Blacks on the Bench

NANCY SCHERER

It is well-documented that President Jimmy Carter was the first president to make significant inroads in diversifying the racial composition of the federal courts. Twelve years later, President William Clinton would continue the work begun by Carter by appointing sixty-two more African American federal court judges. Both Democratic presidents justified these efforts as necessary to provide minorities with descriptive and substantive representation on the federal bench, thereby increasing the federal courts’ legitimacy in the eyes of black citizens. The substantial increase in the number of blacks on the federal bench undoubtedly has provided African Americans with increased descriptive representation in the federal judiciary; clearly, there are more black judges. But, to date, scholars have been unable to establish that black judges provide increased substantive representation to minorities. Contrary to expectations, studies have not found that black and white judges adjudicate cases differently.

The reason for this failure, however, may be a function of flawed research designs. This study is a first attempt to correct for these methodological problems. Analyzing the voting behavior of judges in the United States Courts of Appeals in criminal search and seizure decisions, I conclude that black judges appear more willing than white judges to accept claims by criminal defendants of police misconduct. Thus, in certain classes of cases, race may, in fact, impact judicial decision making.


NANCY SCHERER is an assistant professor of political science at Ohio State University. She is the author of Scoring Points: Politicians, Activists and the Lower Court Appointment Process, which examines why the federal court appointment process has become so politicized in the modern political era. She has also published articles on judicial behavior.
THE NORMATIVE VALUES FOR DIVERSIFYING THE FEDERAL BENCH

There are two normative values commonly cited as support for diversifying the federal bench. First, building on the work of Hanna Pitkin,\(^2\) black judges may be seen as descriptive "representatives," and black citizens living in that jurisdiction as the "constituents." According to this theory, the placement of black judges on the federal bench is vital because it sends a message to black citizens that they, too, have access to positions of influence.\(^3\)

A second justification for implementing affirmative action to diversify the federal bench draws upon the work of Samuel Krislov.\(^4\) Under Krislov's theory, it is critical to have black judges on the federal bench because they provide substantive representation of black perspectives in the federal courts. However, this concept of representation turns not on shared political ideology among blacks, but rather, on shared suffering of racial prejudice. In other words, a black judge will reach a decision based on life experiences unique to African Americans, and can articulate these experiences to his or her fellow judges when deciding a particular case.\(^5\) As Justice Sandra Day O'Connor, the first woman on the Supreme Court, has written about Justice Thurgood Marshall, the first black person on the Supreme Court: "At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen, but also his life experiences."\(^6\) Similarly, Judge A. Leon Higginbotham, a former black federal appeals court judge, has noted that "lacking such [minority] outsiders, a court will be left with only its own self-perpetuating views, preferences and prejudices to inform its decisions."\(^7\)

Although these two forms of representation may differ in means, they nevertheless seek the same end, namely, to increase the legitimacy of the federal courts as an institution. Concerns about how to maintain legitimacy are of particular importance with regard to the federal judiciary because, unlike the executive and legislative branches, federal judges cannot attain legitimization through the election process, inasmuch as they are appointed for life terms.\(^8\) Prior studies relating to the election of black candidates seem to support this theory. For example, F. Glenn Abney and John D. Hutchinson found that the

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\(^6\)Higginbotham, "Seeking Pluralism," 1034.

\(^7\)Ibid., 1042.

TABLE 1

Number of Nontraditional Appointments

<table>
<thead>
<tr>
<th>President</th>
<th>U.S. Courts of Appeals</th>
<th>U.S. District Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Blacks</td>
<td>Hispanics</td>
</tr>
<tr>
<td>Johnson</td>
<td>2 (5.0)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Nixon</td>
<td>0 (0.0)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>Carter</td>
<td>9 (18.1)</td>
<td>2 (3.6)</td>
</tr>
<tr>
<td>Reagan</td>
<td>1 (1.3)</td>
<td>1 (1.3)</td>
</tr>
<tr>
<td>Bush</td>
<td>2 (5.4)</td>
<td>1 (1.3)</td>
</tr>
<tr>
<td>Clinton</td>
<td>6 (14.5)</td>
<td>7 (17.5)</td>
</tr>
</tbody>
</table>


election of a black mayor in Atlanta heightened levels of trust in government among the city’s African American population. In contrast, blacks’ attitudes toward the Supreme Court are decidedly less positive than those of whites.

It is indisputable that Carter and Clinton, by appointing substantial numbers of blacks to the lower federal courts, furthered the goal of descriptive representation of African American citizens. Although African Americans constitute approximately 12.3 percent of the total population in the United States, according to the 2000 census, 14.5 percent of Clinton’s Court of Appeals appointees were African American, and 16.1 percent of his district appointees were African American (see Table 1).

Similarly, 17.4 percent of Carter’s appellate court appointees were black, and 13.9 percent of his District Court appointees were black. However, what remains elusive is whether diversification of the federal bench actually provides black citizens a unique voice on the federal bench, that is, substantive representation.

Assessing whether black judges provide substantive representation for black litigants is a two-step process: first, to determine what the views of black citizens are in a given area of law by looking at black public opinion polls; and second, to determine whether black judges vote in accordance with the views of black citizens; this will require an empirical analysis of black and white judicial voting behavior in the same issue area as the black public opinion polls.

RACE, CRIME, AND PUBLIC OPINION

This paper will focus on one specific area of public opinion and law: crime. I chose this issue because of its particular salience among African American citi-


3 It should be noted, however, that certain jurisdictions continue to be under-represented by black judges (as compared to the total African American population in that jurisdiction).
zens, particularly as it relates to the judicial system. It is well-documented that the "law and order" approach to criminal law enforcement—an approach initiated by President Richard M. Nixon and, with the exception of the Carter presidency, the approach that has dominated to the present—has had a disparate impact on the African American community, particularly on black men.\textsuperscript{12} Indeed, today we see one-third of all black men in the United States under the supervision of the criminal justice system—under indictment, in prison, or on parole.\textsuperscript{13}

Not surprisingly, this disparate impact on the black community has led blacks and whites to form quite different views about the criminal justice system, both substantively and procedurally. Studies in public opinion also confirm that this divide along racial lines has persisted since the Carter administration through the Clinton administration.

From a substantive perspective, prior studies analyzing black public opinion demonstrate that blacks are more "liberal" in criminal ideology,\textsuperscript{14} are less supportive of punitive crime-control policies,\textsuperscript{15} and are less supportive of the death penalty.\textsuperscript{16} In terms of procedural encounters with law enforcement officials, public opinion studies show that African Americans are more critical of the use of deadly force by police,\textsuperscript{17} hold less-favorable attitudes toward police officers, including their honesty and ethics,\textsuperscript{18} have more fear that the police will stop and arrest them when they are innocent,\textsuperscript{19} are less in favor of allowing po-

\textsuperscript{19} National Institute of Justice, Sourcebook, Table 2.30.
lic to search homes without warrants and to conduct stop-and-frisk searches.\textsuperscript{20} and perceive the criminal justice system as unfair.\textsuperscript{21}

**RACE, CRIME AND JUDICIAL VOTING BEHAVIOR**

For purposes of assessing whether black judges are more likely than white judges to question the legitimacy of police tactics in the conduct of search and seizures—just as black citizens are more likely than white citizens to question such tactics—it must be determined whether race has a causal effect on judicial voting behavior, holding all other sociopolitical variables constant. To the extent that black judges are more likely to find that police misconduct warrants suppression of incriminating evidence—and that such statistically significant impact is separate and apart from other sociopolitical causal effects, most notably political ideology—then we may conclude that black judges in the federal courts have a unique perspective on criminal law enforcement that turns on race in much the same way as that of average citizens. This, in turn, would suggest that Carter’s and Clinton’s efforts to increase racial diversity on the federal bench have furthered not only their goal of achieving increased descriptive representation but that of substantive representation as well.

In this part of the analysis, the article focuses on the judicial voting behavior of appointees of Presidents Jimmy Carter, Ronald Reagan, George H.W. Bush and Bill Clinton.

**HYPOTHESES**

Under the stewardship of Bill Clinton, the Democratic Party of the 1990s underwent a dramatic shift in its approach to criminal justice policy—an issue position which had come to define Democrats with the American public as the party of the ideological “left” for the previous thirty years.\textsuperscript{22} Abandoning the Party’s previous emphasis on the protections of a criminal defendant’s civil liberties, Clinton simply co-opted the Republican Party’s tough “law and order” agenda.\textsuperscript{23}


This strategic political move to the right of the ideological spectrum on Clinton’s part proved quite savvy. In short, since the 1970s, white voters have grown increasingly conservative on issues of crime. Thus, experts agree that Clinton’s “new” Democratic platform essentially brought many disaffected white, blue-collar, urban males back into the Democratic fold—the so-called “Reagan Democrats”—and ultimately propelled the Democratic Party back into the White House after Republican domination of the executive branch for the previous twenty-four years.

However, there is one notable subconstituency of the Democratic Party whose approach to combating crime has not dramatically shifted: African Americans. Although white Democratic voters may embrace Clinton’s “new” Democratic agenda, blacks remain firmly “old” Democrats, particularly when it comes to issues relating to procedural justice. And these views are also prevalent among black elites, including black attorneys—an important point for purposes of hypothesizing about the voting behavior of black federal court judges. In a 1999 national survey of lawyers conducted jointly by the American Bar Association and the National Bar Association, 50 percent of black attorneys stated that “very much” racial bias exists in the justice system (compared with 33 percent of whites reporting “very little” racial bias), and 66 percent of black attorneys stated that they had witnessed racial bias in the justice system, while 80 percent of whites claimed not to have witnessed racial bias in the justice system.

The lack of a causal relationship between socioeconomic status and political ideology among African Americans is also contrary to what is observed among white voters, where increased income and education have been shown to be correlated with increased conservativeness. This contrary finding among African Americans is perhaps best explained in Michael Dawson’s *Behind the Mule.* There he demonstrates that African American political ideology is shaped by the individual’s perception of “linked fate” with the black race as a whole, and that blacks’ feelings of “linked fate” do not vary significantly across

27 This is not to suggest, however, that blacks are more liberal than whites in all issue areas. To the contrary, prior research suggests that black Democrats are more conservative than white Democrats on issues such as abortion and school prayer. Michael Combs and Susan Welch, “Blacks, Whites and Attitudes Toward Abortion,” *Public Opinion Quarterly* 46 (1982): 518–520; Philip E. Secret, James B. Johnson, and Susan Welch, “Racial Differences in Attitudes Toward the Supreme Court’s Decision on Prayer in Public Schools,” *Social Science Quarterly* 67 (1986): 877–885.
socioeconomic classes. Thus, for example, because highly educated African Americans are about as likely as high school-educated blacks to feel a "linked fate" with the black race, both educational groups are likely to share the same ideology. As Leslie Espinoza and Angela P. Harris have argued, "That well-to-do as well as poor black people are unable to catch taxis at night, are stopped by the police, and [may have] suffered from random racist violence has contributed to a sense of solidarity among all black people, based on the sense that color prejudice serves as a brutal leveler, erasing distinctions of class and status."30

Because blacks—and, critically, black elites—remain skeptical of the procedural fairness of the criminal justice system, while white elites, Democrats and Republicans alike, are more willing to embrace a "law and order" approach to criminal law enforcement, I would expect black and white judges to vote quite differently in criminal law cases. I would even expect black and white judges appointed by Clinton to vote differently, given this dichotomy in public opinion among Democratic elites. So why, then, have prior studies of judicial voting behavior shown no statistically significant difference between the decision making of black and white judges in criminal cases?31 This is likely the result of four factors.

First, these studies all suffer from serious case selection problems. They look at criminal cases in the aggregate, rather than recognizing that certain types of criminal defense claims accord judges more discretion than other types of criminal claims. For example, two of these studies32 include an unspecified number of habeas corpus petition cases. Because the controlling case law leaves little discretion to a judge to grant such petitions, it is not surprising that there is no difference in the voting behavior of black and white lower court judges in such cases. Accordingly, this study will focus on cases raising but one legal issue, and, critically, one subject to wide judicial discretion.

Further compounding this problem is the fact that three of the studies look at white judges sitting on the bench in the 1970s.33 However, as discussed above, white Democratic elites of the Clinton era are significantly more conservative on crime issues than white elites of the 1970s. Thus, while black and white Clinton appointees are expected to exhibit significantly different voting behavior.

32 Segal, "Representative Decision Making," 137; Walker and Barrow, "Diversification," 595.
black and white Carter appointees are expected to exhibit similarly “liberal” voting behavior in criminal cases.

There is one study in which the author claims to have found a difference between white and black appeals court judges appointed by Carter. However, inasmuch as the author conducted no tests of statistical significance—and inasmuch as he looked only at cases in which dissents were lodged, which probably overstates the impact of race on voting behavior—I would view his results with some skepticism.

Third, none of these studies control for case facts. This is problematic because we know that different legal standards apply given different fact patterns in criminal cases. Moreover, prior studies have found that even jurists not bound by precedent (Supreme Court justices) vote differently given different fact patterns in criminal cases. In contrast, this study employs a model that controls for all key facts; this ensures that judges’ votes in different cases are applying the same controlling law and facts.

Finally, all of the prior studies looking at differences between black and white judicial votes involved analyses of voting behavior at the trial court level; perhaps this is because there are significantly more black trial court judges than appellate court judges, and thus, the total number of observations of black judges would be greater, focusing on this level of the justice system. However, using trial court decisions makes it virtually impossible for the researcher to determine which cases are “close” cases—that is, those subject to two diverse decisional paths given the same set of facts—and which cases are “routine” cases—those in which the lower court judge is left with only one reasonable decision given the facts and controlling case law. Accordingly, no attempts were made in these studies to isolate only “close” cases. As discussed below, however, limiting the analysis to “close” cases is essential when determining how ideology or race (as opposed to facts or law) guide a judge’s decision (see Appendix).

Given the research design employed here, and given what we know about the difference between black and white perceptions of the criminal justice system—even among black and white elites—I will test the following hypothesis: (H1) African American judges are more likely to rule that a governmental search violated the Fourth Amendment rights of a criminal defendant than are white judges.

However, because black and white elites in the Democratic Party during the 1970s lay closer on the ideological spectrum than they do in today’s political environment—the difference between “old” and “new” Democrats—a difference in voting between Carter’s white and black appointees is not expected.

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but such a difference is expected to be seen when comparing Clinton’s white and black appointees. Accordingly, I also hypothesize that: (H2) There is no meaningful difference in the voting behavior of black and white judges appointed by Carter in cases in which the criminal defendant alleges that a governmental search violated his Fourth Amendment rights; and (H3) African American judges appointed by Clinton are more likely to rule that a governmental search violated the Fourth Amendment rights of a criminal defendant than are white judges appointed by Clinton.

White judges appointed in the 1970s under Carter—when “old” Democrats controlled the Party—are expected to vote differently than white judges appointed in the 1990s under Clinton—when “new” Democrats controlled the Party. I thus hypothesize that: (H4) White judges appointed by Carter are more likely to find that a governmental search violated the Fourth Amendment rights of a criminal defendant than are white judges appointed by Clinton.

In contrast, we have seen little change in public opinion among the black population at large between the 1970s and the 1990s. Therefore, black judges appointed by Carter are not expected to vote differently than black judges appointed by Clinton, inasmuch as both cohorts continue to share similar life experiences—namely racial isolation and prejudice—that may cause them to see the criminal justice system in a similar manner. Hence, my final hypothesis is that: (H5) There is no meaningful difference in the voting behavior of black Carter and black Clinton judges in cases in which the criminal defendant alleges that a governmental search violated his Fourth Amendment rights.

**DESCRIPTION OF MODELS**

For purposes of testing my hypotheses, three models were constructed. Model 1 includes only “close” cases, and the votes of Carter, Reagan, H. Bush, and Clinton appointees. Model 2 uses a rare events sampling technique, and the votes of Carter, Reagan, H. Bush, and Clinton appointees. Model 3 includes only close cases, and the votes of Democratic-appointed judges only. Data and methodology issues are detailed in the Appendix.

All three models employ a number of control variables in addition to the central explanatory variable—the race of the judge. Control variables fall into one of two categories: background-based or fact-based. As the label suggests, background-based variables control for differences among judges’ particular backgrounds; in combination, these are designed to measure judicial ideology. Fact-based variables control for differences among the facts of particular cases. It is necessary to control for both of these types of variables because in order

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*Although I would have liked to have compared the voting behavior of black judicial appointees versus white appointees of Republican presidents, there were only six votes rendered by four black Republican judges—not enough to produce statistically meaningful results.

*As is explained in the Appendix, this sampling technique is designed to simulate a sample of all cases—close cases and routine cases.
to isolate the effect of race on a judicial decision, I must parse out any potential causal effect that these background- or fact-based variables may have.

EXPLANATION OF DEPENDENT AND INDEPENDENT VARIABLES

The dependent variable is the vote of each individual judge, either agreeing or disagreeing with the criminal defendant that by virtue of the government's violation of his or her Fourth Amendment rights, discriminating evidence of the defendant's guilt must be suppressed.

Scholars have established that a variety of background factors may substantially influence a judge's voting behavior. Most notable is the judge's party affiliation or appointing presidential cohort. In addition, studies have consistently shown that judges from the South are more "conservative" than are judges from other parts of the country; others have accused the Ninth Circuit of being more liberal than the rest of the circuits. Age, however, is not considered, inasmuch as judicial voting behavior has been found to remain consistent over time.

Although most scholars have focused singularly on establishing the effect of various sociopolitical background factors on judges' decision-making processes, a few political scientists have pursued a different line of inquiry; they have focused on whether certain common fact patterns in a given class of cases could predict the final decisions of particular judges. For example, rather than asking whether Democratic-appointed jurists were more likely to vote in favor of a criminal's constitutional civil liberties, Jeffrey A. Segal explored to what extent different facts in "search and seizure" cases brought under the Fourth Amendment affected the likelihood that a Supreme Court justice would vote for or against the criminal defendant. Segal found that search and seizure decisions of the individual Supreme Court justices studied could be predicted with reasonable accuracy simply by knowing whether certain key facts were present in the given case. Today, however, judicial behaviorists have accepted that the

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best models for predicting judicial voting behavior are those that synthesize the sociopolitical background models with the fact-based models. Accordingly, my models reflect this hybrid approach.

**Fact-based Independent Variables**

**Place of the Search**

This group of variables designates where the search or seizure took place. For each individual vote (for or against the defendant on the search and seizure issue), only one of the following places may be designated as the place of the search: home, business, person, automobile, and luggage. Based on well-settled Supreme Court doctrine, citizens have the greatest privacy interest in their homes, and citizens receive the greatest amount of Fourth Amendment protection (that is, generating the most pro-defendant voting behavior) in their homes. Accordingly, searches of homes will be used as the baseline against which all other places of the searches will be measured.

**Presence of Warrant**

This variable designates whether the search or seizure took place after a warrant had been issued. Because searches made pursuant to a warrant are presumptively reasonable under the Fourth Amendment, citizens receive the highest amount of Fourth Amendment protection when searches are made without warrants.

**Limited Search**

This variable designates whether the search or seizure was of a limited nature or constituted a full-blown search. This is important because it determines the quantum of evidence required by the government to justify a search. Based on Supreme Court precedent, full-blown searches require a greater quantum of evidence (probable cause) than do limited searches such as pat-down frisks (reasonable suspicion). Thus, defendants are expected to receive less protection under the Fourth Amendment when a limited search is conducted.

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46 These fact-based variables largely replicate Segal's model except as follows: Segal had a series of variables all designed to capture how many exceptions to the warrant requirement were present in a given case. The existence of such an exception is critical because it lessens the government's burden in justifying the search—either obviating the need for a warrant or lessening the quantum of evidence necessary to justify a warrantless search. Thus, to compare voting behavior across cases, a model should control for differences in burdens of proof. However, nothing in Supreme Court case law suggests that
Border Searches

This variable designates whether the search or seizure took place at a border of the United States or was conducted by a border control agent. Persons searched at a border are expected to receive less Fourth Amendment protection than are persons searched elsewhere.

Background-based Independent Variables

Appointing President

There is a set of variables designating whether the judge is appointed by President Carter, Reagan, G.H.W. Bush, or Clinton. For each individual vote, only one president may be designated as the appointing president. Because Carter was more supportive of criminal defendants’ civil liberty rights than any of the other presidents included in the analysis, Carter appointees are expected to be more supportive of criminal defendants than are the other presidential cohorts. And Carter appointees will be used as the baseline against which all other presidential cohorts will be measured.

Region

There is a set of variables designating in which geographic region of the country the judge rendering a given decision regularly sits on the bench. For each individual vote, only one of the following regions may be designated as the region from which the judge hails: southern, eastern, midwestern, Tenth Circuit, and Ninth Circuit. Based on consistent findings of prior studies, southern judges are expected to render the most conservative voting behavior (that is, most anti-civil liberties protection), and the southern region will be used as the baseline against which all other regions will be measured.

Race and Ideology

Black Judge (Models 1 and 2 only). This variable designates whether the judge is African American. Because I am interested in race as an influence on judicial
voting behavior above and beyond the ideology of the judge—and not as a direct measure of ideology—I include separate variables for race (whether the judge is white or black) and ideology (measured by appointing president and region). Black judges are expected to be more supportive of a criminal defendant’s civil liberties than white judges.46

Black × Carter (Model 3 only). This variable is a product term reflecting the multiplication of the variable for Carter appointees by the variable for black appointees.

Black × Clinton (Model 3 only). This variable is a product term reflecting the multiplication of the variable for Carter appointees by the variable for black appointees.

White × Carter (Model 3 only). This variable is a product term reflecting the multiplication of the variable for Carter appointees by the variable for white appointees.

White × Clinton (Model 3 only). This variable is a product term reflecting the multiplication of the variable for Clinton appointees by the variable for white appointees.

Female Judge

This variable designates whether the judge is female. Female judges are expected to be more supportive of a criminal defendant’s civil liberties than male judges.

Judge Sitting by Designation

This variable designates whether the judge is normally a district court judge who is sitting temporarily on the court of appeals.

Results

Reported for each model is (Tables 2 through 4): the change in likelihood (measured by percentage points) of a vote to uphold the legality of a search (a vote that goes against the criminal defendant) given the presence versus the absence

46 Although I would have liked to have controlled for the race of the defendant, this variable is omitted because it is never reported in the courts’ opinions. However, because I have no reason to believe that any of the other variables are highly correlated with the race of the defendant, I do not believe this omission produces biased coefficients.
of the variable. For those variables measured against a baseline (that is, appointing president and region), we compare the likelihood of a vote to uphold the search in the presence of the variable compared to the baseline. The results for Model 1 are set forth in Table 2. Consistent with hypothesis 1, there is a statistically significant difference in the voting behavior between black and white judges sitting on the federal bench. This is the first time that any study has been able to reject the null hypothesis that there is no difference between the voting behavior of black and white federal court judges. Consistent with the findings of the American Bar Association in its survey of black and white lawyers, white judges perceive allegations about police misconduct differently than do black judges and thus, black judges are more likely than are white judges to find that law enforcement officials have overstepped their authority in pursuit of a criminal defendant. Stated another way, black judges are much less likely to uphold the legality of a search or seizure in which there are allegations of misconduct by the police. Holding everything else constant, the probability that a black judge will uphold the legality of a search or seizure is eighteen percentage points less than a white judge. This is true even controlling for other socio-political variables, such as ideology (measured by appointing president), gender, and geographic background. And this is true even controlling for differing fact patterns among the cases heard by the courts of appeals. As expected, the improved data selection and model design used herein enable us to obtain a much different result than that previously found by other judicial scholars.

Some other notable findings in Model 1 deserve mention. As expected, Reagan and Bush appointees to the courts of appeals are much more likely to rule against a criminal defendant than are Carter and Clinton appointees to the appellate courts. Also as expected, southern judges are much more likely to rule against a criminal defendant in a search and seizure case than are judges from other parts of the country, and judges from the Ninth Circuit are least likely to rule against a criminal defendant in a search and seizure case. Finally, predictions on fact variables are largely as anticipated. We see that searches in homes are least likely to withstand legal challenge in the courts of appeals, and full-blown searches and warrantless searches are also less likely to be upheld.

Now, to demonstrate just how powerful an effect race has on the voting behavior of federal court judges in search and seizure cases, I have rerun the same model using the sampling method of Gary King and Langche Zeng applicable to rare events data (see Table 3). As detailed in the Appendix, this sample of cases is not designed to include only “close” cases—as was done in Model 1. Rather, in this second model, I include a random sample of cases in which there

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69 The reader may contact the author for a full report of logit coefficients from these models. Also, it should be noted that the models contain some coefficients that were not statistically significant in order to satisfy the referees that a variety of different variables were explored.


are unanimous affirmances of district court orders denying suppression motions ("routine" cases) in addition to all cases in which there was at least one vote rendered in favor of the criminal defendant (treated as a rare event). As King and Zeng counsel, I ensure that the ratio of nonrare events to rare events is 2 to 1. However, even when hundreds of votes from "routine" cases are added to the data, race continues to be a statistically significant predictor of voting behavior. In Model 2, holding everything else constant, the probability that a black judge will uphold the legality of a search and seizure is thirteen percentage points less than a white judge.

I turn now to hypotheses 2, 3, 4, and 5—which focus only on differences in voting patterns among Democratic appointees. The results from these logistic regression analyses are set forth in Table 4. Regarding hypothesis 2—that there is no meaningful difference in the voting behavior of Carter’s white and black judges in search and seizure cases—Table 4 indicates that there is some support for this hypothesis. However, while the Black*Carter coefficient is not statistically significant at traditionally used levels of significance, it is significant at the p = 0.128 level. Moreover, the magnitude of the coefficient is relatively substantial: black Carter judges are 14 percentage points less likely to find a search or seizure legal than are white Carter judges. Thus, I hesitate to completely reject the null hypothesis in this instance.

Turning to hypothesis 3—that there is a statistically significant difference in the voting behavior of Clinton’s white and black judges—I reran Model 3 using Black*Clinton judges as the baseline. Unlike the comparison between Carter’s black and white judges, this model showed a statistically significant difference in voting between Clinton’s white and black appointees, allowing me to squarely reject the null hypothesis. Holding everything else constant, black Clinton appointees are twenty percentage points less likely to uphold the legality of a search or seizure than are white Clinton appointees.

Consistent with hypothesis 4, there is a statistically significant difference in voting behavior between Carter’s white appointees and Clinton’s white appointees (see Table 4). Just as Clinton was more conservative on crime issues than was Carter, Clinton’s white appointees are more conservative than are Carter’s white appointees when ruling on search and seizure motions. Holding everything else constant, Clinton’s white appointees are fourteen percentage points more likely to uphold a search or seizure than are Carter’s white appointees. In sharp contrast, there is no statistically significant difference between black Clinton judges and black Carter judges. This is consistent with hypothesis 5—that there is no meaningful difference in the voting behavior of Carter’s and Clinton’s black appointees.

**Conclusion**

The results of this study lead to four important findings. First, black judges vote quite differently than do white judges in search and seizure cases. Like blacks
nationwide, black judges are more likely to accept allegations that law enforce-
ment officials may have engaged in misconduct in conducting criminal inves-
tigations: like whites nationwide, white judges are much more likely to find that
the government's handling of criminal investigations did not go so far as to war-
rant the suppression of incriminating evidence. This finding also sheds light on
an important political issue played out during the Clinton presidency. Specific-
ally, Democratic leaders accused the Republican-led Senate of taking sig-
nificantly longer to confirm African American judicial nominees than white
judicial nominees, and they attributed this discrepancy to racist motives.52 Re-
publicans, in turn, argued that their opposition to many black judicial appoint-
ees was based strictly on ideology, and not on race. Oftentimes, Republicans
specifically cited concerns about voting in criminal cases as the basis for their
opposition. Because black judges lay further from the Republican Senate's
preference point than did Clinton's white judges on a highly salient issue such
as crime, it is rational that Republicans' opposition to Clinton's black judicial
nominees was stronger than was their opposition to Clinton's white nominees.

Second, there is no statistically significant difference in decision making be-
tween Carter's black appointees and Clinton's black appointees. Just as the ide-
ology of black elites and the black mass electorate remained consistently pro-
civil liberties between the 1970s (when Carter was president) and the 1990s
(when Clinton was president), so too has the voting behavior of black jurists.

Third, white Democratic judicial appointees appointed in the 1990s exhibit
a more conservative voting pattern than do white Democratic appointees of the
1970s—at least in the area of criminal law enforcement. This finding is consist-
tent with the political reality outside the courtroom. Just as Clinton moved the
Democratic Party to the right on criminal law enforcement issues—the so-
called "new" Democrat agenda—so too are Clinton's white judges more sup-
portive of a "law and order" approach than are Carter's white appointees.

Finally, the failure of prior studies to detect differences in voting behavior
between black and white judges would appear to be a function of flawed re-
search design. By tailoring the analysis to "close" cases and to a legal issue in
which lower court judges are given significant discretion in their decision-mak-
ing power, statistically significant differences in voting behavior based on race
may well result—and certainly did in the search and seizure area. This study is
an important first step in truly understanding the relationship between race and
judicial decision making.*

52 See, for example, Mark Sandalow, "Clinton Blasts Senate Over Court Delays." San Francisco

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coeh E. Gerson, Stacia Haynie, and Nancy Crowe.
APPENDIX

Data and Methods

Included in this study are search and seizure decisions of the U.S. courts of appeals, including all of the eleven numbered circuits and the District of Columbia Circuit from 1 January 1994 through 31 December 2002. The units of analysis are each judge’s vote (and not the ultimate holding of the case) rendered on a three-judge or en banc panel.

To determine whether there is a difference in ideology between black and white judges, it is essential that the analysis be limited to “close” cases. However, determining which cases are, in fact, “close” has been a vexing question for those who study voting behavior in the lower federal courts. This is because unlike the Supreme Court, which has the discretion to choose its docket—and, indeed, specifically chooses to hear only “close” cases it deems to be of national importance—the federal courts of appeals enjoy no such docket control. Rather, because all federal court litigants have one appeal as of right, the courts of appeals hear both close cases and what may be called “routine” cases. These cases—which constitute the vast majority of those heard by the courts of appeals—are taken so as to exhaust all possible legal avenues. This is especially true in criminal cases, where defendants are accorded free legal representation and, unless pleading guilty, will always appeal as a last resort to avoid prison. The reason that these cases are termed “routine” and not appropriate for analysis is because the judges in these cases have but one clear decisional path available to them. In other words, the case may be finally adjudicated—and full agreement reached by the appellate panel—without underlying political ideologies or racial differences playing a role in the decision-making process.

There is little doubt that when a dissent is lodged in an appellate case, such a case is not “routine”: clearly, with one judge reaching a different conclusion based on the same set of facts and law, there must, by definition, be two decisional paths open to the panel. That has led scholars in the field to focus only on cases in which dissents were lodged. But are all unanimous cases necessarily “routine” cases? Several studies have found that attitudinal variables such as ideology may impact the outcomes of a subset of unanimous appellate cases. Songer found that ideology impacted outcomes in unanimous reversals but had no significant impact on unanimous affirmances. This makes sense, given that, as is true with nonunanimous cases, unanimous reversals suggest that there are two decisional paths available to the judges. In other words, one of four judges, hearing the same case with the same facts and controlling precedent, reached a different conclusion (similar to a nonunanimous appellate case in which one of three judges disagreed). Although some scholars continue to include only nonunanimous appellate cases as a proxy for “close” cases, I believe the better approach is to include all nonunanimous decisions (cases in which there is a dissent) and unanimous decisions reversing the district court. This will be my principal method of case selection.

There is also a practical reason for limiting analyses of voting behavior to close cases, rather than including all cases in studies of the courts of appeals. Given the tens of thousands of cases the appellate courts decide each year, compared with the 75–100 cases decided by the Supreme Court, analyzing all court of appeals cases—even in one issue area, such as search and seizure—is not feasible. A random sample of cases would be the better approach. Given that most search and seizure decisions at the appellate level are unanimous decisions denying a defendant’s motion to suppress incriminating evidence, there is a sampling technique suggested by Gary King and Langche Zeng for use with rare events that is appropriate here. Treating a vote to suppress evidence

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as a rare event. King and Zeng counsel that a statistically correct sample would include all cases in which votes were cast to suppress evidence, in addition to a sample of those cases in which no votes were cast to suppress evidence. Even this method, however, poses significant problems in data collection because one must first identify the entire universe of relevant cases; it is certainly more feasible than coding all cases.

To demonstrate how powerful the impact of race is in search and seizure cases, I also ran my principal model using the King and Zeng sampling method (see Table 3). I treated a decision to suppress evidence as a “rare event.” Accordingly, for the given time frame (1994-2002), I collected all appellate cases in which at least one vote was cast by the court of appeals to suppress evidence. The total number of votes for suppression was 805. I then identified all search and seizure cases in the relevant time frame in which there was a unanimous decision affirming the lower court’s denial of the suppression motion. Since King and Zeng advise that routine events outnumber rare events by a ratio of two to one, I wanted to collect at least 1,600 votes against suppression. Given that there are normally three votes per case, I took a random sample of 550 routine cases, which eventually yielded 1,635 “routine” votes suitable for analysis. Inasmuch as racial differences were detected under this case selection method as well, there can be little doubt that, as expected, black judges do, indeed, view certain types of criminal cases in a different light than do white judges.

The cases comprising this study’s data set were identified through a series of comprehensive searches on the electronic database WESTLAW. Included in the data set were decisions officially designated by the court for publication in the Federal Reporter, as well as decisions not designated by the court for official publication but reprinted in full on the WESTLAW database. The decision of an individual judge in a search and seizure case was coded 1 if the judge found against the criminal defendant and 0 if the judge found in favor of the criminal defendant. All independent variables are coded 1 in the presence of the variable, and 0 in its absence.

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TABLE 2

Model 1: Logit Results For the Likelihood of a Vote to Uphold the Legality of a Search or Seizure*  

<table>
<thead>
<tr>
<th></th>
<th>Sign of Coefficient</th>
<th>Δ Likelihood of Conservative Vote</th>
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</thead>
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<td>NA</td>
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<td><strong>Background-based Variables</strong></td>
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<td>Carter appointee</td>
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<tr>
<td>Car</td>
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</tr>
<tr>
<td>Luggage</td>
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<tr>
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<tr>
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<tr>
<td>Border search</td>
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Statistical significance – * p ≤ 0.10; ** p ≤ 0.05; *** p ≤ 0.01; **** p ≤ 0.001.
Total N = 1,545.
Likelihood ratio test (17 df) = 168.24; significant at 0.000.
Pseudo $R^2 = 0.089$.

* Measured as the change in likelihood of a conservative vote (one to uphold the search) given the presence of the variable as compared to its absence (assumed as a 50 percent likelihood). For example, a black judge will be less likely to uphold a search by 16 percentage points as compared to a white judge; a Reagan judge will be more likely to uphold a search by 28 percentage points compared to a Carter judge.

TABLE 3

Model 2: Logit Results for the Likelihood of a Vote to Uphold the Legality of a Search or Seizure

<table>
<thead>
<tr>
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<th>Sign of Coefficient</th>
<th>Δ Likelihood of Conservative Vote</th>
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<td>H. Bush appointee</td>
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<td>Clinton appointee</td>
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<td>Regional background of judge</td>
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<tr>
<td>compared to southern judge</td>
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<td>Ninth Circuit</td>
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Statistical significance = * $p < 0.10$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$.
Total N = 2,440.
Likelihood ratio test (17 df) = 188.20; significant at 0.000.
Pseudo $R^2 = 0.064$.
* King and Zeng Rare Events sampling method.
* Measured as the change in likelihood of a conservative vote (one to uphold the search) given the presence of the variable as compared to its absence (assumed as a 50 percent likelihood).

Source: All cases with votes to suppress evidence and random sample of cases unanimously affirming the district court decision not to suppress evidence, search and seizure decisions, U.S. Courts of Appeals, 1 January 1994–31 December 2002.
TABLE 4

Model 3: Logit Results for the Likelihood of a Vote to Uphold the Legality of a Search or Seizure: Clinton and Carter Appointees Only

<table>
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<tr>
<td>Luggage</td>
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<tr>
<td>Presence of warrant</td>
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<tr>
<td>Limited search</td>
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<td>9</td>
</tr>
<tr>
<td>Border search</td>
<td>+</td>
<td>3</td>
</tr>
</tbody>
</table>

Statistical significance: * p < 0.10; ** p < 0.05; *** p < 0.01; **** p < 0.001.

Total N = 725.
Likelihood ratio test (16 df) = 50.34; significant at 0.000.
Pseudo R² = 0.056.

* Measured as the change in likelihood of a conservative vote (one to uphold the search) given the presence of the variable as compared to its absence (assumed as a 50 percent likelihood).