases: *Betts v. Brady* (1942), *Korematsu v. US* (1944)
- defining characteristics:
 - With the *switch in time that saved the nine* (sudden jurisprudential shift by Associate Justice Owen Roberts probably as a strategic political move to protect the Court's integrity and independence from FDR's court-reform bill), Court begins to uphold national regulations under the Commerce Clause, as well as state use of police powers.
 - *expansion of rights and liberties*, until WW II and ensuing Cold War
 - increases in *nonconsensual behavior* (dissents and concurrences) among justices



Modern Period: The Warren Court (1953- 1969)



- Chief Justices: Earl Warren: *Many people consider the things government does for them to be social progress but they regard the things government does for others as socialism.*
- major court cases: *Brown v. Board of Education (1954), Yates v. US (1957), Mapp v. Ohio (1961), Katz v. US (1961), Baker v. Carr (1962), Gideon v. Wainwright (1963), Abington v. Schempp (1963), NY Times Co. v. Sullivan (1964), Escobedo v. Illinois (1964), Miranda v. Arizona (1966), Tinker v. Des Moines (1969)*
- defining characteristics:
 - **expansion of rights, liberties and criminal justice**, including rights of the accused
 - establishment of **right to privacy**
 - emergence of **Court as national policy maker**



Earl Warren

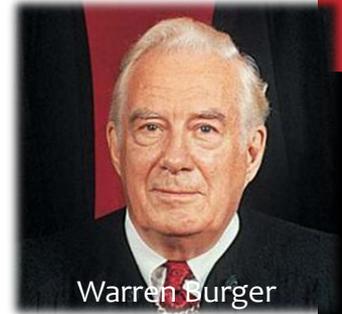
Modern Period: The Warren Court (1953- 1969)



- defining characteristics:
 - established unconstitutionality of **school segregation**
 - continued increase in Court's docket with steady **growth in number of *in forma pauperis* petitions** (without funds to pursue normal costs of a lawsuit or criminal defense)
 - established principle of **one person, one vote** and asserted that federal courts had right to tell states to reapportion their voting districts for more equal representation
 - growth in percentage of constitutional cases on Court's docket
 - first black (**Thurgood Marshall**) appointed to Court



Conservative Retrenchment: Republican Courts (1969- present)



- Chief Justices: Warren Burger (1969-1986), William Rehnquist (1986-2005), John Roberts (2005- pres)
- major court cases: *NY Times v. US* (1971), *Roe v. Wade* (1973), *US v. Nixon* (1974), *U of California Regents v. Bakke* (1976), *NJ v. TLO* (1984), *Wallace v. Jaffree* (1985), *Bethel School District v. Fraser* (1986), *Hazelwood School District v. Kahlmeier* (1988), *Texas v. Johnson* (1989), *Planned Parenthood v. Casey* (1992), *US v. Lopez* (1995), *Bush v. Gore* (2000), *Lapides v. Board of Regents of the U of Georgia* (2002), *Lawrence v. Texas* (2003), *McConnell v. FEC* (2003), *Kelo v. City of New London* (2005), *Massachusetts v. EPA* (2007), *Citizens United v. FEC* (2010), *National Federation of Independent Business v. Sebelius* (2012), *Arizona v. US* (2012), *Shelby County v. Holder* (2013), *Burwell v. Hobby Lobby* (2014), *Obergefell v. Hodges* (2015), *Whole Woman's Health v. Hellerstedt* (2016)

Conservative Retrenchment: Republican Courts (1969- present)

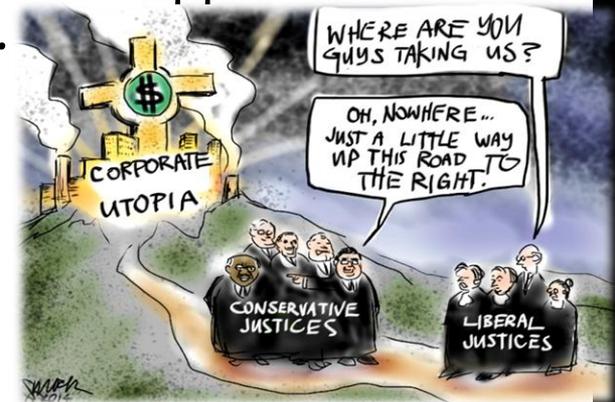


- defining characteristics:
 - Burger Court a **transitional court** which continued the liberal legacy of Warren Court but transitioned into more conservative Rehnquist Court.
 - attempts in some areas (criminal law) to **limit or rescind Warren Court rulings**
 - expansion of **women's rights**, including right to abortion (but subsequent rulings allowed state limits)
 - some attempt to **increase state power**
 - tightened standards for creation of legislative districts designed to enhance **minority representation**
 - Court increasingly called on to resolve **intergovernmental disputes** involving separation of powers or authority of one branch over another

Conservative Retrenchment: Republican Courts (1969- present)



- defining characteristics:
 - appointment of **first woman** (Sandra Day O'Connor) to Court
 - appointment of **first Hispanic** (Sonia Sotomayor) to Court
 - legitimacy of *limited affirmative action* policies
 - rejected state-imposed **term limits** for members of Congress
 - increasing number of rulings **favorable to corporations**
 - Court **increasingly more conservative** with each Republican-appointed chief justice ... Republican presidents have appointed 12 of the 16 most recent justices, including chiefs.



Conservative Retrenchment: Republican Courts (1969- present)



- defining characteristics:
 - During Roberts's first decade as chief, Court was most conservative in more than a half-century and likely most conservative since 1930s.
 - In five terms before Justice Antonin Scalia's death in 2017, for first time Court issued majority of its ideological 5-4 rulings along **party lines**.
 - Roberts Court **most pro-business since WWII**, probably since pre-1937 Court.
 - John Roberts: *The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.*

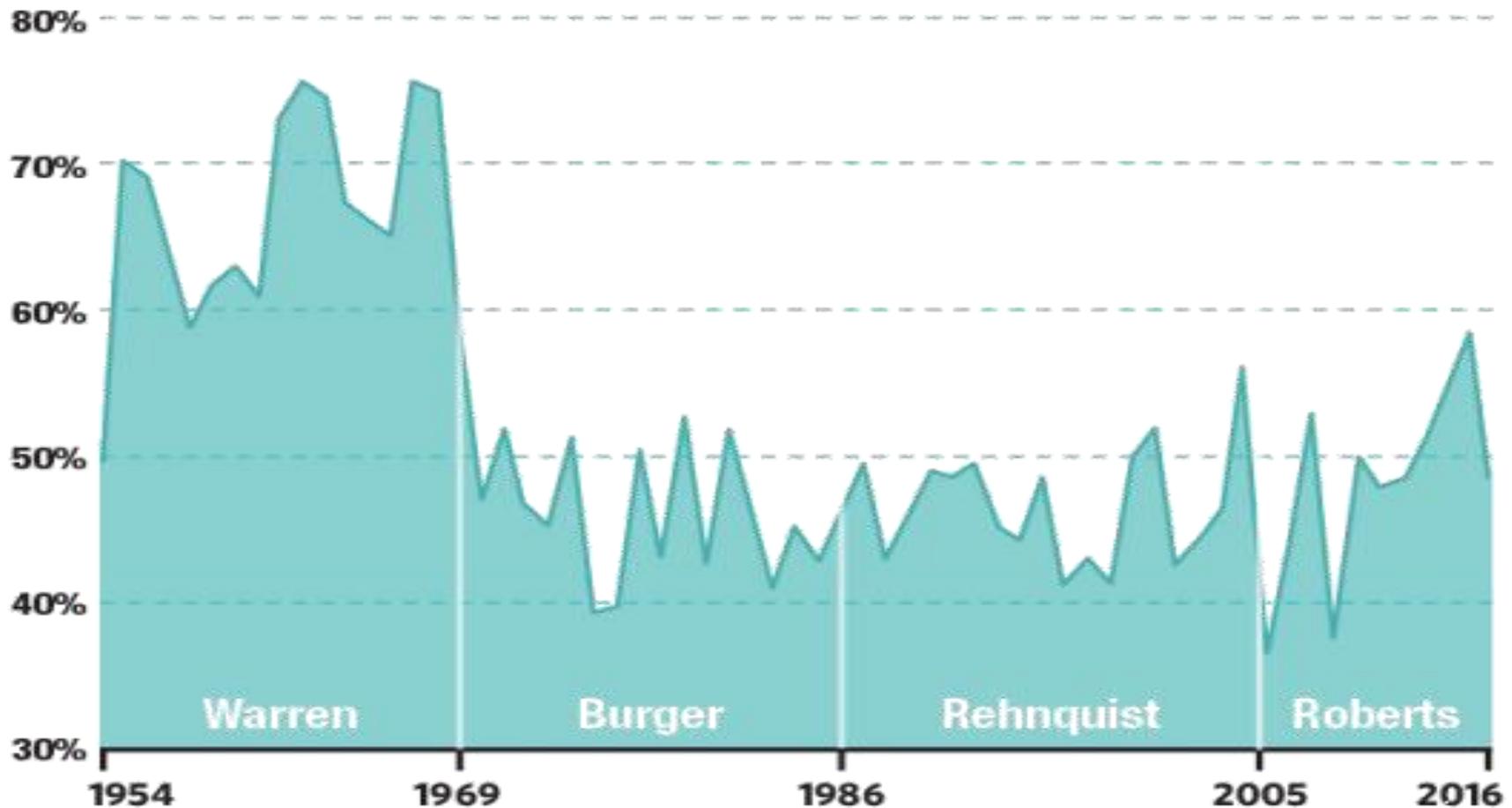


Conservative Retrenchment: Republican Courts (1969- present)



Outcomes in Supreme Court Cases

PERCENTAGE LIBERAL, 1954-2016



Conservative Retrenchment: Republican Courts (1969- present)



Religious liberty & the Supreme Court

A look at three important recent decisions on religious liberty

CASE

CONCURRING

DISSENTING

1 **Burwell v. Hobby Lobby**

DECISION (June 2014): Closely held corporations have religious rights and may claim an exemption from the Affordable Care Act's contraception mandate.



2 **Greece v. Galloway**

DECISION (May 2014): Government meetings may be convened with highly sectarian prayers.

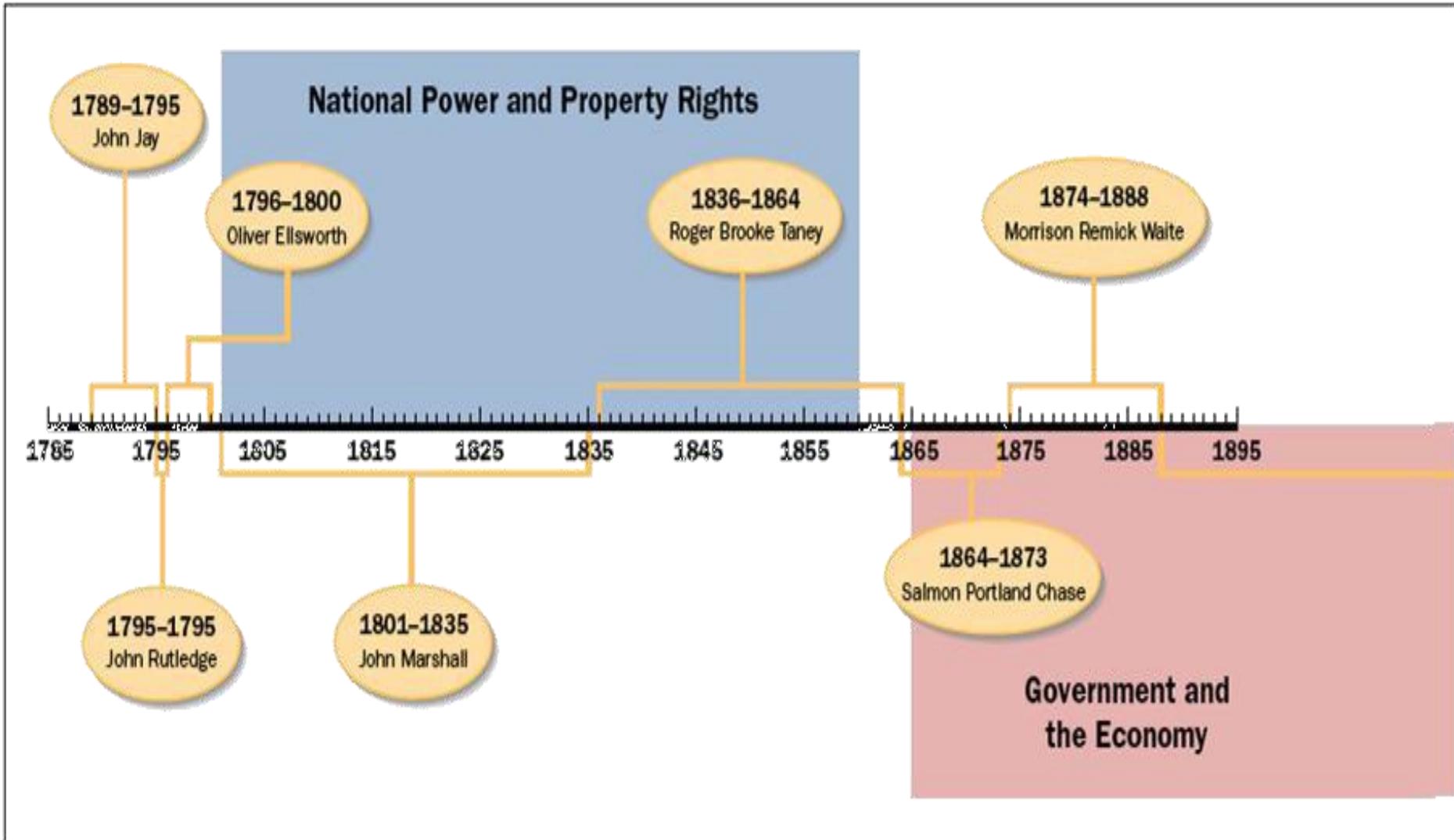


3 **Hosanna-Tabor v. EEOC**

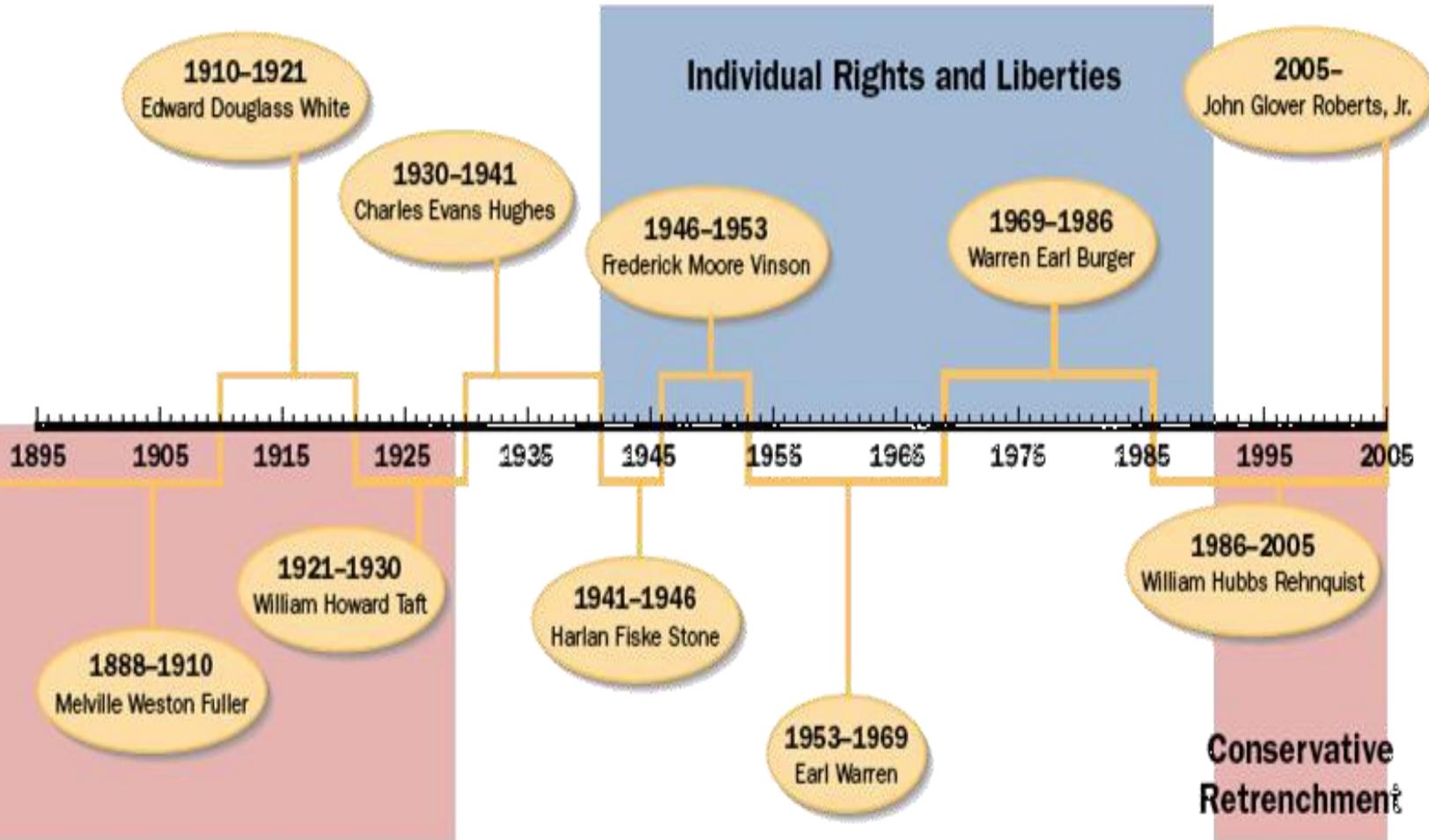
DECISION (January 2012): Churches and religious groups have tight control over who they employ in any religious capacity.



Timeline: Chief Justices, 1789-2007



Timeline: Chief Justices, 1789-2007



The US National Court System



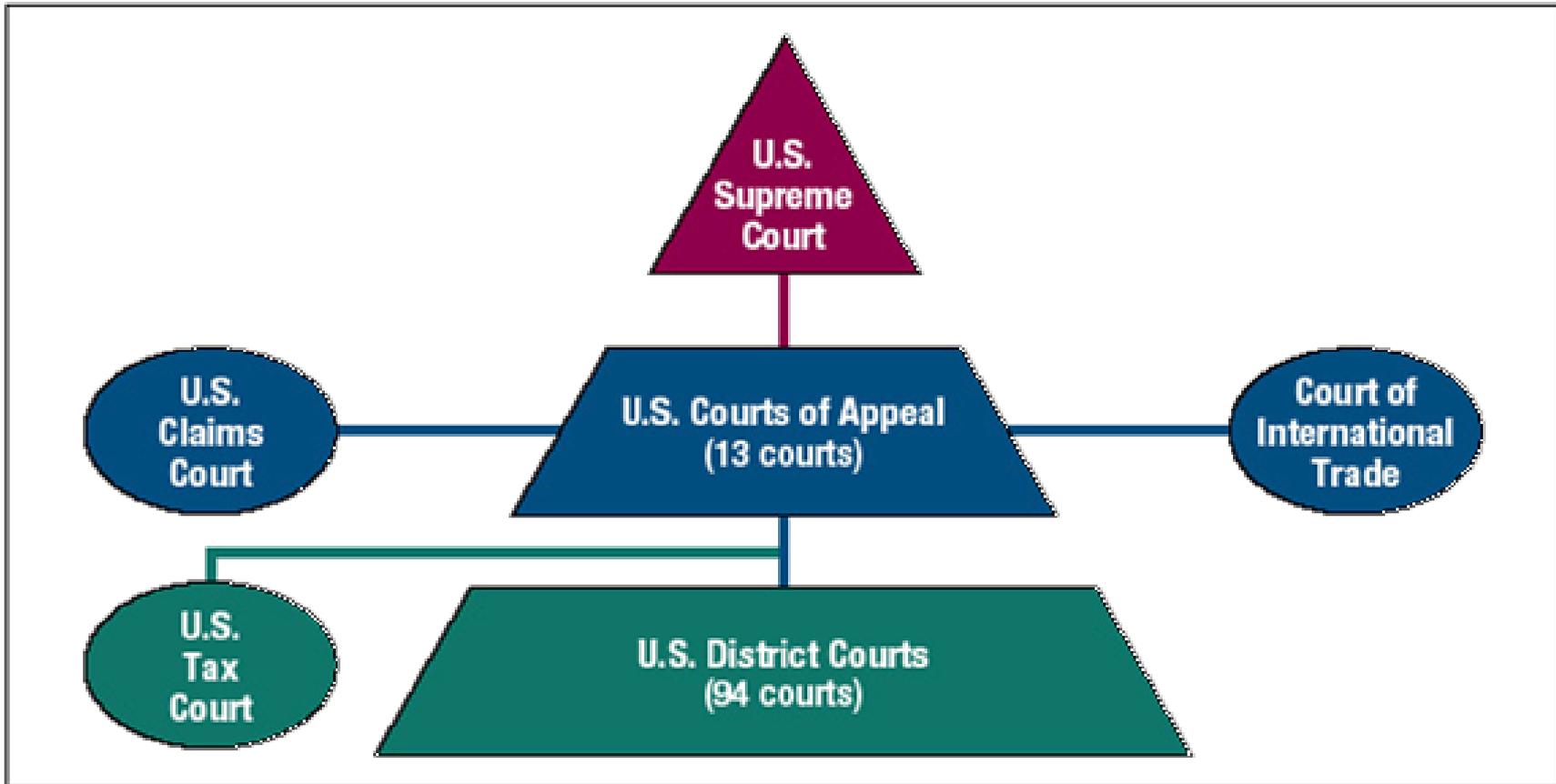
Most of the work of the national judicial branch is carried out by the lower-tier courts.

- **district courts**: lowest level of the national court system and the courts in which most national trials are held
- **appeals courts (Circuit Courts of Appeals)**: courts to which decisions by national district courts are appealed



US Court Of Appeals for the Fifth Circuit

The US National Court System



The federal court system is a three-tiered pyramidal system, with the Supreme Court at the top. Below it are 13 federal courts of appeal and 94 district courts, with at least one district in each state. Additional courts exist to hear cases in highly specialized areas, such as taxes, international trade, and financial claims against the U.S. government.

Source: Administrative Office of the U.S. Courts.

The US National Court System: District Courts



...hear cases that

- involve the national government as a party
- present a national question based on a claim under the US Constitution, a treaty with another nation or a national statute
- involve civil suits in which citizens are from different states and the amount of money at issue is more than \$75,000



The US National Court System: District Courts



- 94 national district courts staffed by 646 active judges, assisted by more than 300 retired judges
- Most cases in the national court system are first heard in one of the district courts, and most of the business of the national courts takes place at this level.
- No district courts cross state lines.
- Every state has at least one national district court.
- Most populous states have four (CA, TX, NY).



The US National Court System: District Courts



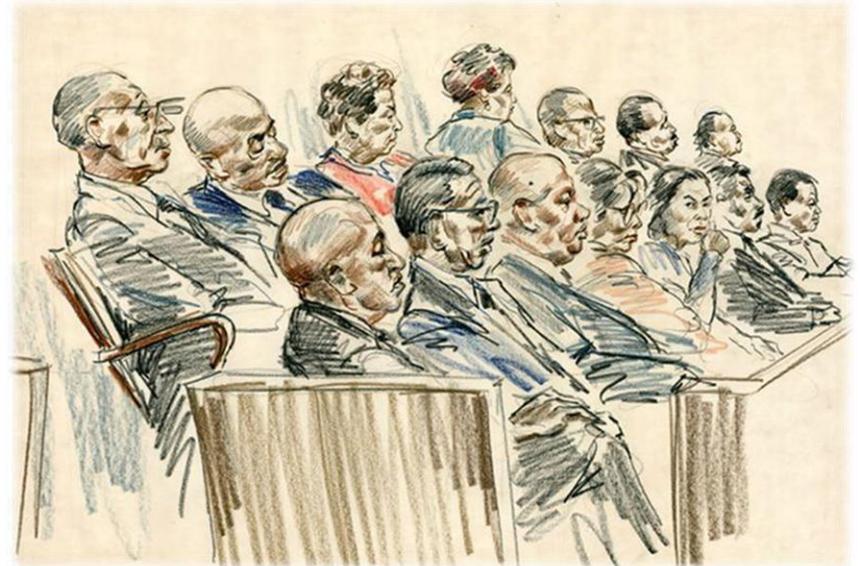
National district judges have many levels of support in order to fulfill their roles.

- Each judicial district has a **US attorney** nominated by the president and confirmed by the Senate ... the district's chief law enforcement officer ... has considerable discretion as to whether to pursue criminal or civil investigations, or to file charges against individuals or corporations ... very high political profile
- President and Senate select a **US marshal** to serve each of the district courts ... act much like county sheriffs in regard to national crimes.
- A **magistrate** is appointed by each district court judge to handle duties ranging from issuing warrants to setting bail in national criminal cases.
- Each district judge appoints one **bankruptcy judge** for his/her district.

The US National Court System: Circuit Courts



- Courts of appeal try to correct errors of law and procedure that have occurred in the lower courts or administrative agencies.
- The decisions of these courts determine the meaning of laws for the people who live in the states covered by each circuit court.
- Sometimes particular circuit courts play an important role in changing constitutional interpretation.



The US National Court System: Circuit Courts



- The losing party in a case heard and decided in a national district court can appeal the decision to the appropriate court of appeals.
- 11 **geographic circuit courts** hear appeals from the district courts.
- A 12th appeals court, the **DC Court of Appeals**, handles most appeals involving national regulatory commissions and agencies.
- A 13th appeals court, the **US Court of Appeals for the Federal Circuit**, is located in Washington, DC and deals with patents and contracts, and financial claims against the national government.
- Courts of appeal are **appellate courts** ... hear only cases on appeal, not new cases (no original jurisdiction) or new testimony.

The US National Court System: District and Circuit Courts



This map shows the locations of the U.S. courts of appeals and the boundaries of the federal district courts in states with more than one district.

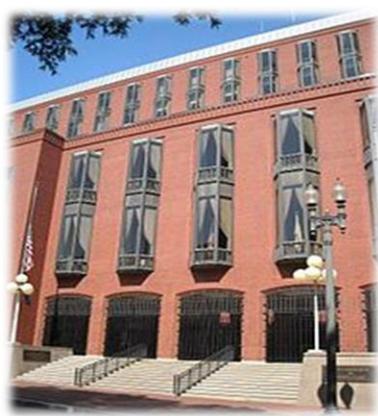


The US National Court System: Specialized Courts



US Court of International Trade
(James K. Watson Courthouse)
One Federal Plaza, NY NY

- **The Court of International Trade:** handles cases concerning trade and customs



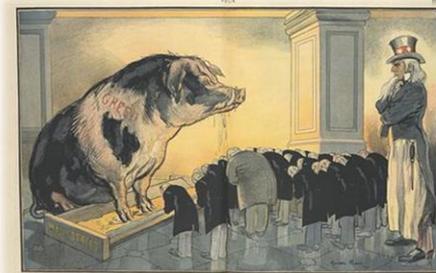
US Court of Federal Claims
on Madison Place in
Washington DC

- **US Court of Federal Claims:** special trial court with nationwide jurisdiction which hears cases concerning national contracts, money damages in excess of \$10,000 against the US, national takings of private property for public use, rights of military personnel and other issues that involve the national government ... With the approval of the Senate, the President appoints US Court of Federal Claims judges for fifteen-year terms.
- **US Bankruptcy Courts:** hear and administer matters that arise under the Bankruptcy Code ... unit of district court and technically hear cases referred by district court but for most practical purposes function as separate administrative units

National Judges: The Appointment Process



- National judges are appointed by the president and confirmed by the Senate to (almost all) lifetime positions.
- **senatorial courtesy**: an informal rule that the Senate will not confirm nominees within or from a state unless they have the approval of the senior senator from that state from the president's party
- **increasingly contentious process**: tension between president's need for Senate confirmation and desire to appoint judges who share his ideology
- **increasingly lengthy process**: time for Senate confirmation has grown considerably ... When Senate and president are from different parties, Senate often simply doesn't hold a vote.
- **increasing numbers of national judicial vacancies unfilled**
- **Federal Judicial Nominations: 9 Steps from Vacancy to Confirmation**



National Judges: The Appointment Process

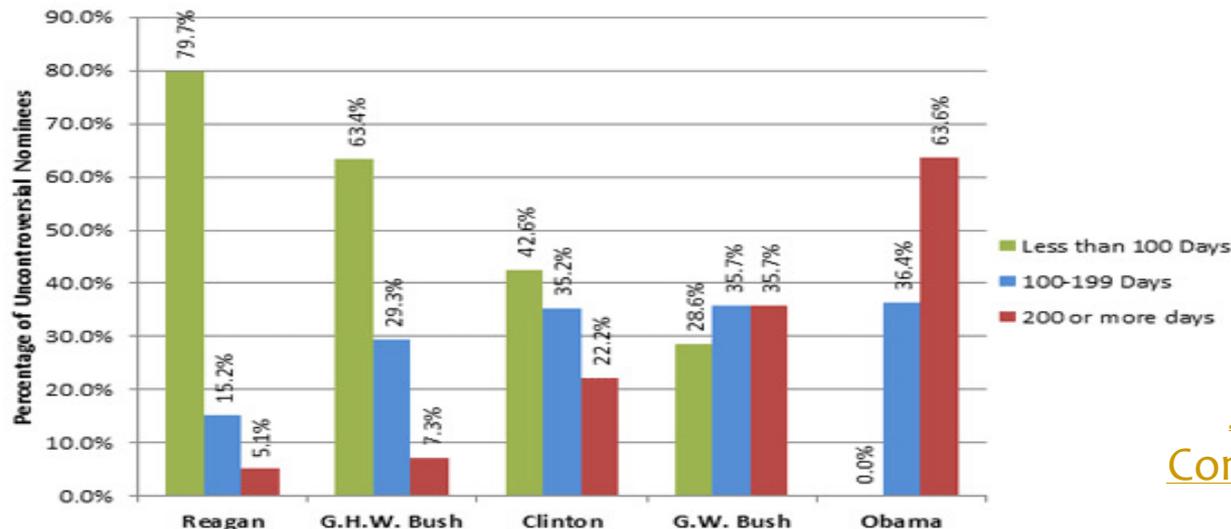


Percent of all judicial nominees confirmed in first 14 months



Source: Center for American Progress, July 30, 2010

WAITING TIMES NOMINATION TO CONFIRMATION FOR UNCONTROVERSIAL NOMINEES TO THE FEDERAL APPEALS COURTS



Judicial Nominations and
Confirmations: Fact and Fiction

Source: Congressional Research Service

National Judges: The Appointment Process



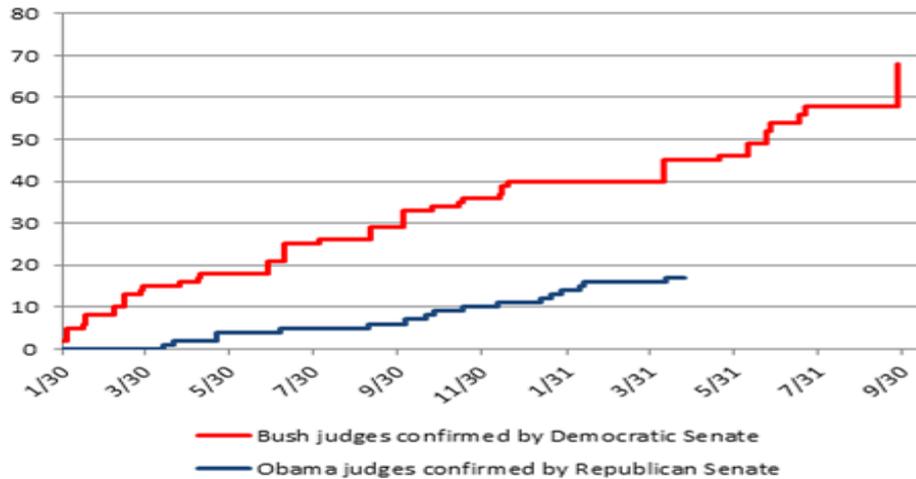
Conflict over the appointment of national judges, especially circuit judges, has escalated due in part to the fact that White House has played an increasing role in selection process since the late 1970s.

- When GW Bush assumed presidency he inherited a sizable number of vacancies because many of Clinton's judicial nominees went without Senate confirmation toward end of his term.
- Obama faced opposition from Republicans, who frequently used filibusters to block even uncontroversial nominees, and from Senate Judiciary Committee chair's strict interpretation of arcane committee traditions ... example: In 2016 there were 70 national judicial vacancies. President made 68 appointments. Senate voted on and confirmed only 11 before adjourning, plus 34 new vacancies occurred.
- Of 870 national judicial positions, Trump inherited 108 vacancies. Few incoming presidents have had opportunity to make that many appointments at the start of an administration.
- [Instead of Protecting US Judiciary, Senate Republicans Fighting to Help Trump Transform It \(PDF\)](#)

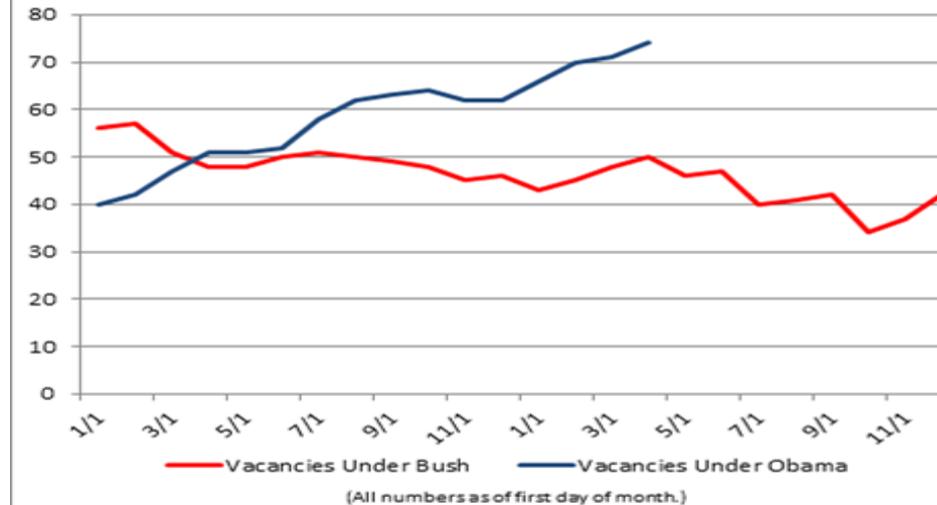
National Judges: The Appointment Process



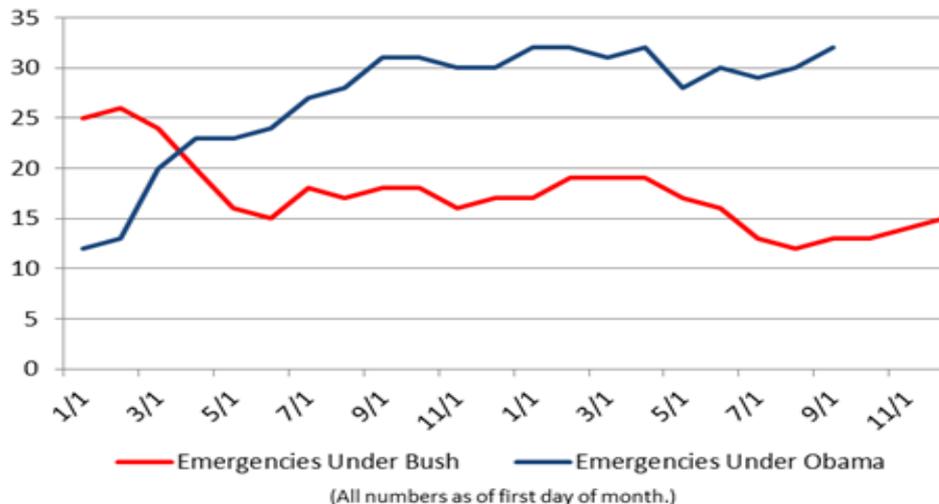
Circuit and District Court Judges Confirmed in Last Two Years of Presidency



Judicial Vacancies in Last Two Years of Presidency



Judicial Emergencies in Last Two Years of Presidency

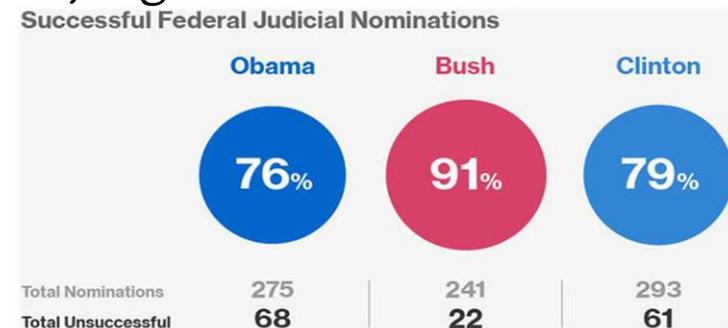


judicial emergency: formal designation assigned by the Administrative Office of US Courts for vacancies where the caseload per judge is so high that it endangers access to justice

National Judges: The Appointment Process



- Judicial appointments have become extremely important to presidents.
- National judges continue to make or break policy long after the presidents who appointed them have lapsed into history. (Evidence to suggest Reagan made a point of selecting younger judges for purpose of prolonging his judicial legacy.)
- But presidents often disappointed by the rulings of their appointees ... example: Warren Burger overrode Nixon's claim of executive privilege.
- Increasingly important to presidents to choose and win confirmation of the right judges since those judges can have an important and lasting impact.



National Judges: The Appointment Process



Cass Sunstein: 15-year study of how different the judicial outcomes are in national *regulatory* challenges, depending on whether the judges were appointed by a Democratic or Republican president

- When affected *industry* challenges a rule, *Republican* appointees are significantly more likely than Democratic appointees to vote to strike down that rule.
- When *public interest group* challenges a rule, *Democratic* appointees are significantly more likely than Republican appointees to vote to strike down that rule.
- Judges' likely votes are greatly *affected by the positions of their colleagues*. Sitting with two fellow Republican appointees, a Republican appointee becomes even more likely to side with industry. Sitting with two Democratic appointees, a Democratic appointee becomes even more likely to agree with a public interest group.

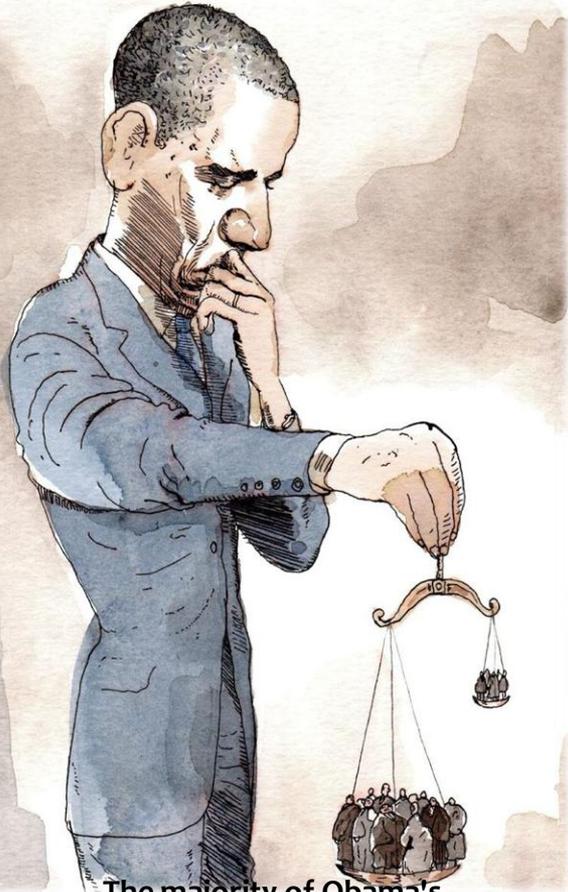
National Judges: The Appointment Process



- In selecting judicial nominees, presidents employ a **mix of criteria** that includes
 - objective merit
 - party loyalty
 - personal friendship
 - demographic diversity
 - agreement with the president's basic political and constitutional philosophy
- For their part, judges themselves tend to attribute their appointment to a combination of political participation, professional competence, personal ambition and luck.
- Though the relative importance of these factors is in no way fixed, **judicial philosophy weighs heavily.**



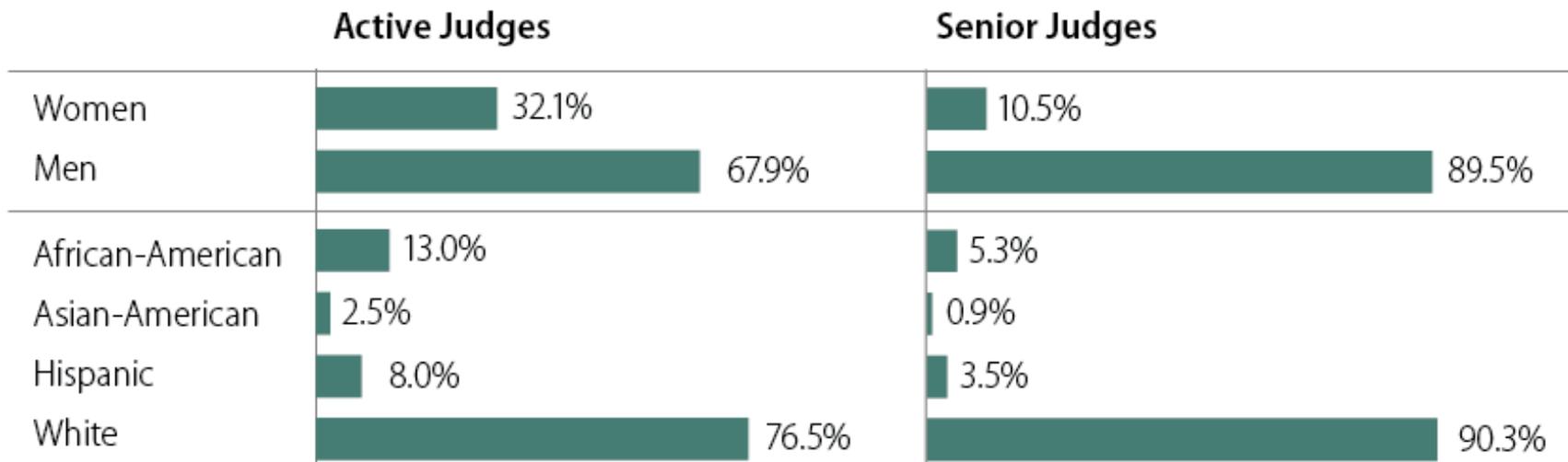
National Judges: Who are they?



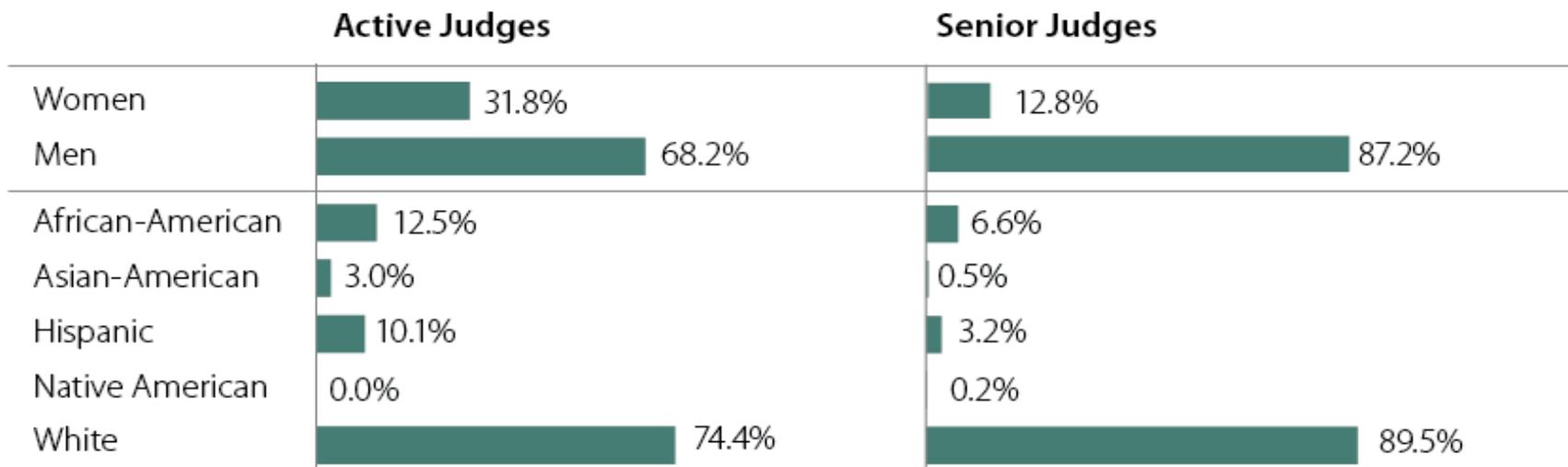
The majority of Obama's appointments have been women and nonwhite males.

- Though not required by the Constitution, typically only **attorneys** are eligible.
- Until recently, appointees have had little judicial experience.
 - With increased partisanship, there is increased interest in evidence of the judicial philosophy of nominees.
- mostly from **privileged** backgrounds
- mostly **white male**
- historically mostly **Protestant** ... currently somewhat diverse in terms of religion
- Typically they have **held other political offices**: state court judge or prosecutor
- Most have been **involved in politics**.

National Judges: Who are they?



Percentage of Active and Senior US Circuit Court Judges

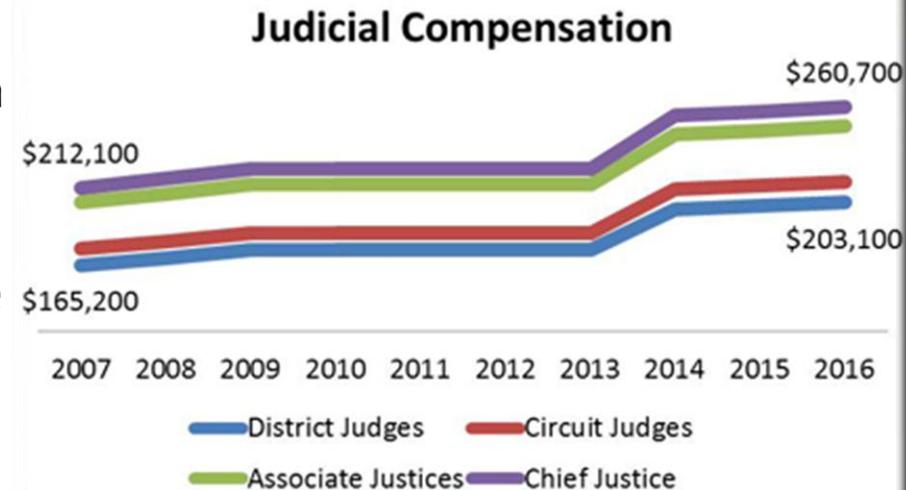


Percentage of Active and Senior US District Court Judges

National Judges: Tenure and Salary



- Founders believed **life tenure** for judges was essential to the system of separation of powers.
- Can only be removed by Congress through the **impeachment** process and standards are very high.
- Congress is not allowed to lower salaries but judicial **compensation** may not have kept pace with inflation.
- At one time, shorter **work hours** may have been an advantage.
 - Civil and criminal filings in national courts are substantially higher than they were 20 years ago.
 - The number of judicial vacancies in recent years has contributed to the increase in the workloads of sitting judges.



Judicial Philosophy



- ...the way in which a judge understands and interprets the law
- Laws are universal, but they must be applied to particular cases with unique circumstances. To do this, judges interpret the law (both constitutional and statutory), determining its meaning and sometimes the intent of those who wrote it.
- main types of contrasting judicial philosophies:
 - **judicial activism vs. judicial restraint**
 - **loose constructionism vs. strict constructionism**
 - **living document vs. original intent**
- All judges, regardless of their philosophy, develop their own methods of reading the Constitution.



Judicial Philosophy



Labeling judicial philosophies is even more hazardous than labeling political philosophies.

- The general population might not have a complete **understanding of the job judges do** ... the intricacies of statutory interpretation and common law jurisprudence are complicated. Any attempt to label different methods for deciding cases is likely to be overbroad and inaccurate.
- Possibly because it is so hard to define a judicial philosophy in simple terms, there is a tendency for the general population to **correlate certain judicial philosophies to certain political philosophies**: an activist judge, for example, is thought to be politically liberal. This is not always correct.

Judicial Philosophy



- As public perceptions of the national judiciary become more politicized, the **legitimacy of its power becomes clouded** and the courts are perceived as just another political institution making political decisions. That perception is dangerous.
- When all is said and done, studies seem to indicate the a judge's **political philosophy** - not judicial philosophy - provides the larger influence on decision-making and the latter may simply be an excuse for the former.
- A theory of constitutional interpretation that **ignores consequences** is no more satisfactory than one that ignores the political importance of **building a bridge** between the contemporary judge's pronouncement and some authoritative document from the past. It is difficult to argue to Americans that in evaluating a political theory they should ignore its practical consequences.



continued in The Courts and The Judiciary Part III



Mike Keefe THE DENVER POST 2004

