

November 2007

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Recommended Citation

Cunningham, Maurice T. (2007) "Historical Eras in Choosing the Nation's Civil Rights Enforcer," *Journal of Political Science*: Vol. 35 : No. 1 , Article 8.

Available at: <https://digitalcommons.coastal.edu/jops/vol35/iss1/8>

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Historical Eras in Choosing the Nation's Civil Rights Enforcer

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This article explores significant eras and challenges surrounding confirmation of the chief of the Civil Rights Division of the United States Department of Justice. In the first era, Southern Democratic Senators fought civil rights progress. Confirmation was labored and tenuous. In the second era, nominees were confirmed smoothly, but gathering controversies, such as, the meaning of affirmative action, differences in elite and mass opinions, and the regional realignment of parties in the Senate, foretold conflict. In the third era, conflict becomes more dominant. President Reagan began a trend of devising new strategies to achieve confirmation of nominees.

The presidential appointment process has been generally described as a festering national embarrassment (Mackenzie 1981, 1998, 2001). The challenges facing the United States President over time in nominating and securing confirmation of a chief of the Civil Right Division (CRD) of the United States Department of Justice emphasize the combined effects of institutions and processes. The effects of institutions and processes are an important approach to the study of political science (Pierson and Skocpol 2002).

The Civil Rights Division operates at the intersection of law and politics in the politically contentious areas of equality and affirmative action. It was established in 1957 and is the primary United States government agency that enforces federal statutes dealing with discrimination based on race, sex, disability, religion, citizenship, and national origin. The Chief of CRD coordinates enforcement of the various civil rights statutes and pursues criminal activities that threaten protected individual rights in ten program sections. The program sections deal with voting rights, disability rights, educational opportunity, employment law, housing, and fair credit issues (United States Government Organization Manual 2007). Although CRD actions are typically controversial and reflect sensitive enforcement decisions, the division's

staff is "committed to equality under the law and to litigation as the engine of securing that right" (Landsberg, 1993).

DIMENSIONS OF THE CRD APPOINTMENT EXPERIENCE

The general development of civil rights in the United States may be described in two broad phases (Graham 1990). In the initial phase before the mid-1960s, the primary goal was to incorporate African-Americans into economic society. Based on tenets of classical liberalism, the objective was to eliminate racial discrimination to allow an individual's equal opportunity for success. By the late 1960s, civil rights leaders argued against "historical racism" and transformed the meaning of affirmative action (see also Glazer 1988; Lipset 1995). Their theory was that embedded racism reduced the proportion of racial groups in the workplace, a condition that could be remedied only by proportional representation defined by statistical disparity analysis.

This study uses the general civil rights backdrop to develop three descriptive eras, or periods, to describe the main characteristics of the appointment experience for the Chief of the CRD:

(1) **Era 1: The Status Quo—1957 into the mid-1960s—**

Compatible with the initial, general phase described above, the Status Quo is a period of lengthy confirmation periods that included two recess appointments.

(2) **Era 2: The Triumph of Cooperation—1965 through 1985—**

Fueled by the successful influence of civil rights leaders after the mid-1960s, the entrenched opposition of Southern Democrats to the CRD dissolved. Confirmation of presidential nominees was relatively quick.

(3) **Era 3: The Simmering Conflict—since 1985—**

This is a new period that extends Graham's analysis of civil rights conflict. Ideological battles over some nominees developed—a sharp contrast with the relatively smooth confirmations during Era 2.

The time dimensions allow the discussion of the larger context of civil rights development as well as the interplay among the presidency, re-

gional and party composition of the Senate, and interest group influences. During each period, presidents have used different strategies for to achieve confirmations, including especially recess appointments.

Era 1: The Status Quo, 1957 into the early 1960s

This is a period of little change after the founding of the CRD. Southern Democratic senators were so hostile to the notion of federal civil rights enforcement that they regularly blocked confirmation of a Division chief.

An example of an assertive presidential strategy is President Dwight Eisenhower's avoidance of Senate obstruction for his nominee by use of a recess appointment. He announced W. Wilson White for the position of Assistant Attorney General for the Civil Rights Division on November 21, 1957-- the first appointment for the position after the 1957 Civil Rights Act. Although White had little civil rights background, he was already confirmed as Assistant Attorney General in charge of the department's Office of Legal Counsel. And, his office had been instrumental in drafting legal documents authorizing the dispatch of federal troops to Little Rock, Arkansas, in 1957. United States Senator James O. Eastland (D-MS), chair of the Senate Judiciary Committee, blocked the appointment by calling White before the committee four times. White was eventually confirmed on August 12, 1958 (Lewis 1957, 1958). The debate about his appointment gave validity to a key approval criterion by opponents and supporters of a specific nominee, namely, experience of the nominee in civil rights law.

Harold Tyler, Jr., was nominated on January 25, 1960, to replace White, who left the position in October 1959. The first hearing, a harsh reception by Southern Democrats did not occur until June 29, 1960. Tyler's lack of civil rights experience was seen as a potential advantage to placate opponents. President Eisenhower again used a recess appointment on July 13. Full Senate approval was quicker this time. The Committee approved August 22 with full confirmation following on August 27, 1960., the eve of President Eisenhower's term (Lewis 1960a, 1960b, Trussell 1960).

On February 2, 1961, President Kennedy's first nominee was Burke Marshall, an accomplished lawyer with no civil rights experience. At

the Judiciary Committee hearing beginning a month later, March 2, Senator Eastland aggressively questioned Marshall regarding plans for voting rights enforcement. On March 15, Attorney General Robert F. Kennedy attended a committee hearing to demonstrate the support of JFK's administration for Marshall. Friendlier questioning followed and Marshall was confirmed on March 28 (Lewis 1961; Shuster 1961; Landsberg 1997). Immediately, the administration announced an increased pursuit of discrimination in voting.

Era 1 is marked by the gradual softening opposition of the Senate Judiciary Committee to administration nominees for the CRD directorship. Nominees with little civil rights litigation experience were confirmed. The Kennedy administration won confirmation of its nominee due to greater deference by Senator Eastland, a leading civil rights opponent.

Era 2: The Triumph of Cooperation, 1965—1985

Major factors transforming the United States Senate in the 1960s-1970s were the entry of a large cohort of Northern Democrats from 1959-1965 and the impact of external influences on Senators' agendas (Sinclair 1989). The newcomers changed the body's political center point and civil rights advocates gained political support from the expansion of government programs and the influence of interest groups. Southern Democrats were increasingly less able to halt confirmation of nominated civil rights advocates even though Senators continued to dominate committees.

Controversy over affirmative action also became more turbulent. Politically, large segments of the public approved affirmative action as a merit-based approach to help the disadvantaged; they rejected quotas and preferences (Lipset 1992). "Soft" terms like "goals and timetables" clashed with "hard" terms like "quotas and preferences." Despite President Clinton's use of "diversity" as a substitute, "goals and timetables" became the most frequent interpretation after the 1970s (Glazer 1988). This interpretation follows the legislative intent of the Civil Right Act of 1964 as expressed by the moderate Senate Republican Minority Leader Everett Dirksen (R-IL) that racial quotas would not be required and Democratic Senator Hubert Humphrey (D-MN) that proof of discriminatory intent would be required. Thus, the legislation underpin-

ning the CRD emphasizes a classical liberal approach of merit-based elimination of discrimination.

Table 1
Nominees by Era, Date, Party, Days, and Experience

Nominee	Date of Nomination	Senate Vote	Pres Party	Sen Party	Days	Experience
Era 1						
White	11/22/57	8/1/1958	R	D	270	Nominal
Tyler	01/25/60	08/27/60	R	D	214	None
Marshall	02/02/61	03/28/61	D	D	54	None
Era 2						
Doar	12/18/64	04/07/65	D	D	110	CRD
Pollak	11/30/67	12/13/67	D	D	13	CRD
Leonard	01/17/69	01/31/69	D	D	14	Nominal
Norman	07/13/71	08/10/71	D	D	28	CRD
Pottinger	01/13/73	01/01/73	D	D	19	HEW
Days	02/15/77	03/04/77	D	D	17	LDF
Era 3						
Reynolds	06/12/81	07/27/81	R	R	46	Nominal
Lucas	02/24/89		R	D	158	None
Dunne	01/25/90	03/09/90	R	D	43	Nominal
Guinier	04/29/93		D	D	35	LDF
Payton			D	D		Litigation
Patrick	02/01/94	03/22/94	D	D	49	LDF
Lee	07/21/97		D	R		LDF
Lee	03/05/99		D	R		LDF
Boyd	03/06/01	06/20/01	R	D	106	Nominal
Acosta	06/26/03	08/01/03	R	R	36	CRD
Kim	06/13/05	11/04/05	R	R	140	CRD

Note: Table 1 is based on Freedom of Information Request by author to CRD requesting tenures, Congressional records, and media accounts. Days = Length to Confirmation; Lucas = Days to Committee Vote; Guinier = Days to Withdrawal.

On December 18, 1964, President Lyndon Johnson nominated John Doar after Burke Marshall's resignation on the same day. Doar, a Republican, had been Marshall's direct assistant. Doar had personally

visited many spots of direct resistance to civil rights enforcement. Although his confirmation hearing lasted longer than his next six successors, it was relatively uneventful. Upon leaving the CRD directorship, Doar positive influence was widely regarded (Branch, 1989). LBJ's last nominee, Stephen Pollak, was confirmed December 12, 1967, within two weeks after nomination. He served the balance of LBJ's term.

The era of cooperation continues with President Richard Nixon nominees. Jerris Leonard was the first on January 21, 1969. Despite criticisms of his membership in whites-only clubs, Leonard too was confirmed within two weeks (Semple 1969; Graham 1969). Nixon's second nominee, David L. Norman also had an easy confirmation and was CRD director until January 1973. Norman's successor, J. Stanley Pottinger was sharply questioned by Senator Eastland about his aggressive intentions and by liberals about his passivity, but he was confirmed in two weeks as well (MacKenzie 1973). The era of cooperation continued unabated despite the growing shift from equal opportunity to equal results in Supreme Court decisions such as *Griggs* and *Swann*.

On February 15, 1977, Drew Days III became President Jimmy Carter's nominee to direct the CRD. Days was an African American attorney with extensive experience with the NAACP Legal Defense Fund (LDF). Consistent with the cooperative era, his confirmation process was completed in two weeks. Underneath and presaging emerging conflict, public opinion began increasingly to support affirmative action as outreach, special training, even compensatory programs short of quotas beyond the traditional merit approach (Lopes and Pantoja 2004; Brown-Nagin 2005). The debate would erupt into open conflict during the confirmation process during the Reagan administration (Pierson and Skocpol 2002).

President Reagan promised a conservative approach to civil rights policy. Although his nominee, William Bradford Reynolds, asserted that civil rights laws should be applied in a "color blind" manner based upon individual, not group, rights (1985), his confirmation proceedings took approximately only a month. Reynolds' view depended on preference and challenged the emerging, more involved, mainstream view. The era of cooperation was about to end.

Era 3: The Simmering Conflict: since 1985

In 1985, President Reagan's nomination of Reynolds as Associate Attorney General, the third ranking office in the Department of Justice and one that requires Senate Confirmation, launched an evaluation of Reynolds' performance as CRD chief. Coming at the beginning of Reagan's second term, civil rights advocates were highly critical of Reynolds' lethargic enforcement policies. Senator Edward Kennedy (D-MA) characterized Reynolds as leading a retreat on civil rights. Senator Joseph Biden (D-DL) pointed out Reynolds unwillingness to object to Louisiana's 1982 congressional redistricting plan despite the advice of staff. Reynolds nomination failed after opposition by the Congressional Black Caucus, aided by interest groups such as the NAACP's Legal Defense Fund, the Mexican-American Legal Defense and Educational Fund, and the National Women's Caucus (Congressional Quarterly 1985). The divide in the consideration of Reynolds persists today, pitting advocates of enhanced affirmative action, including the NAACP, the Leadership Conference for Civil Rights, the American Civil Liberties Union, and others, against opponents, such as the Institute for Justice...in political label shorthand, liberal advocates against conservative opponents.

Democrats regained control of the Senate in the 1986 elections, placing President George H.W. Bush between the hammer of the conservative wing of his party and the anvil of his campaign promise of a less combative civil right policy. Democrats were poised to block a Reynolds-type nominee. Bush's first nominee was William Lucas, a former Democrat, now Republican from Michigan immediately identified by civil rights advocates as inexperienced and, therefore, probably an ineffective director (Cunningham 2001). Lucas became the first nominee to be rejected after Senator Howell Heflin (D-AL) made the committee's recommendation a tie vote on August 1, 1989 (Biskupic 1989). Bush's second nominee, former New York Republican state senator, John R. Dunne was not forthcoming until January 25, 1990. Despite little experience as a civil rights advocate and a lackluster performance before the committee, Dunne was confirmed on March 8—the first CRD chief confirmed by the Senate since Reynolds' resignation December 1988 (Cunningham 2001).

Controversy over a president's nominee became evident with President Bill Clinton's proposal of Lani Guinier, an African-American law professor. By June 1993, Guinier's potential confirmation was dead. She became the "quote queen," the position most feared by civil rights opponents. (Bolick 1993). Her law review articles had described new models for Voting Rights Act enforcement, including proportional issue representation. The intellectual questioning of majority rule as legitimate proved too much, even for moderate Democrats (Lewis, 1993; Marcus 1993). The Clinton election had enjoyed extensive support from civil rights groups. These groups expected nomination of a more aggressive CRD chief than in the preceding twelve years. John Payton, a District of Columbia corporate counsel, was Clinton's initial candidate. However, he had a poor interview with the Legislative Black Caucus, especially when disclosed that he had not voted in sixteen years—a poor indication of voting rights enthusiasm (Lewis, 1993).

After the Guinier rejection, President Clinton nominated Deval L. Patrick, a former attorney for the NAACP Leadership Development Fund (LDF). Patrick was a great example of the Bootstrap story—he had overcome childhood poverty in South Side Chicago to attend Harvard and Harvard Law School and join a Boston law firm (Duke 1994). He was easily confirmed and served through Clinton's first term.

The CRD operated under an acting chief until Attorney General Janet Reno nominated Bill Lann Lee in June 1997. Lee was a veteran LDF litigator, the son of penniless Chinese immigrants who worked his way through law school. He was a seasoned strategist for civil rights causes, but this time experience worked against him. Republicans re-won control of the Senate in the 1996 election. Senator Orrin Hatch (R-UT), Senate Judiciary Chair, found Lee an "ombudsman for the political left (Hatch 1997). By November 1997, it was clear that Lee would not win confirmation. Bypassing a recess appointment, President Clinton named Lee as Acting Attorney General for Civil Rights (Broder 1997), a position from which he ran the CRD for fifteen months. Clinton nominated Lee again on March 5, 1999, but confirmation stalled. This time Clinton made a recess appointment of Lee, who served without confirmation until the end of the Clinton administration.

President George W. Bush entered the CRD nomination process on the heels of the Florida 2000 election dispute and the controversy over

his nomination of conservative Attorney General John Ashcroft. Bush's nominee, African-American attorney Ralph Boyd, was confirmed in just over four months after his March 6, 2001, announcement. Boyd was perceived as a bridge builder. He had prosecuted gang and weapons cases as an assistant United States Attorney. While personally conservative, he was deeply concerned with inner city youth. He spoke to both sides of the affirmative action issue and was quickly approved.

After Boyd's two year term, R. Alexander Acosta was nominated in June 2003. Acosta was the son of Cuban immigrants with little civil rights background. The Leadership Conference on Civil Rights was disappointed in Boyd's achievements and feared Acosta would be similar. However, Acosta won the support of Hispanic, Asian, and Arab-American groups and was easily confirmed in August. Civil rights advocates continued their suspicion that President George W. Bush was maintaining his effort to blunt the bolder policy direction of the CRD.

Table 2
Nominee Experience, Politics, and Bootstraps, Post 1985

Nominee	None	Experience No Af-Act	Conflict	Politics	Bootstrap
Reynolds			C	Neg	na
Lucas	X			Neg	Pos
Dunne	X			Pos	na
Guinier			L	Neg	na
Payton				Neg	
Patrick		X		Pos	Pos
Lee			L	Neg	Pos
Boyd	X			Pos	
Acosta		X		Pos	Pos
Kim		X		Pos	Pos

Note: Neg = Negative; Pos = Positive; In Conflict column: L = Low; C = Conflict Reputation

After Acosta's almost two year term ended with his resignation June 16, 2005, Wan J. Kim got the nomination. A clear illustration of

the Bootstrap Story, Kim's father had come to America from South Korea in 1971 with little money, no education, and unable to speak English. Wan Kim was five years old when he and his mother joined his father in 1973. The family ran a luncheonette. Kim was serving as deputy assistant attorney general in the CRD and quickly gained the endorsement of the National Asian Pacific American Legal Consortium. Despite reservations from the Lawyers' Committee for Civil Rights Under Law, Kim was confirmed November 4, 2005, as the first Asian American and the first immigrant to head the CRD.

DISCUSSION

During Era 2, 1965-1985, the average time for a candidate from nomination to confirmation was twenty-three days. After 1985, during Era 3, the average was seventy-five days—evidence of increased, but not obstructive conflict. The average measure gives false assurance, however, for significant gaps. President George H. W. Bush had no confirmed CRD for the first fourteen months of his administration; President Clinton had none for over his first two years in office and none during his second term. For the period 1989-1999, presidents generally experienced difficulty in achieving confirmation of their nominess (Loomis 2001). Part of the explanation may be in the exchange between perceptions of experience, politics, and the Bootstrap characteristic as referenced in the previous descriptions of nominees.

With reference to experience, Reynolds' confirmation was influenced by his conservative enforcement record which attracted massed Democratic opposition. Lee was damaged by his work with the LDF. Guinier's "experience" was defined by her law review articles. Lucas and Payton were defined by their lack of experience in civil rights law.

Politics as an influence were invoked by Reynolds' alienation of two Republicans from his party on the Judiciary committee. Lucas raised questions of trust by switching parties thus triggering doubts from Democrats. Payton's failure to vote as a citizen was significant.

Finally, the Bootstraps story, was useful for the recent nominees of President George W. Bush. Nomination of Acosta, the first Hispanic, and Kim, a Korean-American immigrant, promoted individuals with unique personal stories unconnected with civil rights controversies.

The selection of the CRD chief serves substantive and symbolic purposes. Substantive concerns reflect deep divisions over the meaning of affirmative action, for example, group versus individual rights, opportunity versus results, and assistance versus compensation. Different presidents have used different strategies to achieve confirmation, especially appointing non-controversial or endorsed individuals. Symbolic concerns reflect "firsts," as illustrated by the Bootstrap nominees.

The party differences are ultimately most noteworthy. Since 1977, every Democratic nominee has been endorsed by the LDF. The nominee is confirmed more easily based on a record of participation in controversial racial preference cases. No white civil rights attorney has been nominated by a Democrat since the 1960s. Republicans cannot successfully nominate an individual from an active civil rights group. Acosta and Kim, nominees of President George W. Bush, were the first nominees with civil rights experience in thirty years. Significantly, their experience did not include involvement in affirmation action matters. The future suggests a continuation of the partisan divide in approaches to nominating and confirming a chief for the Civil Rights Division.

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