Research Note

PRESIDENTIAL EFFECTS ON CRIMINAL JUSTICE POLICY IN THE LOWER FEDERAL COURTS: THE REAGAN JUDGES

C. K. ROWLAND
DONALD SONGER
ROBERT A. CARP

Scholarly and media accounts have portrayed the Reagan administration as strongly committed to the selection of judges who are ideologically in tune with the president. Interviews with key congressional participants indicate that Reagan has received substantial home-state support for his ideological selection criteria. These findings lead to the prediction that Reagan judges on the lower federal courts will be substantially less supportive of criminal defendants than will Nixon or Carter appointees. Analysis of each appointment cohort's criminal justice decisions confirms this expectation for the district courts and courts of appeals. Indeed, the degree of polarization between the Reagan and Carter cohorts is unprecedented. However, this difference was due to the unexpectedly high support for criminal defendants exhibited by Carter appointees as well as the predicted low support provided by Reagan judges.

I. INTRODUCTION

By the end of his second term, Ronald Reagan will have appointed a majority of the lower federal judiciary in active service (Goldman, 1985: 314). However, as to the important question of whether his appointees will engender a change in the courts' allocation of value and privilege, Goldman (ibid., p. 327) notes that the "answer must await systematic empirical analysis." In response, we systematically compare levels of support for criminal defendants among Nixon, Carter, and Reagan appointees to the lower federal courts.[1] Because the empirical and theoretical foundations

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[1] We have omitted direct reference to the Kennedy, Johnson, and Ford

of accumulated research suggest that the key to understanding adjudicatory differences among appointment cohorts is understanding differences in the politics and ideological criteria of appointment, we first review briefly the literature on presidential appointment effects and describe the appointment policies of Nixon, Carter, and, in greater detail, Reagan. Then we estimate Reagan appointment effects by comparing his appointees' support for criminal defendants with that of Nixon and Carter appointees between 1981 and 1984.

II. PRESIDENTIAL EFFECTS ON CRIMINAL JUSTICE DECISIONS

Differences among appointing-president cohorts' support for criminal defendants have been consistent and significant since 1968. They have been most pronounced on the courts of appeals. In separate studies, Goldman (1975) and Gottschall (1983) found Johnson appointees to be more than twice as supportive of criminal defendants' claims as Nixon appointees. Gottschall (1983) also found that Carter appointees to the appellate courts were more supportive of criminal defendants than were the appointees of other Democratic presidents or Nixon appointees. Because these studies were limited to published, nonunanimous opinions, they were cautiously interpreted as indicating that policy predilections selected in the appointment process have an effect when the fact/law stimuli are sufficiently ambiguous to engender disagreement among judges hearing the same case (Songer, 1982a; 1982b). This conclusion was recently reinforced by a study (Gottschall, 1986) that distinguished unanimous from nonunanimous criminal justice opinions and found that Carter appointees were about 60 percent more supportive of criminal claimants than were Reagan appointees for all cases (55% versus 34%, respectively), but almost twice as supportive in nonunanimous decisions (61% versus 31%, respectively).

Because all district court judgments are "unanimous," one might expect weaker presidential effects on criminal judgments at the trial court level. This expectation is reinforced by early studies of the federal trial courts (Walker, 1972) and by the fact that presidents' district court nominations are more constrained by the preferences of home-state influences than are their appellate nominations. However, recent work indicates that, while less pronounced than at the appellate level, presidential effects on pub-

cohorts for several reasons. First, information about the Ford appointment strategy is extremely limited. Second, anecdotal evidence suggests that many Ford nominees were actually selected during the Nixon administration and processed by the Ford administration. Finally, an attempt to include Kennedy and Johnson appointees revealed that less than 20% of the former and 33% of the latter remained active on the bench in 1984. Moreover, these survivors did not approximate random samples of the original cohorts.

lished outcomes remain statistically and substantively significant at this level (Carp and Rowland, 1983). In one study (Rowland *et al.*, 1984), the support for criminal defendants by Johnson appointees was more than 60 percent greater than the level of support by Nixon appointees (39% versus 24%, respectively), and almost 50 percent greater than the level of support by Kennedy appointees. Moreover, differences among appointing-president cohorts actually increased under controls for region and state.

The research summarized above leads us to anticipate differences in support for criminal litigants between Reagan appointees and the appointees of his predecessors and to expect these effects to be more pronounced for nonunanimous appellate judgments than for unanimous appellate or trial judgments. The quality and quantity of these differences can be anticipated by comparing the administrations' judicial selection strategies.

III. THE POLITICS OF APPOINTMENT

The Nixon administration, pursuant to its 1968 campaign pledge to appoint "law and order" judges to the federal courts, systematically sought to eliminate from its appointment cohort judges found to be "soft" on the crime issue (Gottschall, 1983). Despite the administration's criteria, a Democratic Senate and changes on the Senate Judiciary Committee (Slotnick, 1980; 1981) placed constraints on Nixon's ability to secure a "law and order" federal bench and forced him to compromise frequently with liberal home-state senators. In California, for example, he conceded every fourth district judge to Democratic Senators Alan Cranston and John Tunney in return for their support of his California nominees in the Senate (Jackson, 1974).[2]

Carter's commitment to affirmative action selection criteria and merit selection commissions focused public and scholarly attention on the process of selection (Slotnick, 1980, 1981; Neff, 1981; Berkson and Carbon, 1980) and increased the number of minorities and women appointed (Goldman, 1981). Although one study (Berkson and Carbon, 1980) concluded that candidates for appellate vacancies were questioned by judicial panelists about issues ranging from affirmative action to capital punishment, most students of the process have concluded that the Carter cohort ranged from moderate to liberal in general outlook and was heterogeneous in specific policy predilections (Goldman, 1981; Neff, 1981; Berkson and Carbon, 1980; Fowler, 1983). No scholarly evidence reveals a concerted ideological commitment by this administration to specific criminal justice predilections.

[2] See also the interview with Roy Greenaway of Senator Cranston's staff, Washington, D.C., March 4, 1986 (available from Rowland).

A. Reagan Appointment

In many ways the political roots of the Reagan appointment process can be traced to the 1980 Republican platform's promise to "secure the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens" (Republican Party, 1980: 11). The 1984 Republican platform reaffirmed this appointment philosophy, and commended Reagan's "fine record" of appointing federal judges, "committed to the rights of law-abiding citizens" (Republican Party, 1984: 9). Since 1984 Reagan has maintained his public commitment to "law and order" judicial appointments. As recently as October 1986 he warned that if the Democrats won control of the Senate, it would undermine his attempt to appoint tough federal judges: " 'We don't need a bunch of sociology majors on the bench. What we need are strong judges . . . who do not hesitate to put criminals where they belong, behind bars' " (*New York Times*, October 9, 1986: A3).

As his predecessors discovered, Reagan learned that a president's ideological appointment goals cannot be achieved without support from senators in general and home-state senators in particular. In this regard, until 1987 he benefited from a politically sympathetic Senate Judiciary Committee. Of particular importance is the commitment by home-state senators and Reagan supporters in several of the largest states to recruit judicial candidates who meet the Republican platform's appointment criteria. In California, for example, Republican Senator Wilson has established two nominating commissions in each of the state's four federal judicial districts; one is a "merit commission," the other a "political commission" to insure that those potential appointees found to be meritorious also have the appropriate conservative political and judicial philosophy (*Los Angeles Times*, February 21 and 22, 1986).[3] Moreover, Senator Wilson has abolished the longstanding agreement whereby the out-party's senators were allowed to choose every fourth judicial appointee in the state. Today Senator Cranston's staff learns the identity of nominees "when and if we are contacted by the FBI as part of its security check."[4]

Reagan's home-state ideological support extends to many states without Republican representation in the Senate. In many of these states the senior Republican congressman coordinates the selection of judicial candidates and forwards three to five names from which the White House can choose a legally and politically acceptable nominee. In Illinois, for example, this role is performed by Representative Robert Michel, the conservative House

[3] See also the interview with Ira Goldman of Senator Wilson's staff, Washington, D.C., February 17, 1986 (available from Rowland).

[4] See the interview cited in n. 2 above.

Minority leader,[5] whose presidential support score for 1985 was an exceptionally high 85 percent (*Congressional Quarterly Almanac*, 1985).

In states whose Republican representatives have been less supportive of the President, the tendency has been to circumvent elected officials by appointing informal selection committees whose membership includes representatives of the Reagan/Bush campaign organization. In Massachusetts, where Representative Silvio Conte's support score (36) was lower than those of many Democrats and barely half the 1984 Republican average (67) (ibid.), a selection panel is chaired by the chairman of the state's 1984 Reagan/Bush committee and includes as an ex-officio member Roger Moore, general counsel for the Republican National Committee.[6]

In combination, the Reagan administration's politicized appointment process and the history of appointment effects on criminal justice judgments lead us to anticipate a Reagan bench that is substantially less supportive of criminal litigants than are Carter or Nixon appointees seated at the same time. We now test this expectation.

B. Appointment Effects of Reagan

Support for criminal litigants is defined as acquittals, decisions granting the trial or pretrial motions of criminal defendants, and decisions granting state or federal habeas corpus relief. Each presidential cohort is assigned a criminal support score equal to the percentage of its decisions that support criminal defendants. We compute criminal support scores from random samples of 1,500 district court opinions published in the *Federal Supplement* and 1,500 appellate opinions published in the *Federal Reporter* between 1981 and 1984; however, to control for potential temporal effects and increase the number and comparability of Reagan appointees' opinions, we have stratified the sample to overrepresent 1983 and 1984 opinions.

Table 1 compares the criminal support scores of Nixon, Carter, and Reagan appointees on the district courts. These findings are of the sort predicted by previous research; moreover, the degree of polarization between Carter and Reagan appointees is unprecedented. In the aggregate Carter appointees are almost twice as supportive of criminal defendants as are Reagan appoin-

[5] See the interview with Sharon Yard of Representative Michel's staff, Washington, D.C., April 1, 1986 (available from Rowland).

[6] This panel recommended (and the president nominated) Douglas Woodlock, the attorney who had represented the antibusing Boston School Committee in a desegregation case that focused national attention on Boston and Judge Arthur Garrity, to replace Judge Garrity. See *Boston Globe*, Dec. 1, 1986; and the interview with Frank Conway, Chair, Massachusetts Federal Selection Committee, May 5, 1986.

Table 1. Percent Support for Criminal Litigants by Presidential Appointment Cohorts in the Federal District Courts, 1981–84

Nixon		Reagan		Carter
32 ($N = 499$)	$\hat{\alpha} = 1.49$* $p < .05$	24 ($N = 217$)	$\hat{\alpha} = 2.81$ $p < .01$	47 ($N = 784$)

* The cross-product ratio, frequently called the odds ratio, is a measure of the relative odds of respondents from each independent variable category being placed in a single dependent variable category. The odds ratio is computed for 2-by-2 tables by the formula: $(N_{11}/N_{21}) \div (N_{12}/N_{22})$. For an expanded discussion, see Reynolds (1977).

tees, a difference that would occur by chance less than one time in a thousand. The odds ratio (2.81) indicates that the relative odds of supporting the defendant are greater than two to one. The Nixon appointees, while less supportive of criminal litigants than Carter appointees, are significantly more supportive than are Reagan appointees. At first blush their moderate position might seem the result of the moderating influence of age or experience. However, studies of federal trial judges (Rowland and Carp, 1983) and Supreme Court justices (Segal, 1986) reveal virtually no maturation effects on civil liberalism. Thus, the most plausible explanation for the moderation of the Nixon cohort is that, despite Nixon's commitment to "law and order" appointments, his discretion was constrained by a Democratic majority in the Senate and moderate home-state Republican recruiters (Rowland *et al.*, 1984).

The ambiguous nature of many appellate case stimuli leads us to expect even greater presidential effects at this level and maximum presidential effects for dissenting decisions within that arena. Table 2 indicates that this expectation is fulfilled. Although both cohorts are reluctant to support criminal appeals, for the entire sample of appellate judgments the Carter appointees are almost twice as likely as Reagan appointees to support the criminal litigant. The probability of this disparity occurring by chance is less than one in a thousand.

As anticipated, the magnitude of presidential effects increases dramatically as dissension increases. Even for nonconsensual cases in which the entire panel votes to reverse the trial judge, the Carter cohort's support score (72) remains approximately 90 percent greater than the Reagan cohort's (37).[7] But, as indicated by the nonunanimous category, when judges who hear the same case disagree, the polarization between Reagan and Carter appointees is

[7] The elevated support score for all three cohorts reflects the fact that the vast majority of these disagreements between appellate panels and trial judges are reversals that favor the defendant.

Table 2. Percent Support for Criminal Litigants by Presidential Appointment Cohorts in the Federal Courts of Appeals, 1981–84

Cases	Nixon		Reagan		Carter
All	26 (N = 518)		17 (N = 213)		32 (N = 769)
		$\hat{\alpha}$ = 1.72[d]		$\hat{\alpha}$ = 2.30	
		$p < .05$		$p < .01$	
Unanimous[a]	11 (N = 286)		10 (N = 157)		15 (N = 537)
		$\hat{\alpha}$ = 1.10		$\hat{\alpha}$ = 1.59	
		p = ns[e]		p = ns	
Non-consensual[b]	54 (N = 151)		37 (N = 56)		72 (N = 232)
		$\hat{\alpha}$ = 2.00		$\hat{\alpha}$ = 4.38	
		p = ns		$p < .05$	
Non-unanimous[c]	35 (N = 136)		14 (N = 21)		67 (N = 102)
		$\hat{\alpha}$ = 3.31		$\hat{\alpha}$ = 12.47	
		$p < .05$		$p > .001$	

[a] Unanimous affirmation of trial court.
[b] Unanimous reversal of trial court.
[c] Split decision by three-judge appellate panel.
[d] The cross-product ratio, frequently called the odds ratio, is a measure of the relative odds of respondents from each independent variable category being placed in a single dependent variable category. The odds ratio is computed for 2-by-2 tables by the formula: $(N_{11}/N_{21}) \div (N_{12}/N_{22})$. For an expanded discussion, see Reynolds (1977).
[e] Not significant.

dramatic, suggesting that when appointees respond differently to the same stimuli, these differences parallel differences in the administrations' ideological appointment criteria.

As with their district court counterparts, Nixon's appellate appointees occupy a moderate position roughly equidistant from the polarized Carter and Reagan cohorts. The Nixon cohort's consistent moderation suggests that presidential compromises with the Democratic Senate and its Judiciary Committee had a moderating influence on Nixon's appointment strategies. However, this apparent moderation should not divert attention from the fact that, for nonunanimous decisions, his cohort's support score is more than double that of the Reagan cohort and barely half that of the Carter cohort. Thus, even though Nixon's appointment discretion was constrained, his appointment cohort remains statistically and substantively distinct.

IV. DISCUSSION

The polarization between Reagan and Carter appointees indicates that appointment effects on the lower courts are increasing and that they are maximized when the president's appointment discretion and his appointees' judicial discretion are maximized.

Moreover, our findings suggest that the contemporary polarization is a product of the Carter cohort's high level of support for criminal defendants as well as the Reagan appointees' low level of support. Thus, while the data constitute evidence that, yes, the Reagan administration's explicit, platform-based appointment criteria are reflected in its appointees' allocation of criminal justice values, they also suggest that implicit ideological criteria affected the allocation of values by the Carter appointees more strongly than would be predicted by most descriptions of the Carter appointment process. At the risk of oversimplication, it is difficult to avoid the observation that the differences in support resemble differences one would expect if Presidents Carter and Reagan were Judges Carter and Reagan.

Some implications of this research for future study are fairly obvious; for example, a comparison of Reagan effects before and after the 1987 shift to a Democratic Senate majority and the associated changes on the Senate Judiciary Committee (*Washington Post*, February 14, 1987) would help clarify the interaction between presidential and senatorial effects on judgment and jurisprudence. But the more important questions, such as why appointment effects persist in a common law system, will remain unanswered until they are accommodated by new theoretical developments.

If future research is to do more than chronicle incremental changes in the link between politicized appointment and judicial allocation of value, we should heed the calls of Jacob (1983) and others (Gibson, 1983; Boyum and Mather, 1983) and develop a theoretical framework that accommodates multiple levels of the dispute resolution process and synthesizes the disparate threads of current scholarship. Such a framework would, at a minimum, adapt from social and cognitive psychology the conceptual distinction between judgment and other forms of decision making and recognize cognitive constraints on the exercise of judgment (by judges and disputants) in response to ambiguous case stimuli (Hammond *et al.*, 1980; Segal, 1986). Such an adaptation will require careful operationalization of key concepts (e.g., ambiguity and judgment) and encourage methods, such as fact pattern analysis (Ulmer, 1969), not associated with contemporary judicial research. The effort will be time-consuming and arduous. The result, however, may significantly advance our understanding of judicial judgment and therefore our ability to understand the larger dispute resolution process and the influences of appointment politics on that process.

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