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Why Obama struggled at court, and Trump may strain to do better

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President Barack Obama won a series of major cases before the Supreme Court on health care, gay rights, affirmative action and abortion, helping to preserve significant parts of his legacy.

But, over hundreds of cases in eight years, his reception at the court, on the whole, was chilly.

“Barack Obama’s win rate before the Supreme Court is extremely low, lower than any president of this century,” said Eric Posner, a law professor at the University of Chicago and an author of a new study on the subject.

On average, presidents win in the Supreme Court about two-thirds of the time. The Obama administration won just 50.5 percent of its cases. That record, the study said, “may be the worst since the Zachary Taylor administration,” which began in 1849.

Supporters of Obama point out that he faced a generally conservative court inclined to be hostile to his generally liberal policies. His critics say his losing streak was a judicial response to his expansive deployment of executive power.

What seems certain is that Obama’s record is an outlier. But it is also part of a trend that started after the Reagan administration, which won 75 percent of the time. Each succeeding president did worse than the last. President George Bush won 70 percent of his cases, President Bill Clinton 63 percent and President George W. Bush 60 percent.

“It may be that the Obama administration is just the latest victim of a court that has gradually been losing confidence in the executive branch,” the study concluded.

If that is so, President Donald Trump may have no more success in the Supreme Court than his predecessor did.

The core of the new study considered decisions in orally argued cases from 1932 to 2016 in which the federal government, its officials or its agencies were a party. The study also took a preliminary look at all such cases, starting with the administration of George Washington.

Lee Epstein, a law professor and political scientist at Washington University in St. Louis and the other author of the study, said a combination of factors probably explained Obama’s track record. Some of them have nothing to do with politics or the separation of powers, she said.

“Scholars have long attributed the success of the executive branch to the quality of its lawyers,” particularly in the solicitor general’s office, which represents the federal government in the Supreme Court, she said. “But the emergence of a specialized Supreme Court bar full of former solicitors general and other government lawyers may be offsetting the president’s traditional advantage.”

Richard Lazarus, a law professor at Harvard who served in the solicitor general’s office and has studied the rise of the private Supreme Court bar, agreed.

“The solicitor general’s office, and therefore the president, still has terrific lawyers but has lost its comparative advantage,” he said. “And its loss of comparative advantage in expertise during the past three decades has likely decreased at a rate that fairly approximates the decrease in its win rate.”

The private bar, he said, has gotten very good at identifying promising cases and persuading the court to hear them. The government, by contrast, has been filing fewer petitions seeking Supreme Court review. Since the court reverses the decision under appeal some 70 percent of the time, the government has a built-in disadvantage.

There are limits to numerical analysis of court decisions. As relatively poor as the Obama administration’s overall results were, its lawyers did win a number of landmark cases, though they were offset by big losses, including in cases on campaign finance and voting rights.

The simplest explanation for Obama’s overall record was that the court he faced was generally conservative. “Greater ideological distances between the court’s center and recent presidents is a natural explanation for the declining win rate,” the study said. “But the ideological distance today is hardly unprecedented.”

Other presidents did better in the face of equal or greater gaps between them and the pivotal justice, the study said, including Presidents Ronald Reagan and Jimmy Carter.

Obama’s critics say his Supreme Court track record reflects the aggressive positions he took. “The reason this president has done so poorly in the high court is because he sees no limits on federal — especially prosecutorial — power and accords himself the ability to enact his own legislative agenda when Congress refuses to do so,” Ilya Shapiro, a lawyer at the Cato Institute, wrote last year.

There is some support for that critique in a separate set of data that looked only at lopsided wins and losses. In cases involving a federal department or agency, Obama won unanimously or with a single dissent 20 percent of the time, and he lost by that margin 31 percent of the time.

The first number was the lowest since at least the administration of Franklin D. Roosevelt, and the second was the highest.

“It fortifies the interpretation that Obama is an outlier rather than the latest victim of a trend,” Posner said. “We might think of the first group of cases as those in which the president’s position is so strong that even hostile justices vote for him. The second group of cases are those in which the president’s position is so weak that even the most loyal justices (including his appointees) join the other justices to rule against him.”

“By thinking of this in terms of the participation of Democratic justices,” Posner said, “we can get away from the idea that the court was ideologically opposed to Obama.”