

Polarization and the Executive Branch and the Judicial Branch

The Executive Branch

The Presidency has become more polarized. Prior to 1989, the average distance in the President's **NOMINATE score** and the House of Representatives was 0.32, after 1980 this doubled to 0.65.¹ One reason for this increase in **elite polarization** between the President and Congress is the increased instance of divided government. There are three eras of unified and divided government, the first is from the emergence of the party system up to 1896.

²During this period, divided party government was common and occurred around 50% of the time. The second period is the era of unified party government from 1896 to the mid 1950s.³ The first part of this second period was dominated by Republicans while the second part of the second period was dominated by Democrats.⁴ During this period, divided party government was rare which had a probability of 20 percent or less. Divided government only occurred three or four times during this era.⁵ This era of unified government ended by the mid 1950s. By the time the early 1960s came around, the probability of divided government went above 50% and continued to rise. At the present moment, the probability of divided government is higher than 90%. This is the greatest period of divided government in US history, only the 1880s and 1890s are comparable.⁶

Disagreement - However, according to Morris Fiorina, the partisan conflict that accompanies divided government does not necessarily have to indicate polarization but can also indicate increased electoral competition. *'When party control seemingly hangs in the balance, members and leaders of both parties invest more effort in enterprises to promote their own party's image and undercut that of the opposition. These efforts at party image making often stand in the way of cross-party cooperation on legislation... When majority status is not at stake, there are fewer incentives to concentrate so intently on winning partisan advantage. But when majority status is in play, members of out parties tend to think in terms of winning the long game of institutional control rather than the short game of wielding influence by cooperating in policymaking at the present moment. When competing for majority status, parties focus more intently on public relations, messaging, and related strategies designed to win the high stakes in contention'*. In short, when a party thinks it is possible to win majority status in congress, it is more likely to engage in conflict to highlight differences in issue positions. On the other hand, when a party does not think it can win and is stuck with permanent 'minority status attitude', it is more likely to want to work with the majority party to have some influence over legislation. The Republican party never had control of the senate from the 1953 till 1981 and did not control the house until 1994. After the Senate take over, house Republicans led by Gingrich realized it was possible to win the house and started engaging in partisan conflict to highlight issues differences in order to win.⁷ Gingrich's quip *'I'm willing to be ineffective in the short run if it means in the long run, we're able to build a majority'*.⁸

The Judicial Branch

Before 2017, 60 votes were needed to confirm Supreme Court Justices and other federal judges. This was because the opposition would use the filibuster to hold up the nomination indefinitely.⁹ The party in power always feels frustrated when their nominations are held up; however, in recent decades partisan polarization has increased the conflict over judicial appointments.¹⁰ For this reason, Republicans changed the rules, so that only 51 votes were needed to confirm Supreme Court Justices.¹¹ This increased **mass polarization**, since both parties were increasingly viewed by the public as being in opposing camps since the public takes queues from partisan elites.

Another reason for polarization among Supreme Court members is the changes in the legal profession. In the 1960s and 1970s, most associations such as the American Bar Association were left leaning. Conservatives were determined to respond to what they saw as an 'ideological imbalance'.¹² Justices generally orient themselves toward the 'political, legal and social elite groups' which they are a part of. The elite audiences that are of particular importance differ for every individual Justice, but their personal backgrounds and positions make some audiences specifically relevant.¹³ Today's Justices are part of *'increasingly polarized elite social networks that help to create and reinforce their ideological commitments'*.¹⁴ This is because the competing networks of the Federalist network and liberal network of the present have replaced the *'relatively consensual center-left social network'* of the past that influenced the thinking of both Republicans and Democrats appointees to the court.¹⁵ This is one reason why post 1990 Justices appointed by Republican presidents are less likely to support liberal positions than pre 1990 Justices appointed by Republican presidents.¹⁶ The fact that this change has had less of an impact on the Democratic side, further points to this reason since Justices appointed by Democratic Presidents were part of left-wing social networks in the past (before the current era of strong polarization).¹⁷ Some groups claimed that 'a milieu of people and groups that shared liberal values' influenced the behavior of Justices. This included the American Bar

Association, legal academics, Supreme Court Reporters and ‘elite social circles’ in Washington DC. According to this view, Justices who came to the court as Conservatives moved to the left to please liberal leaning audience.¹⁸ At the same time the Conservative legal network started to rise. The incentives that had pushed Republican judicial nominees to the left was now being counteracted producing a force that pushed new nominees to the right.¹⁹ When the Founders of the Federalist Society started law school in the 1980s, they found that the institution was dominated by liberal ideas.²⁰ In order to challenge the liberal legal network group, conservatives began fighting in the most hostile institution of all-US law schools.²¹ The Federalist Society was established in 1982 *‘to build a conservative counter elite that would challenge the liberal legal orthodoxy and help win the war of ideas in the law schools’*.²²

According to Nancy Scherer and Banks Miller there are two possible reasons why Federalist Society Membership increases the likelihood of a conservative vote. One is the ‘attraction hypothesis’ while the other is the ‘conversion hypothesis’.²³ The **attraction hypothesis** states *‘The Society attracts its members from among those Republican lawyers and law students who already lie on the conservative end of the ideological continuum’*. On the other hand, the **conversion hypothesis** states ‘The Society converts Republican lawyers who join its ranks to adopting the originalist method of constitutional interpretation. In other words, membership in the society somehow socializes lawyers who may not ascribe to the originalist mode of constitutional interpretation when they join the organization- instead ascribing to the living and evolving constitutional paradigm-in such a manner that, over time, they are transformed into proponents of originalism’.²⁴ Either way Republican Presidents have an increasingly reliable conservative, originalist pool to draw nominees from. This has increased the likelihood that a Republican president will be able to pick a conservative nominee. This has helped avoid the problem former Presidents such as Nixon faced. When Richard Nixon ran for President, he promised to reverse the tide of judicial liberalism. However, he soon found this was harder than it seemed.²⁵ Nixon had good reason to believe his first term Supreme court appointments delivered on this promise.²⁶ However, just two months later the court issued its ruling in *Roe V Wade*.²⁷ *‘This experience showed the conservative movement’s weakness, for despite high profile presidential support, its network was not able to effectively identify truly conservative judges, and when they did, those judges lacked the intellectual sophistication, professional standing, and compelling legal vision to be appointed’*.²⁸ This is where the Federalist Society makes a difference today. Federalist Society Member Michael Greve said, *‘The Federalist Society has a de facto monopoly on the credentialing of rising stars of the conservative legal movement...on the left there are a million ways of getting credentialed; on the political right, there’s one way in these legal circles’*.²⁹ This is a possible reason that today’s Republican judicial appointees are more Conservative than prior decades. The Federalist Society has *‘helped build an impressive farm team of conservative legal talent’* which Republican presidents/administrations draw to appoint Justices and to staff important positions within the legal-political community.³⁰ The result of this is **affective polarization** since Republican appointed judges since *‘Partisan identification has become an increasingly strong correlate of political attitudes and behavior’*, in other words Republican appointed judges are increasingly correlated with conservative position.

Disagreement - On the other hand, Martin-Quinn scores suggest that as Supreme Court Justices grow older they move to the left.³¹ The Martin-Quinn score is a prominent measure of judicial ideology which uses ‘the Justices’ votes to quantify their position on a left-right spectrum’.³² Negative scores refer to increased liberalism while positive scores refer to increased conservatism.³³ Data from the supreme court database are used to calculate the scores. Josh Blackman, a Supreme Court scholar says *“Justices may be subject to influences by the Beltway cocktail scene and want to be perceived as reasonable and moderate,”*. This implies that the ‘cocktail scene’ is liberal and made up mostly by liberal professors and journalists.³⁴ This contradicts the literature which says that Republican nominated judges hang out with like-minded right of center peers and that the center left consensus network of the past has broken down. It may well be that this consensus center left network still exists and is responsible for moving judges to the left as their career progresses. This also questions the notion that the Federalist Society has been as successful in identifying staunch conservatives as many would suggest.

References:

- ¹ Cameron, Charles M. "Studying the Polarized Presidency." *Presidential Studies Quarterly* 32, no. 4 (2002): 647-63. <http://www.jstor.org/stable/27552431>.
- ² Ibid.
- ³ Ibid.
- ⁴ Ibid.
- ⁵ Ibid.
- ⁶ Ibid.
- ⁷ Lee, Frances E.. *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago, Illinois: University of Chicago Press, 2016.
- ⁸ Shirley, Craig. *Citizen Newt: The Making of a Reagan Conservative*. Nashville, Tennessee: Nelson Books, 2017.
- ⁹ Bartels, Brandon. "It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why." *The Washington Post*. June 29, 2018. Accessed March 24, 2019. https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/?utm_term=.699eadba1449.
- ¹⁰ Ibid.
- ¹¹ Ibid.
- ¹² Devins, Neal and Baum, Lawrence, Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court (January 30, 2017). *Supreme Court Review* vol. 2016. Available at SSRN: <https://ssrn.com/abstract=2432111> or <http://dx.doi.org/10.2139/ssrn.2432111>
- ¹³ Ibid.
- ¹⁴ Ibid.
- ¹⁵ Ibid.
- ¹⁶ Ibid.
- ¹⁷ Ibid.
- ¹⁸ Ibid.
- ¹⁹ Ibid.
- ²⁰ Avery, Michael. *The Federalist Society: How Conservatives Took the Law Back from Liberals*. Nashville, TN: Vanderbilt Univ. Press, 2013.
- ²¹ Hollis-Brusky, Amanda. "Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement." *Law & Social Inquiry* 36, no. 2 (2011): 516-36. <http://www.jstor.org/stable/23011901>.
- ²² Ibid.
- ²³ Scherer, Nancy, and Banks Miller. "The Federalist Society's Influence on the Federal Judiciary." *Political Research Quarterly* 62, no. 2 (2009): 366-78. <http://www.jstor.org/stable/27759874>. Although the Federalist Society claims that is not a political organization, liberals accuse it of pursuing a very conservative political agenda. Nancy Scherer of Wellesley College and Banks Miller of The Ohio State University examine the question 'Do members of the Federalist Society decide cases in a more conservative manner than other nonmember jurists?' Their study uses data from decision-making in the US Courts of Appeals and finds that Federalist Society members are significantly more conservative than non-members. Positions in support of states' rights is used as a proxy/measurement of increased conservatism. Specifically, the question 'should a congressional statute be declared unconstitutional because Congress has overstepped its authority to the detriment of a state's sovereignty in violation of the Tenth or Eleventh Amendments' is used. This issue is inextricably linked with the Federalist Society's mission. The judge must choose between curtailing the power of the federal government (the conservative position) and expanding it (the liberal position). The unit of analysis is each judge's vote (not the ultimate holding of the case), rendered on a three judge or en banc appellate panel in all cases meeting certain criteria set out below. For the states' rights data, all cases decided from January 1, 1996, through December 31, 2006 are used. Included in the analysis are the votes of circuit court judges in active service and circuit court judges with senior status. District court judges sitting by designation were excluded. Cases were identified from a series of comprehensive searches on the electronic database WESTLAW.
- ²⁴ Ibid.
- ²⁵ TELES, STEVEN M. "Conservative Mobilization against Entrenched Liberalism." In *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, edited by Pierson Paul and Skocpol Theda, 160-88. Princeton University Press, 2007. <http://www.jstor.org/stable/j.ctt7rwcc.12>.
- ²⁶ Ibid.
- ²⁷ Ibid.
- ²⁸ Ibid.
- ²⁹ Hollis-Brusky, Amanda. "Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement." *Law & Social Inquiry* 36, no. 2 (2011): 516-36. <http://www.jstor.org/stable/23011901>.
- ³⁰ Ibid.
- ³¹ Ibid.
- ³² Ibid.
- ³³ Ibid.
- ³⁴ Ibid.