Br. J. Am. Leg. Studies 8 (Special Issue) (2019), DOI: 10.2478/bjals-2019-0008 sciendo

A Legacy Diminished: President Obama and the Courts

Clodagh Harrington*
Alex Waddan**

ABSTRACT

A central concern for any U.S. presidential administration is its relationship with the federal judiciary. For an administration, this relationship is potentially legacy making or breaking in two ways. First, what is the imprint that the administration leaves on the judiciary? Will a president have the opportunities and institutional capacity to change the political balance of the federal judiciary? Second, how will the judicial branch respond when the administration's policy plans are, as many inevitably will be, challenged in the court system? Will the administration's policy preferences be preserved and its agenda advanced, or will court decisions stymie important initiatives and restrict that agenda? This paper examines these questions with regard to the Obama administration's record. The Obama era saw new levels of diversity in terms of judicial nominees and the courts did sometimes uphold key aspects of the Obama administration's program to the chagrin of conservative opponents. Yet, with the benefit of two years hindsight, the evidence suggests that the Obama administration's legacy with regard to both the central questions addressed in the paper was a diminished one. The administration's capacity to reorient the federal bench was thwarted by the legislative branch, notably obstruction in Senate, with the consequences of that frustration highlighted by the rapid actions taken by the Trump administration and Senate Republicans in 2017-18. Furthermore, on balance, the decisions made by the federal judiciary on matters of significant concern to the Obama White House weakened rather than strengthened the administration's legacy.

KEYWORDS

Obama, Supreme Court, Federal Judiciary, Presidential Legacy

CONTENTS

* Associate Professor, Department of Politics, De Montfort University
** Associate Professor, School of History, Politics & International Relations, University of Leicester.

© 2019 Clodagh Harrington, Alex Waddan, published by Sciendo.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

I. Introduction

As the United States Senate completed the confirmation process and affirmed Brett Kavanaugh as a Supreme Court Justice in October 2018 Republicans were justifiably satisfied that they had locked in a conservative majority on the Supreme Court for the foreseeable future. Moreover, in addition to the nomination and confirmation of Kavanaugh and Neil Gorsuch to the Supreme Court, the Trump administration and Senate Republicans had made rapid progress in filling judgeships elsewhere on the federal bench.[1] For conservatives this raised the prospect of the judicial branch of government making supportive rulings on a range of issues, potentially including restrictions on access to abortion services; further limiting the scope of affirmative action programs; prioritizing gun rights over gun control, and placing limits on the power of labor unions. For liberals, this demoralizing narrative highlighted how, over two terms, President Obama had not been able to transform the federal bench, and particularly the Supreme Court, in a manner that they would have preferred. Furthermore, the judicial branch had sometimes thwarted key policy initiatives advanced by the Obama administration, notably with regard to expanding the Medicaid program and liberalizing immigration rules for many undocumented aliens. On the other hand, the Obama years did leave a distinct imprint on the make-up of the federal bench, notably increasing diversity, and the courts did make rulings that advanced the administration's agenda. In order to make sense of the interaction between the Obama administration and the federal judiciary this article examines that relationship in two ways, looking at Obama's legacy for the courts and also at how the judicial branch enhanced or diminished his administration's wider political and policy legacy. On both counts, the record we discuss is a mixed one and there is no clear way in which the wins and losses can be scored. However, the events in the two years following Obama's departure from office lend weight to the view that his imprint on the courts was limited and that his domestic policy legacy was diminished more than it was enhanced as a consequence of its entanglements with the judicial system.

II. Courting Liberalism

The Supreme Court's move in a conservative direction contrasted with the reputation the court had developed in the post war period. In the third quarter of the twentieth century the Supreme Court made a series of decisions that expanded rights in ways that mostly coincided with liberal preferences, even if they were not always causes that liberal political actors publicly embraced at the time. These cases ranged from civil rights in *Brown v. Board of Education* in 1954[2], to criminal rights in *Miranda v. Arizona* in 1966[3] and reproductive rights in *Roe v. Wade* in 1973.[4] This last case, of course, has remained at the center of a political storm ever since, with the pro-life

---

1 Kevin Schaul & Kevin Uhrmacher**,** *How Trump is Shifting the Most Important Courts in the Country*, Wash. Post (Sept. 4, 2018).

2 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

3 Miranda v. Arizona, 384 U.S. 436 (1966).

4 Roe v. Wade, 410 U.S. 113 (1973).

movement anxious to re-litigate and over turn that ruling. Other decisions, notably *Engel v. Vitale* in 1962,[5] which effectively prevented organized prayer in public schools, also antagonized cultural conservatives.

Moreover, further reinforcing the impression that the judiciary had its finger on the liberal side of the political ledger, after its initial clashes with the Roosevelt administration, the Supreme Court had steered away from challenging the expansion of the federal administrative state. Hence a plethora of regulatory bodies arose, "composed of a diverse set of institutions-agencies, commissions, and executive departments-that, together, seem to sprawl over just about every facet of modem life".[6] The understanding that federal agencies were to be given wide discretionary authority seemed to be confirmed in 1984 in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[7] In that case, which in fact upheld a deregulatory move by the Reagan administration to reverse a rule issued by the Environmental Protection Agency during the Carter presidency, the Supreme Court ruled that executive agencies had leeway to interpret rules in cases of statutory ambiguity. At the time the Supreme Court, at least, did not see its own actions in establishing this precedent as controversial,[8] but by the end of the Obama presidency congressional Republicans saw the principle of so-called Chevron deference as a bulwark of the regulatory state that constituted a violation of the separation of powers.[9]

The importance of these decisions helped sustain the impression that the Supreme Court represented a bastion of liberalism beyond the 'sell by' date for that notion. The Supreme Court's relatively consistent, though not absolute, siding with liberal preferences in potentially divisive and politically salient cases had ended by the mid-1980s at the latest: Yet, the subsequent court, led by Chief Justice William Rehnquist did not always counterpunch in a conservative direction,[10] and some Justices, even though nominated by Republican presidents, proved less than reliably conservative. In particular, President George H. W. Bush's nominee, David Souter, was regarded as a liberal stalwart by the time he left the Court. In addition, Reagan nominee Sandra Day O'Connor was a genuine 'swing justice' in terms of siding with the liberal and conservative blocs and, even though Justice Anthony Kennedy was a more regular conservative than his reputation as a swing justice sometimes implies, he was a critical vote with liberals on matters of same sex rights in particular, as well as reproductive rights. In fact, Kennedy's time on the court does illustrate the potentially decisive role of each individual justice, showing how his or her singular views can be of major consequence. Kennedy's ascent to the Court came after Reagan's original nominee for the court's vacancy, Robert Bork, was rejected by the Senate. Bork, who later helped draw up a proposed constitutional amendment calling for marriage to be defined as a union between

---

5 Engel v. Vitale, 370 U.S. 421 (1962).

6 J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & Pol. 243 (2017).

7 Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

8 Alan B. Morrison, *Chevron Deference, Mend It, Don't End It*, 32 J.L. & Pol. 293-304 (2017).

9 Paul R. Verkuil, *Properly Viewed, Chevron Honors the Separation of Powers*, The Hill, (June 26, 2016, 06/23/16 03:45 PM EDT), https://thehill.com/blogs/congress-blog/judicial/284643-properly-viewed-chevron-honors-the-separation-of-powers.

10 Robert R. Robinson, *The Relative (Un)importance of Rehnquist Court Decisions*, 38 (5) Politics & Policy, 907 (2010).

a man and a woman,[11] would certainly have been a stronger voice advocating for cultural conservatism than Kennedy.[12]

President George H W Bush's legacy in terms of Supreme Court nominees and their ideological imprint was also mixed. As well as the liberal Souter, Bush nominated Justice Clarence Thomas, who has proved to be a profoundly conservative voice. By the time the younger Bush entered the White House the conservative legal movement was thoroughly aware of the importance of getting its favorites onto the federal bench, with the Federalist Society acting as a hothouse for conservative legal minds.[13] Executive Vice-President Leonard Leo explained that a guiding priority was that the judiciary provide "structural restraints on the power of government", which laid down a challenge to the spread of the administrative state.[14]

In practical terms, the Federalist Society was determined to ensure that there were "No More Souters".[15] When Bush nominated Harriett Miers to the Supreme Court in 2005, the fact that the Federalist Society did not give her its blessing was one of the reasons why conservatives so quickly turned on her.[16] In the end, Bush's two confirmed nominees to the Court, John Roberts and Samuel Alito, were both endorsed by the Federalist Society. Hence, the Supreme Court that greeted President Obama seemed likely to be an inhospitable one should his administration choose to use federal authority in a legally questionable manner.

Before moving on to look at how the Obama administration fared when arguing its corner before the judicial branch, it is important to examine the impact the administration made on the federal bench. Did his nominees to the Supreme Court turn out to be liberal versions of Clarence Thomas or of David Souter? Further, to what extent did Obama bring change to the wider federal bench?

III. The Supreme Court

A. Justices Confirmed: Sotomayor and Kagan

Obama's worldview did not prioritize bringing change through judicial action,[17] and his administration got off to a slow start in filling vacancies on the bench.

---

11 Daniel K. Williams, God's Own Party: The Making of the Christian Right (2012).

12 Joel Dodge, *Why We Live in Anthony Kennedy's America, Not Robert Bork's,* The Hill, (07/02/18 02:30 PM EDT), https://thehill.com/opinion/healthcare/395178-why-we-live-in-anthony-kennedys-america-not-robert-borks

13 Michael Avery & Danielle McClaughlin, The Federalist Society: How Conservatives Took the Law Back from Liberals, (2013); Amanda Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution, (2015).

14 Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, New Yorker, (Apr. 17, 2017).

15 Jeff Greenfield, *The Justice Who Built the Trump Court*, Politico, (July 9, 2018), https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953.

16 *Id*. at 14.

17 Risa L. Goluboff, & Richard Schragger, *Obama's Court?* in The Presidency of Barack Obama: A First Historical Assessment 78 (Julian E. Zelizer ed. 2018).

On the campaign trail he had talked of the need for judges to have "empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old —and that's the criteria by which I'll be selecting my judges." This statement was mocked by conservatives who insisted judges should apply the law rather than re-interpret it based on their own experiences,[18] but the sentiment did reflect Obama's desire to bring significantly more diversity to the federal bench. As it was, Obama quickly got the chance to make two nominations to the Supreme Court itself.

The two openings that came up, however, were never going to be transformational in terms of the Supreme Court's political and philosophical balance as both retiring justices were associated with the liberal wing of the court. This was the case even though both retirees had been nominated by Republican presidents. One was Souter and the other was John Paul Stevens. The latter had joined the court in 1975 after being nominated by President Gerald Ford, and was the third longest serving justice in court history when he retired aged 90. He described his "general politics" as "pretty darn conservative", but his jurisprudence was regarded as firmly in the liberal camp.[19] As his picks to replace these two, Obama chose only the third and fourth women to serve on the Court. First, he settled on Sonia Sotomayor, a judge serving on the U.S. Court of Appeals for the Second Circuit, and followed this by nominating Elena Kagan, who was then the administration's Solicitor-General.

Sotomayor, aged 55, became the first Latina on the Court. She had a record of acknowledging that her personal story impacted on her judicial decision-making. For example, in a public lecture in 2001 she noted, "Personal experiences affect the facts that judges choose to see", adding, "I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage."[20] She backtracked from these sentiments during her confirmation hearings, but some Republicans used such statements to revisit "empathy" wars and question whether she had an appropriate temperament for the Supreme Court. Then Senate Minority Leader Mitch McConnell of Kentucky argued, "judges are supposed to be passionate advocates for the even handed reading and fair application of the law, not their own policies and preferences".[21] Nevertheless, Sotomayor picked up a handful of Republican votes on her way to being confirmed by a margin of 68 to 31 votes.

Elena Kagan's nomination did in fact provoke some murmurs of liberal discontent from those hoping for a more radical nominee and concerned that she did not have a long paper trail of judicial decisions substantiating her liberal credentials.[22] In her confirmation hearings, however, Kagan, then aged 50, was explicit about

---

18 Robert Alt, *Sotomayor's and Obama's Identity Politics Leave Blind Justice at Risk*, US News and World report, (May 27, 2009), https://www.usnews.com/opinion/articles/2009/05/27/sotomayors-and-obamas-identity-politics-leave-blind-justice-at-risk.

19 Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N. Y. Times Magazine, Sept. 23, 2007,, https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

20 Sheryl G. Stolberg, *Sotomayor, A Trailblazer and a Dreamer*, N.Y.Times, May 26, 2009, https://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html.

21 Alex Isenstadt, *GOP Goes on Attack Against Sotomayor*, Politico, June 24, 2009, https://www.politico.com/story/2009/06/gop-goes-on-attack-against-sotomayor-024112?o=1.

22 Joshua Green, *Why Liberals Don't Trust Kagan*, The Atlantic, May 13, 2010, https://www.theatlantic.com/politics/archive/2010/05/why-liberals-dont-trust-kagan/56641/.

her partisanship, stating "I've been a Democrat all my life, my political views are generally progressive" though adding that "personal preferences" would not affect her decision-making.[23] In the end, she was confirmed by 63 votes to 37.

With these two choices President Obama did at least maintain the liberal presence on the Supreme Court. In some of the contentious political decisions Kagan has sided with the conservatives, notably in ruling against the Medicaid expansion as part of the Affordable Care Act in 2012 (see below) and in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018,[24] although in the latter case she is credited with persuading the court's majority to make a narrow ruling that did not establish wide precedent.[25]

Overall, Sotomayor and Kagan have proved to be liberal picks, if reflecting the slightly different positions taken by President Clinton's two nominees to the Court, with Sotomayor tending toward the liberal lion that is Ruth Bader Ginsburg and Kagan allying with the slightly more moderate voice of Stephen Breyer. In the term that began in October 2017 Sotomayor and Kagan voted together 91% of the time. That compared with Sotomayor and Ginsburg siding together in 96% of cases and Kagan and Breyer in 93% of decisions. For context, both Sotomayor and Kagan were least likely to vote with Justice Alito at 49% and 57% respectively.[26] In addition, Sotomayor has developed a reputation for scathing dissents when on the losing side of Court decisions, with this on very public display as she railed against the majority in *Trump v. Hawaii*.[27] In sum, despite their differences, Obama's two confirmed nominees are likely to be clear and assertive voices for the liberal wing of the Court for the foreseeable future, and have given a stronger voice to women on the bench.[28]

B. A Justice Denied

Justice Scalia's death presented President Obama with the apparent opportunity to change the political balance on the Supreme Court. However, the 2014 elections had left Republicans with a majority in the Senate, and Mitch McConnell made it plain that although Merrick Garland was a relative moderate,[29] he would not get consideration in the Senate Judiciary Committee, never mind a vote on the Senate floor.[30]

---

23 Ariane de Vogue & Devin Dwyer, *Hearings Give Glimpse of Kagan's Views on Hot Issues*, ABCNEWS, (June 30, 2010, 3:12 PM,), https://abcnews.go.com/Politics/Supreme_Court/elena-kagan-issues-supreme-court-hearings-give-glimpse/story?id=11052847.

24 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. __ (2018).

25 Kate Shaw, *Why Did Liberals Join the Majority in the Masterpiece Case?*, N. Y. TIMES, June 5, 2018.

26 SCOTUSblog Statistics, http://www.scotusblog.com/statistics/.

27 Trump v. Hawaii, 585 U.S. __ (2018); David Fonata, *Justice Sotomayor Is Showing Her Liberal Peers on SCOTUS How to Be a Potent Minority Voice,* VOX, July 7, 2018, https://www.vox.com/the-big-idea/2018/7/6/17538362/sotomayor-kennedy-retirement-liberal-wing-dissent-travel-ban-rbg.

28 Taunya L. Banks, *President Obama and the Supremes; Obama's Legacy - The Rise of Women's Voices in the Court* 911-948, 65 DRAKE L. REV. (2017).

29 Adam Bonica et al., *New Data Shows How Liberal Merrick Garland Really Is*, WASH POST, 20 Mar. 2016.

30 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR POLITICS, (June 29, 2018, 5:00 AM ET), https://choice.npr.org/index.html?origin=https://

The Senate rejection of Garland was made all the more crushing for the president by the fact that his nomination had deliberately been shelved when previous Supreme Court vacancies had arisen. Garland had been under consideration by the White House to replace Justice Stevens. At that point, the administration settled on Kagan, mindful that the uncontroversial Merrick Garland would be better suited for a later nomination, which seemed likely given the ages of some Supreme Court justices.[31]

If President Obama had expected a chance to replace another of the liberal Justices, notably Ginsburg, an opportunity to bring about a more dramatic change arose in February 2016 when the 'Schwarzenegger of jurisprudence' Antonin Scalia, died.[32] This was a moment of reckoning for President Obama. To adjust the balance of the court in his final year in office would be an enduring legacy, even if this meant appointing a Justice who would bring about a recalibration rather than transformation of the Court's balance of political power. Yet, even before President Obama announced his nomination, Senate Republicans had already stated that they would refuse to hold confirmation hearings on any nominee.[33] In summer of 2016 Majority Leader Mitch McConnell boasted: "One of my proudest moments was when I looked Barack Obama in the eye and I said to him, 'You will not fill this Supreme Court vacancy.'"[34] Republicans argued that there had not been a Supreme Court vacancy filled in an election year in 80 years. Scholars responded to the various claims made to the media by pointing out that this 'tradition,' as described by Ted Cruz, was misleading.[35] The reality was that the Supreme Court was too important an institution and political prize for McConnell to allow Obama to further impose his imprint on the court without using all the tools at his disposal to obstruct the sitting president.

McConnell's justification for delay was that the pick for the new justice legitimately lay with the president to be elected in 2016 and as the Supreme Court carried on with only eight sitting justices the 2016 presidential campaign picked up speed. Even before he had formally won the nomination Donald Trump soon realized how beneficial the Court vacancy was to his campaign mandate, and he encouraged wavering conservative voters to choose him if only because he would give them the Supreme Court justice they desired. In an unprecedented move he issued a list of judges that he would nominate to the Court, which proved a tempting

www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

31 Jeffrey Toobin, The Oath: The Obama White House and the Supreme Court, 220 (2012).

32 Craig Hemmens & Rolando V. Del Carmen, Criminal Procedure and the Supreme Court, 334 (2010).

33 Burgess Everett, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, Politico, (Feb. 13, 2016, 06:34 PM EST, Updated 02/13/2016 09:56 PM EST), https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

34 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, National Public Radio, (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

35 Linda Qui, *Fact-checking Claims About the 80-Year SCOTUS Nomination 'Tradition'*, Politifact, (Feb. 17, 2016 at 3.31 PM), https://www.politifact.com/truth-o-meter/article/2016/feb/17/misleading-notion-supreme-court-vacancy-hasnt-been/.

offer.[36] Once he took office, the Federalist Society's list of twenty-one possible names was reduced to seven. The forty-nine year old Neil Gorsuch was sworn in on April 7 2017. In his first term, he remained reliably on the ideological right in his judgments, veering mostly towards the positions taken by archconservative Justice Thomas.[37]

IV. Circuit and District Courts

As well as bringing a greater degree of gender equity to the Supreme Court, President Obama also brought more diversity to federal judgeships at the Circuit court and District court level. According to data collected by the Pew Research Center, the Obama administration saw 324 of its nominees confirmed to the federal bench. Of these, 208 were white; 58 were black; 31 were Hispanic; 18 were Asian, with 9 other non-white appointments. This meant that 36% were non-white, compared to 24% of President Clinton's appointees and 18% of President George W Bush's appointees. Obama also comfortably surpassed any previous efforts at increasing women's representation on the federal bench. 42% of his appointees were women against 28% for Clinton and 22% for Bush.[38]

Importantly, however, in terms of Obama's imprint on the federal judiciary, Congressional stonewalling did not begin and end with Merrick Garland. Mitch McConnell and Senate Republicans obstructed numerous other efforts to fill vacancies elsewhere on the federal bench. Previous Senate Majority Leader Harry Reid had effectively done away with the use of the filibuster to block lower court nominees towards the end of 2013, in a move that Republicans at the time said would come back to haunt Democrats.[39] This came to pass in 2017 when McConnell used it as precedent to get rid of the filibuster for Supreme Court nominees as well. Nonetheless, Reid's move did help Democrats confirm some judges through the following year, but when Republicans recaptured the Senate in the 2014 mid-terms the confirmation process ground almost to a halt. In the final two years, only 22 of Obama's nominees to the federal bench were confirmed.[40] When Barack Obama took office there were 53 vacancies on the federal bench and when Donald Trump

---

36 Tim Hains, *Trump: I Will Produce a List of "5-10 Conservative Judges That I "Guarantee" I Will Nominate To Supreme Court if Elected*, RealClearPolitics, (Mar. 21 2016), https://www.realclearpolitics.com/video/2016/03/21/trump_i_will_produce_a_list_of_5-10_judges_that_i_guarantee_i_will_nominate_to_supreme_court_if_elected.html.

37 Oliver Roeder, *Just How Conservative Was Neil Gorsuch's First Term?*, FiveThirtyEight, (July 25, 2017, at 6: 00 AM.), https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuchs-first-term/.

38 John Gramlich, *Trump Has Appointed a Larger Share of Female Judges than Other GOP Presidents, but Lags Obama*, PEW Research Center, (Oct. 2 2018), http://www.pewresearch.org/fact-tank/2018/10/02/trump-has-appointed-a-larger-share-of-female-judges-than-other-gop-presidents-but-lags-obama/.

39 Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees,* Wash. Post, Nov. 21 2013.

40 Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies Up, Nominees Down*, Brookings Institute, (Aug. 18, 2015), https://www.brookings.edu/blog/fixgov/2015/08/18/confirming-federal-judges-during-the-final-two-years-of-the-obama-administration-vacancies-up-nominees-down/.

came in there were 112.[41] Perhaps not realizing how the nomination process could be stymied, Trump subsequently thanked Obama: "When I got in, we had over 100 federal judges that weren't appointed. I don't know why Obama left that. It was like a big beautiful present to all of us. Why the hell did he leave that … Maybe he got complacent."[42]

When looking at Obama's Court of Appeals confirmations in his final two years, compared to his recent predecessors, a Brookings Institute analysis (see below) provides evidence of Obama's relative lack of success in closing his presidency with a series of judicial appointments.

Table 1: Final-Two-Year Court of Appeals (CA) and District Confirmations.

		Eight Years	**Final Two Years**	**Percent of Total**
Reagan	CA	83	17	20%
	District	290	66	23%
Clinton	CA	66	16	24%
	District	305	57	19%
Bush 2	CA	60	10	17%
	District	261	58	22%
Obama	CA	55	2	4%
	District	268	18	7%

Source: Brookings Institute, 4 June 2018

Ronald Reagan appointed 20% of his Court of Appeals judges in his final two years, and 23% of his District Court judges. For Bill Clinton, it was 24% and 19% respectively, and for George W Bush, 17% and 22%. This puts Obama's 4% and 7% in stark perspective.[43] These numbers cannot be explained by simple institutional context as all these presidents faced a Senate controlled by the opposite party. The change was in the behavior of the majority party, the ever-elevated levels of polarization and the GOP's commitment to the conservative judicial project.

President Trump moved quickly to put his stamp on the federal judiciary, with considerable success. His nominations did meet with some resistance, as measured by the amount of Senate votes cast against them. The partisan element here is clear, as the votes (but one) against all came from Democrats or Independents, but Republicans held together and without the possibility of a filibuster the GOP

41 John Gramlich, *With Another Supreme Court Pick, Trump Is Leaving His Mark on Higher Federal Courts*, Pew Research Center, (July 16, 2018), http://www.pewresearch.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts/.

42 *Remarks by President Trump on the Infrastructure Initiative*, (Mar. 29, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-infrastructure-initiative/.

43 *Id*. at 40.

majority in Senate sufficed. This is in keeping with recent trends.[44] The relative speed at which President Trump has had his nominees appointed brings joy to those of his supporters who monitor such developments, which is reinforced at the relative youth of the nominees, whose average age is forty nine.[45] In addition, Trump has availed of the opportunity to move the courts to the ideological right. The majority of his appointments are white males, and clearly appointees are chosen on the basis of their adherence to a conservative agenda. Approximately 39% of his choices as of November 2018 were replacements for Democrat appointees.[46]

V. Consolidating, Advancing and Resisting Obama's Agenda

The Obama administration's win – loss record before the Court was historically low.[47] However, rather than looking at the aggregate numbers, this article concentrates on the legacy making/breaking cases. We start by looking at major Supreme Court rulings on existing law where the Obama administration took a clear position, before moving on to look at rulings the courts made on Obama era initiatives.

A. Consolidation

The administration cheered the decision in *Fisher v Texas* in 2016,[48] known as *Fisher II,* in which the Supreme Court ruled to uphold the Court of Appeals Fifth Circuit decision. The ruling that "The race-conscious admissions program in use by the University of Texas at Austin when Abigail Fisher applied to the school in 2008 is lawful under the Equal Protection Clause" met with a 4:3 favorable response from Justices Kennedy, Bader Ginsberg, Sotomayor and Breyer.[49] (Justice Scalia died prior to the ruling, and Elena Kagan recused herself from the proceedings as she had been involved with the case before it reached the bench). Clearly, this was a consolidation of the Obama administration's guidelines to universities to factor race into their admissions policies. Another contentious ruling occurred in 2016, with *Whole Women's Health v Hellerstedt.*[50] The Supreme Court ruled 5:3 against restrictions on abortion services, which were deemed unconstitutional. Justices Thomas, Alito and Roberts dissented. The case was the most dramatic ruling on

---

44 John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, Pew Research Center, (Mar. 7 2018), http://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/.

45 Russell Wheeler, *Judicial Nominations in the Bush and Obama Administrations' First Nine Months*, Brookings Institute, (Oct. 23 2009), https://www.brookings.edu/research/judicial-nominations-in-the-bush-and-obama-administrations-first-nine-months.

46 Rorie Solberg & Eric N. Walternburg, *Trump's Presidency Marks the First Time in 24 Years That the Federal Bench Is Becoming Less Diverse*, The Conversation, (June 11, 2018, 11.43am BST), http://theconversation.com/trumps-presidency-marks-the-first-time-in-24-years-that-the-federal-bench-is-becoming-less-diverse-97663.

47 Lee Epstein & Eric Posner, *The End of Supreme Court Deference to the President?*, (Jan. 20, 2017), http://epstein.wustl.edu/research/PresWinRate.pdf.

48 Fisher v. Univ. of Texas,, 579 U.S. __ (2016).

49 *Id*. at 48.

50 Whole Woman's Health v. Hellerstedt, 579 U.S. __ (2016).

abortion in two decades.[51] However, the Eighth Circuit ruling in September 2018 about clinics in Missouri suggests that this was not as binding nor as categorical a victory for reproductive rights as was seen at the time.[52]

B. Admonishment

On the other hand, the administration lamented the decisions in *Citizens United* and *Shelby County*, which gutted the Voting Rights Act. Both these rulings were welcomed by conservatives and were widely interpreted as likely giving partisan advantage to Republicans in terms of fund raising and efforts to dampen voter turn-out. In its decision in *Citizens United v Federal Election Commission* the Supreme Court undid key elements of the Bipartisan Campaign Reform Act of 2002 (BCRA),[53] better known as McCain-Feingold after its two leading sponsors in the Senate. The Court, by a 5-4 margin, determined that political spending was a protected form of free speech, meaning that the government could not limit campaign spending by corporations or unions. President Obama's anger was displayed within a week of the decision when he very publicly rebuked it in his 2010 State of the Union address, with six of the court's members in attendance. Obama noted: "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections".[54] This prompted Justice Alito to murmur "not true" in what was described in the *Washington Post* as "a rare and unvarnished showdown between two political branches".[55] Later in the summer, Obama urged Congress to take action to diminish the impact of the Court's decision.

> Now, imagine the power this will give special interests over politicians. Corporate lobbyists will be able to tell members of Congress if they don't vote the right way, they will face an onslaught of negative ads in their next campaign. And all too often, no one will actually know who's really behind those ads.[56]

---

51 Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y.Times June 27, 2016. https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html.

52 *Comprehensive Health of Planned Parenthood Great Plains v. Hawley, 903 F.3d 750 (2018).*

53 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

54 President Barack Obama, State of Union Address (Jan. 27, 2010), *Barack Obama's State of the Union Transcript 2010: Full text*, Politico (Jan. 27, 2010, 7:06 PM), https://www.politico.com/story/2010/01/obamas-state-of-the-union-address-032111.

55 Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, Wash. Post, (Jan. 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html.

56 Jesse Lee, *President Obama on* Citizens United*: "Imagine the Power This Will Give Special Interests Over Politicians"*, the White House blog (July 26, 2010, 3:07 PM), https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit.

Congress, however, did not act and outside group spending during campaigns has increased, including from groups who argue that they do not need to register with the Federal Election Commission.[57]

In *Shelby County v. Holder* the court again ruled by 5 votes to 4,[58] split along the established conservative – liberal fault line, to rescind central parts of the 1965 Voting Rights Act (VRA). Section 5 of the VRA prevented districts with a history of applying discriminatory practices against minority voters from altering their election laws without federal review. This was challenged by Shelby County, Alabama, but Section 5 was upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[59] In reversing that decision the Supreme Court ruled that the conditions that had prevailed in the 1960s and 1970s that had justified the use of Section 5 were no longer apparent.[60]

VI. Advancing Obama's Agenda

A. A Legacy-Making Case

In a momentous decision in summer 2015, in *Obergefell* v *Hodges*,[61] the Supreme Court effectively granted a constitutional right to same sex marriage. After the ruling was announced President Obama issued a celebratory statement:

> this ruling is a victory for America. This decision affirms what millions of Americans already believe in their hearts. When all Americans are treated as equal, we are all more free.
>
> My administration has been guided by that idea. It's why we stopped defending the so-called Defense of Marriage Act and why we were pleased when the court finally struck down the central provision of that discriminatory law. It's why we ended, 'Don't Ask, Don't Tell.'[62]

Yet, in the early years of his presidency, President Obama received an array of criticism in relation to gay marriage from those who viewed his evolving stance as either politically expedient or even as evidence of homophobia.[63] As it was Obama's evolution during his presidency at least mapped onto changing public opinion. It had only been in 2004 that many pundits attributed Bush's re-election to his opposition to same sex marriage, as polls showed 60% of Americans disapproving

---

57 Bob Biersack, *8 Years Later: How* Citizens United *Changed Campaign Finance*, OpenSecrets.org (Feb. 7, 2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/.

58 Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

59 Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

60 *Shelby Cnty.,*570 U.S. 529.

61 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

62 President Barack Obama, *Transcript: Obama's Remarks on Supreme Court Ruling on Same-Sex Marriage*, Wash. Post (June 26, 2015).

63 *See* , *e.g.* Randall Kennedy, The Persistence of the Color Line (2012); or Kerry Eleveld, Don't Tell Me to Wait: How the Fight for Gay Rights Changed America and Transformed Obama's Presidency (2015).

of the idea against 31% supporting it. In 2008 this had shifted to 51% against gay marriage compared to 39% in favor. By 2012, the numbers had flipped so that a plurality then supported rather than opposed same sex marriage by 48% to 43%, and by 2015 a majority expressed support with 55% in favor against 39% opposed.[64] In this context, Obama had likely learned from the trials suffered by the previous Democratic occupant of the White House. President Clinton had lost public support early in his presidency over the issue of whether gays should be allowed to serve in the military and had ended up signing the Defense of Marriage Act into law, which allowed states to refuse acknowledgement of same-sex marriages from other states and was passed with veto proof majorities, despite his spokesperson describing that law as "gay baiting, pure and simple".[65] Despite the marriage sticking point, on the wider issue of gay rights, there is no doubt that candidate Obama had an overtly forward-thinking perspective. There are a number of key moments, particularly throughout 2010-11, when the president spoke publicly about the evolution of his thinking on gay marriage. He declared that it was "something that I think a lot about."[66]

When running for a 2004 Senate seat in Illinois, Obama had not supported DOMA and reconciling acceptance of gay marriage with religious faith was a matter he spoke and wrote about, which offered citizens some insights into his views on the matter, albeit in a managed fashion.

In 2011, President Obama instructed the Justice Department to no longer defend DOMA in court. In a statement, Attorney General Eric Holder declared, "While both the wisdom and the legality of [DOMA] will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court."[67] Clearly, the momentum was building in support of marital rights for gay Americans, and the executive was on board. Among the 50 states, progress was deeply uneven. From Washington DC signing domestic partnerships into law as far back as 1992 to Wyoming rejecting domestic partnerships and marriage as recently as 2013 and 2014 respectively, there was little coherence in efforts to move this agenda forward.

It is important to understand that the *Obergefell* case did not result from an Obama administration initiative, but came about after the U.S. Court of Appeals for the 6th Circuit had overturned trial court rulings on the legitimacy of the bans on same sex marriage in Ohio, Michigan, Kentucky and Tennessee. The trial court had supported those challenging the ban, but the 6th Circuit disagreed. When the matter reached the Supreme Court the Department of Justice filed an amicus brief in support of Obergefell case,[68] as it had also done two years earlier when asking

---

64 PEW Research Center, *Changing Attitudes on Gay Marriage* (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

65 Jerry Gray, *House Passes Bar to U.S. Sanction of Gay Marriage*, N.Y. Times, July 13, 1996.

66 Becky Bowers, *President Barack Obama's Shifting Stance on Gay Marriage*,' Politifact (1 May 2012, at 4:19 p.m.), https://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/.

67 *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, Dep't of Just. (Feb. 23, 2011).

68 Kendall Breitman, *Dems, Obama Administration Press SCOTUS on Gay Marriage*, Politico (Mar. 6, 2015), https://www.politico.com/story/2015/03/president-obama-amicus-brief-same-sex-marriage-115844.

the Court to strike down California's Proposition 8, which had banned same sex marriage in the state in a 2008 ballot measure, with reporting that Obama personally helped craft that brief.[69] Hence, it fell to the judicial branch of government to decide the wider fate of the nation's gay population in relation to their right to marry, but the administration's position was clear.

At this point, the make-up of the Supreme Court was therefore crucial in deciding the future of gay marriage across the nation. Not for the first time, the fate of progress and direction of social travel for a nation of hundreds of millions apparently sat in the lap of a single individual. Described by one lawyer (later nominated by President Trump to a federal court position) as a "judicial prostitute" the swing voter Kennedy wielded enormous power on the bench.[70] A potentially insightful explanation for the liberal position taken by Justice Kennedy, often conservative in his decision making, in *Obergefell v. Hodges*, was that he was well travelled, with annual teaching commitments in Europe dating back to 1990. Spending his summers in Austria, Kennedy was surrounded by international judges with opinions often at odds with mainstream U.S. opinion and law. Europeans tended to have a more relaxed approach to gay marriage, for example.[71] Kennedy had long since proved his socially progressive value on the court when he led a 6:3 decision in *Lawrence v. Texas* to strike down sodomy laws in the Lone Star state.[72] In the words of Jeffrey Toobin, "when he was with the liberals, he could be very liberal."[73] Those arrayed in opposition to same sex marriage included Clarence Thomas who voiced his concerns at the mandatory disclosures relating to those who contributed to Proposition 8 in California. Whilst Thomas was not a conventionally influential judge, conservative colleagues who later came to the bench offered avenues for his ideas and opinions to become law.[74] As Kennedy sided with the four liberals to endorse same sex marriage, the conservative justices, led by Chief Justice Roberts, protested, but to no avail.[75]

During his confirmation hearings, when asked for his opinion by Al Franklin on the matter, Trump-appointee Neil Gorsuch stated publicly that same-sex marriage is "absolutely settled law."[76] Gorsuch declined to share his personal views on the subject but as a religious conservative, he was unlikely to be a proponent of marriage equality, yet there seems little political momentum on the part of the conservative movement to re-litigate the *Obergefell* decision with the same intent as continuing battles over *Roe*.

---

69 Richard Socarides, *Obama's Brief Against Proposition 8 Goes Far*, New Yorker (Feb. 28, 2013), https://www.newyorker.com/news/news-desk/obamas-brief-against-proposition-8-goes-far.

70 Damien Schiff, *Kennedy as the Most Powerful Justice?*, Omnia Omnibus blog (June 29, 2007, 08:35 AM), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com/omnia_omnibus/2007/06/index.html .

71 Toobin, *supra* note 31, at 52.

72 Lawrence v. Texas, 539 U.S. 558, 561 (2003) (Kennedy, J.).

73 Toobin, *supra* note 31, at 183.

74 *Id*. at 245.

75 Ariane de Vogue, *Roberts Issues Stern Dissent in Same-Sex Marriage Case*, CNN Pol. (June 26, 2015), http://edition.cnn.com/2015/06/26/politics/john-roberts-gay-marriage-dissent/index.html.

76 Jeremyart, *Sen. Franken Questions Judge Gorsuch*, C-Span (Mar. 21, 2017), https://www.c-span.org/video/?c4662443/sen-franken-questions-judge-gorsuch.

B. Health Care, Mixed Stories

The 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius* was reported as a relief for the administration as Chief Justice Roberts' decision to side with the liberal quartet meant that the Affordable Care Act, the centerpiece of the Obama administration's domestic policy agenda, survived the challenge brought by NFIB and 26 state attorneys general.[77] In a complicated ruling the Court determined that the so-called 'individual mandate', which required people to get insured or face a penalty, was not justified under the Commerce Clause of the Constitution, but by a 5 to 4 margin maintained that the penalty could be seen as a tax rather than a fine and was therefore constitutional. Roberts' decision to view the individual mandate in this light was critical as the four dissenting justices deemed that what they saw as the unconstitutional mandate was 'inseverable' from the legislation as a whole and therefore would have overturned the complete ACA. In the circumstances, with the stakes so high, it is understandable that the conventional wisdom saw this as a triumph for the Obama administration. Yet, it is misleading to see the Supreme Court's actions as giving the go-ahead to the administration's agenda. The law survived but, critically, the Court simultaneously unpicked another key part of the ACA.

One of the main planks of the ACA was a major expansion of the Medicaid program to cover everyone living in a household with an income below 138% of the federal poverty level. As a program run jointly by the federal and state governments, much discretion for determining Medicaid eligibility had been left to the states. The creation of a new national minimum eligibility standard, therefore, did represent a new departure for the program. The ACA proposed effectively to impose this standard on states through a two-step process. First, as an incentive, it proposed that the federal government would pay the vast majority of the costs of newly eligible enrollees in a state, making this a much more generous grant to states than applied to the existing Medicaid program. Second, as an enforcement mechanism, the ACA proposed that any state that did not join with the expansion would lose all of its existing Medicaid funding. It was this second aspect that really removed autonomy from states as to whether they wished to join the expansion. It was politically and fiscally conceivable for a state to forfeit new federal revenues, but not so to lose existing funding. In this context, the Court determined that this second aspect constituted federal over-reach and so stopped the federal government applying sanctions against states that chose not to expand. This judgment was reached on a 7 votes to 2 basis, with Justices Kagan and Breyer joining Roberts and the conservative bloc. This decision meant that the choosing to reject expansion was genuinely an option for states, whereas under the terms of the ACA expansion was effectively compulsory.[78]

Before Obama left office two other challenges to the ACA found their way to the Supreme Court. *King v Burwell*,[79] challenged the legitimacy of the Internal Revenue Service providing tax credits to people buying insurance via federally,

---

77 Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

78 For further detail on how this decision impacted the implementation of the ACA, *see* Daniel Béland et al., Obamacare Wars: Federalism, State Politics and the Affordable Care Act (2016).

79 King v. Burwell, 135 S.Ct. 2480 (2015).

rather than state, organized exchange marketplaces set up by the ACA. In this case, by six votes to three, the Court upheld the ACA. In *Burwell v Hobby Lobby Stores,*[80] however, the Court sided against the administration. By a five to four majority the justices ruled that the 1993 Religious Freedom Restoration Act meant that the employers could refuse to provide insurance coverage of certain types of contraception to their workers on the grounds that the contraceptive methods in question violated the employers' religious beliefs. This ruling did not constitute an existential threat to the law, but it fostered opposition and the idea that the ACA was not the settled law of the land.

VII. Rebuking Executive Action

As the administration had failed to get Congress to legislate on key areas of its agenda, so Obama turned to his executive powers. "On the domestic front, President Obama aggressively used his office and the administrative state to create new policies in several areas such as immigration, climate change, health care, gun control, overtime rules, and minimum wage".[81] As his presidency became increasingly frustrated in its legislative ambitions by Republican control of the House and then both chambers of Congress, the Obama White House exercised its executive branch powers in a variety of ways in order to pursue its agenda. But in two key areas the courts stymied the plans.

First, with regard to immigration policy and especially the pressing question of how to treat the several million people living in the U.S. illegally, the administration saw a major part of its efforts knocked down by the courts. One major initiative did, however, survive his presidency. In June 2012, via presidential memorandum, President Obama introduced the DACA Program for 600,000 undocumented youngsters, known as DREAMers, who had been brought to the US illegally as children. The constitutionality of DACA was questioned by many,[82] but it was the subsequent DAPA initiative that provoked widespread legal challenge. In November 2014, the president gave a televised address to the nation that outlined his plans for fixing the broken immigration system. This move towards expanding the eligibility of DACA, with key points including cracking down on illegal immigration at the border, deporting felon, not families, and accountability including criminal background checks and taxation.[83]

The content of DAPA, which came in the form of executive action, was challenged in the District Court for the Southern District of Texas by Texas and 24 other Republican-led states and on February 16 2015, Judge Andrew Hanen imposed an injunction against DAPA.[84] A White House request for a stay pending

---

80 Burwell v. Hobby Lobby Stores Inc, 134 S. Ct. 2751 (2014).

81 Eric Berger, *Of Law and Legacies*, 65 Drake L. Rev. 949, 949 (2017).

82 *Deferred Action for Childhood Arrivals (DACA)*, Dep't. of Homeland Security (June 23, 2018).

83 Remarks by President Obama in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://obamawhitehouse.archives.gov/briefing-room/speeches-and-remarks].

84 Texas v. United States, 86 F. Supp. 3d 591 (S.D. Texas 2015) (Andrew S. Hanen, J.).

appeal was rejected by the appellate court in May 2015.[85] In November 2015, DAPA was struck down by the 5th Circuit Court in a 2:1 decision.[86] Governor Greg Abbott (who had previously filed a lawsuit challenging the policy when he was attorney general) told media outlets that "The president's job is to enforce the immigration laws, not rewrite them. President Obama should abandon his lawless executive amnesty program and start enforcing the law today."[87] The decisions against DAPA were made by Reagan appointee Jerry E Smith and Jennifer Elrod, a George W Bush appointee. Carter appointee Judge Carolyn Dineen King voted against her colleagues.[88] Between the two programs, it was estimated that they would impact approximately 4.4 million individuals. [89]

United States v. Texas offers a prime example of how the courts can, and inevitably do, engage with politically charged issues. In a SCOTUS blog post, Lyle Denniston wrote :

> In many ways, the case of *United States v. Texas* illustrates much about the current political climate in America and in the nation's capital, in particular. It reflects gridlock, partisan polarization, and the use of sometimes imaginative lawsuits to pursue political or policy agendas.[90]

The 4:4 ruling (due to the death of Justice Scalia) demonstrates how the Supreme Court was literally stuck on the issue. The empty seat, where Obama had planned Merrick Garland would sit, starkly symbolized the challenge faced by the forty-fourth president in maintaining his legacy. The administration was supported by the Migration Policy Institute with regard to how DAPA would benefit families.[91] Whilst it was clear that "the judgment is affirmed by an equally divided court,"[92] as Reuters pointed out the decision of each justice was not publicized.[93]

It had been a 2008 campaign pledge of Barack Obama's to fix America's broken immigration system. Once in power, he found his plans continuously stymied, and the promised comprehensive immigration bill in his first year did not materialize. Nor did it in subsequent years. In June 2013 the Senate, with 68 votes,

---

85 787 F.3d 733 (5th Cir. 2015).

86 809 F.3d 134 (5th Cir. 2015) *aff'd* U.S. v. Texas, 136 S. Ct. 2271 (2016).

87 Julián Aguilar, *Fifth Circuit Strikes Down Immigration Program*, Tex. Tribune (Nov. 9, 2015).

88 Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

89 *The Obama Administration's DAPA and Expanded DAPA Programs*, FAQ, National Immigr. L. Ctr. (Mar. 2, 2015), https://www.nilc.org/issues/immigration-reform-and-executive-actions/dapa-and-expanded-daca-programs/.

90 Lyle Denniston, *Argument Preview: A Big, Or Not So Big Ruling Due on Immigration*, SCOTUSblog (Apr. 15, 2016, 9:07 AM), http://www.scotusblog.com/2016/04/argument-preview-a-big-or-not-so-big-ruling-due-on-immigration/.

91 Randy Capps et al, *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, Migration Pol'y. Inst. Rep. (Feb. 2016), https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families.

92 United States v. Texas, 136 S. Ct. 2271, 2272, (2016).

93 Lawrence Hurley, *Split Supreme Court Blocks Obama Immigration Plan*, Reuters (June 23, 2016, 3:45 PM), https://www.reuters.com/article/us-usa-court-immigration-idUSKCN0Z91P4.

passed a comprehensive immigration reform package including toughened border security, but also set out pathways to legal status for several million undocumented immigrants.[94] The House, however, refused to take the matter up and nothing came from this effort, which provides some context for Obama's decision to take the executive action route. The judicial response proved as consequential as the House's inaction, as circuit court opposition developed into a nationwide DAPA injunction. Hence, President Obama's legacy aspirations to bring wide ranging reform to the country's immigration system were, to a great extent, thwarted by the courts. After the Supreme Court left the 5th Circuit's ruling in place Obama lamented: "I think it is heartbreaking for the millions of immigrants who made their lives here, who've raised families here, who hope for the opportunity to work, pay taxes, serve in our military, and fully contribute to this country we all love in an open way."[95]

The practical outcome of this meant that immigration was a hot-ticket issue in the 2016 election, and Republican candidate Donald Trump successfully tailored his campaign message to offer comfort to concerned voters. His 'Build-the-Wall' rhetoric scored continuously well, as it offered a symbolic and potentially substantive solution to those with concerns around border security. Perhaps a Clinton victory in 2016 may have presented some alternative avenues for moving the Democrat immigration agenda forward but the Trump victory ensured that restrictionist measures on immigration control would be taken at the earliest opportunity. Along with efforts to implement the controversial travel ban, President Trump veered dramatically away not only from the immigration priorities of his liberal predecessor, but also those of George W Bush. The forty-third president had made overt efforts to reach out to the US Latino community, and spoke regularly of the importance of good relations with Mexico.

Second, the courts also undermined what was known as the Clean Power Plan. This effort to reduce emissions from coal burning power plants was described by Obama as "The single most important step that America has ever made in the fight against global climate change" [96] In October 2008, Barack Obama told *Time* magazine's Joe Klein that an "Apollo project" for a new energy economy was his "top priority."[97] The issue of the environment and climate change had become an increasingly partisan one over the years as parallel narratives emerged, seemingly offering citizens a choice of either focusing on the economy or on the planet. The idea that these two priorities could be merged was lauded by candidate Obama on the 2008 campaign trail. Air pollution was an ongoing topic for concern in the U.S., along with growing awareness of the challenges involved with relying on the fossil fuel industry. Any president wanting to take action on climate change had a

---

94 Seung Min Kim, *Senate Passes Immigration Bill*, POLITICO (June 28, 2013, 04:25 PM EDT,
Updated 06/28/2013 12:19 AM EDT), https://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530.

95 Lawrence Hurley, *Split Supreme Court Blocks Obama Immigration Plan*, Reuters (June 23, 2016), https://www.reuters.com/article/us-usa-court-immigration-idUSKCN0Z91P4.

96 Lucy Perkins & Bill Chappell, *President Obama Unveils New Power Plant Rules in 'Clean Power Plan'*, NPR (Aug. 3, 2015, 2:10 PM ET), https://choice.npr.org/index.html?origin=https://www.npr.org/sections/thetwo-way/2015/08/03/429044707/president-obama-set-to-unveil-new-power-plant-rules-in-clean-power-plan.com.

97 Joe Klein *The Full Obama Interview*, Time,Oct. 23, 2008.

number of avenues open to him. His government could participate in international agreements such as the Kyoto Protocol, or he could present legislation to Congress for consideration. Both paths were fraught with challenges as those in opposition to green plans could throw up endless roadblocks. A third possibility was to utilize agencies such as the Environmental Protection Agency (EPA).[98]

The legislative route to comprehensive reform was closed off even when Democrats controlled Congress. The House did pass substantive legislation in 2009 through the American Clean Energy and Security Act, but institutional fragmentation again proved fatal as the Senate took no similar action. It was therefore no great surprise when the EPA unveiled a Clean Power Plan (CPP) in June 2014, with a view to lowering carbon dioxide emitted by power generators. The aim was to return to 2005 levels by 2050, which involved a 32% reduction in that 25 year period. This tied in with the U.S. commitment to the Paris Climate Agreement, and was a significant demonstration of its adherence and example-setting for others.[99]

On August 3 2015, the final version of the CPP was shared by President Obama, and two months later was published in the Federal Register. It immediately faced a legal challenge by 24 states. Along with Murray Energy, the complainants called on the Court of Appeals for the District of Columbia Circuit to overturn the rule and to prevent it from coming into force while the lawsuit played out. The 24 states' attorneys general argued that the plan was unconstitutional, stating that, "The final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law."[100] In response, the White House stated that the CPP was based on sound legal footing and was consistent with the structure and history of the Clean Air Act.[101]

In early 2016, the Supreme Court issued five identical orders requiring the EPA to delay implementation of the CPP until the D.C. Circuit made a ruling on the merits of the case brought by the states against the CPP's regulations.[102] This was one of the final rulings involving Justice Antonin Scalia before his unexpected death on February 13 that year. The 5:4 decision, made along the court's ideological lines, was the first time it had ruled to stay such an item of regulation before the lower court had made its decision. This was enormously significant and caused environmentalists concern as there was potential for further such action. In addition, the Supreme Court stay would hold, whatever the DC Circuit Court ruled. The

---

98 John Berg, *Obama and the Environment*, in Obama's Washington: Political Leadership in a Partisan Era 157 (Clodagh Harrington ed., 2015).

99 Fact Sheet: Clean Power Plan by the Numbers, EPA., (June 2014), https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602fs-important-numbers-clean-power-plan.pdf

100 Gregory Korte, *24 States Challenge Obama's Clean Power Plan as Rules Go Into Effect*, USA Today (Oct. 23, 2015, 4:18 PM), https://eu.usatoday.com/story/news/politics/2015/10/23/24-states-file-legal-challenge-obamas-power-plan/74472236/.

101 Blair Beasley, *Clean Power Plan/Affordable Clean Energy Rule, Timeline of Events*, Bipartisan Pol'y. Ctr. (Oct. 2018), https://bipartisanpolicy.org/clean-power-plan-timeline-of-key-events/.

102 *See* Lyle Dennison, *Carbon Pollution Controls Put on Hold,* SCOTUSblog, (Tue, Feb. 9th, 2016 6:45 pm) https://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/(citing as illustrative Order in Pending Case, West Virginia v. EPA, 577 U.S. _(2016).

postponement could only be lifted if and when the Supreme Court decided to hear an appeal on the matter.[103]

'Friend of the Court' climate scientists warned that the Clean Power Plan was a crucial component of the United States' adherence to the Paris Climate deal. Without it, the nation did not have a climate change-driven pollution reduction strategy.[104] Scalia's death resulted in the Supreme Court left with an even 4:4 split, which meant that the decision of the lower court would prevail. In the case of the CPP, this could have meant good news, as the DC Circuit Court had a liberal slant.[105] This highly significant case offered a reminder of the consequences of a Republican Senate's refusal to consider hearings for any nominee that Obama had in mind to replace Justice Scalia. As the seat lay vacant throughout the president's final year in office, Donald Trump's election campaign promises included one to kill the CPP (as part of the Paris deal). True to his word, in March 2017, President Trump signed executive order 13783 for the EPA to review the plan, and suspend, rescind or revise as appropriate.

The Clean Power Plan had been a central component of the Obama administration's effort to tackle climate change. Donald Trump made his views on this issue crystal clear throughout his campaign, at times blaming the Chinese for fabricating the issue or lambasting liberals for creating an elaborate hoax.[106] Under the new administration, the EPA was headed by Scott Pruitt, a man not known for his green credentials. In September 2018, a second vacant Supreme Court seat was finally filled by Brett Kavanaugh after fractious Senate hearings. Swing justice Anthony Kennedy, no eco-warrior, had nonetheless in the past ruled sympathetically on key environmental cases. In *Massachusetts v. EPA* (2007) the 5:4 decision ruled that the EPA was allowed to rule on the matter of greenhouse gases (under the remit of the Clean Air Act). Judge Kavanaugh was described by Columbia University's Michael Gerrard, as more 'anti-agency' than anti-environment. [107] When Kavanaugh took his seat, the Clean Power Plan was dormant, as the Trump administration called for consultation on ways to move forward. Kavanaugh's anti-agency track record, and skepticism about the role of the administrative state, was tantamount to

---

103 Bobby Magill, *The Suit Against the Clean Power Plan Explained*, Climate Central (Apr. 12, 2016), http://www.climatecentral.org/news/the-suit-against-the-clean-power-plan-explained-20234; Tracy Hester, *The Supreme Court Suspends Obama's Clean Power Plan: Changing the Law on Staying Put*, Forbes (Feb. 18, 2018, 4:42 PM), https://www.forbes.com/sites/uhenergy/2016/02/18/the-supreme-court-suspends-obamas-clean-power-plan-changing-the-law-on-staying-put/#6ba501b5726d ; Adam Liptak and Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. Times, Feb. 10, 2016.

104 Magill, *supra* note 103.

105 Susan Phillips, *What Scalia's Death Means for Obama's Clean Power Plan*, St. Impact Pa. (Feb. 15, 2016), https://stateimpact.npr.org/pennsylvania/2016/02/15/what-scalias-death-means-for-obamas-clean-power-plan/.

106 Louis Jacobson, *Yes Donald Trump Did Call Climate Change a Chinese Hoax*, Politifact (June 3, 2016, 12:00 PM), https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/.

107 *See* Marianne Lavelle, *What Brett Kavanaugh on Supreme Court Could Mean for Climate Regulations*, Inside Climate News (Oct. 6, 2018), (quoting Michael Gerrard, Director of the Sabin Center for Climate Change Law, Columbia University): https://insideclimatenews.org/news/10072018/brett-kavanaugh-supreme-court-confirmed-climate-change-policy-environmental-law-trump.

an anti-environmental stance. Law professor Michael Livermore observed that the new justice's ascent to the Supreme Court would push Chief Justice Roberts to the center of the count on green issues. As a result, Kavanaugh's presence on the Court would make it "considerably less sympathetic to environmental protections."[108] Such a development was another body blow to the Obama era climate agenda.

VIII. Conclusion

It is hard to look away from the impact of Senate Majority Leader McConnell's power play in 2016. The death of Scalia was unexpected, but it was the rare type of contingent event that really can alter political fortunes, but McConnell ensured this was not to be. The evidence suggests that the empty Supreme Court seat motivated conservative voters more than liberals in November 2016 and was likely one factor in tipping the election to Trump.[109] So this potentially legacy making moment and opportunity in fact worked to harm Obama's legacy.

McConnell's actions in blocking the Merrick Garland nomination and then the opening 20 months of the Trump administration do expose some of the limits of progressive efforts to populate the federal judiciary. It sometimes seems as if liberals still live in the third quarter of the 20th century when judicial activism worked to advance causes liberals preferred such as in *Brown* and *Roe*. In reality, despite stand-out rulings such as in *Obergefell*, the Court has not been consistently liberal for a long time. Yet, while conservatives have developed networks such as the Federalist Society to promote conservative judicial thinking and a supply of qualified conservative minded judges, liberals have not cultivated a similar environment or encompassing philosophy. There are, of course, many liberal-minded judges, but there is not an effective equivalent to the Federalist Society that provides both intellectual ballast and practical organization. This gap was not filled during the Obama presidency. Obama's call for judges with "empathy" clearly informed the diversity of his nominees to the federal courts, but it did not provide a rationalization for why this should be a priority for Americans when electing the other branches of government.

Moreover, the evidence suggests that the courts did more to inhibit Obama's efforts at change than to enhance them. The *Obergefell* decision has changed the United States profoundly, but the Supreme Court's actions mean that millions of Americans are still not eligible for Medicaid; millions more remain as illegal immigrants, threatened by deportation and unable to live fully out of the shadows, and coal burning power plants can continue their work.

---

108 Michael Livermore, *Judge Kavanaugh and the Environment*, SCOTUSblog (July 18, 2018 1:27 PM), http://www.scotusblog.com/2018/07/kavanaugh-and-the-environment/.

109 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.